

SPACE POLICY AND LAW COURSE 2019

INTERNATIONAL HUMANITARIAN LAW (IHL)

CASE STUDY:

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

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 co-operation and understanding (emphasis added)

2. The treaty extends existing international law into space. It follows that for military purposes, IHL applies to operations in space.

QUESTIONS:

1. How 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. Payloads: 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 or 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 rendering a given orbital regime unusable?
 - d. Anticipatory self-defence: As a principle this has attracted significant study and discussion. The underlying route to its acceptance relies on:

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

2. What challenges do these criteria pose in space?
3. 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?

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DISCUSSION

1. Satellites are frequently 'dual-use' e.g. by virtue of being communications systems while also providing location services. The same principles of proportionality and military advantage would apply to such satellites. There would also be a presumption in favour of reversible effects.
2. Hosted payloads are not separately identified or given any special status under IHL. An analogy may be destroying a bridge for valid reasons, that would also cut any pipelines or cables carried across it (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'. Further, an adversary would have difficulty detecting any hosted payload.
3. There is a complicating factor relating to debris, which would have enduring effects. Orbital debris disperses over time, affecting both other satellites in similar orbits and, to a lesser extent, other orbits.
4. Anticipatory self-defence may, on one view be regarded a contradiction. It is also strongly dependent on particular circumstances, including the capabilities of adversaries. It would be fair to say there is no commonly agreed answer to this question.