

Editor's Column

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Why the Recognizing of Space Object as a Legitimate Target for a Strike is Always Bad Idea Leading to the International Liability

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The increase in military tension on the Earth actualises the ancient discussion about permissible military activities in space. The ambiguity of the term “peaceful purposes,” which is recognised as an exclusion of any use for military-related purposes (non-military approach) or as a prohibition of the use of aggression in the context of a violation of UN Charter (non-aggressive approach), became more aggravated with the growing of dual-use of space services

that are provided by private entities. As well as the term “dual-use” reveals both civil and military purposes; the lack of a common understanding of the last one leads to scientific and diplomatic statements to legitimate the actions prohibited by the Liability Convention.

More precisely, under the auspices of the Open-Ended Working Group on Reducing Space Threats through Norms, Rules and Principles of Responsible Behavior Konstantin Vorontsov, deputy director of the Russian Foreign Ministry’s department for non-proliferation and arms control, stated that the US involves components of civilian space infrastructure, including commercial, its allies in armed conflicts and as a result such quasi-civilian infrastructure may be a legitimate target for a retaliatory strike. This idea grounds on the excellent research of David A. Koplow explained how US violates the law of armed conflicts in space in the light of the lack of distinction between combatants and non-combatants, namely military and civil objects and actors. So, the danger for the future of space activity could pose not the statement of official of the aggressor-State, but use by them the half-true to convince others that aggressive actions are legitimate.

Let’s briefly remind the arguments of D. Koplow. He stated that military use of space assets (e.g., for reconnaissance, communications, or space launch to assist in the prosecution of the war effort would categorize them as military objectives, subjecting them to direct targeting by the enemy, regardless of whether the asset was owned and operated by the US, foreign States or by one of its private entities. Noticeably the author is guided by the concept of non-military, but not to non-aggressive conception. Here, should take particular attention to the war effort at the light of aggression in the explanation of the status of such objects. The first, most obvious consequence of a failure of reverse distinction is that the mixed-use satellite loses its protected civilian status; it is converted into a legitimate military objective that the enemy may legally fire upon (provided that the belligerent complies with other governing LoAC rules, such as the principle of proportionality). Special attention should be paid to the proportionality in the case of the destruction and irreversible change of the space environment.

Four types of alternative policy responses: (1) to construct an adequately robust military and IC space architecture without planning to integrate commercial and neutral orbiters, launchers, and ground stations into the warfighting; (2) to undertake an international effort to negotiate a revised understanding of the concept of separation, particularly as relevant to satellites; (3) to declare that in a time of armed conflict, all its dual-use satellites and ground stations become military objectives, subject to lawful attack; (4) to assert that the sole reason why it is eschewing the application of reverse distinction in this context is because it is no longer economically and technologically feasible to maintain the traditional separation of military and civilian satellites.

In any of these approaches, it is noteworthy that it is inevitable that “worst case planning” will tempt an enemy, in real-time and in the fog of space war, to conclude (or at least to suspect) that an ambiguous orbiter is (or will soon be) manipulated to its military disadvantage and has become a legal military objective.

According to this concept, some questions arise:

1. Which content of the military use of space assets?
2. How to realise the principle of the proportionality in the case of execution the right of direct targeting by the enemy?

Milamos manual at the art. 103 reveals that in the determination of the military character of a space activity, the actors involved in the activity, the aims of the activity, and the effects of

the activity are to be taken into account, as appropriate. The author pays attention an advance the first two criterias, but it's indispensable to attract attention to the effects. For this, let's reminds the explanation of the principles of distinction. Russian Federation's Regulations on the Application of IHL (2001) states: "The principle of distinction means making a distinction, under any circumstances, between the civilian population and servicemen, as well as between civilian objects and military objectives, which helps ensure the protection of civilian persons and objects during combat operations and concentrate the force's effort against the enemy military objectives." More precise this principle revealed in the US Naval Handbook (2007): "The principle of distinction is concerned with distinguishing combatants from civilians and military objects from civilian objects so as to minimize damage to civilians and civilian objects." I want to remind also the Ukraine's IHL Manual (2004): "Principle of distinction means that during preparation for and conduct of combat a clear distinction must be made between civilians and combatants [and] between civilian objects and military objectives, with a view to ensuring protection of the civilian population and civilian objects from the consequences of hostilities and to concentrating the actions of forces exclusively against the enemy's military objects." Space services as the remote sensing data or communication can serve equally for offensive, defensive of humanitarian purposes regardless of the private of public operator. In the case of Russian aggression against Ukraine private remote sensing data provides data that helps to protect civilians or to prove the crimes against them. The satellite providing such type of information cannot be deemed as neutral as well as a military in the pure sense. But in the case of realising the concept of legal targeting in the response of such type of military activity, the damage will be caused primarily to civilians that do not match with the philosophy of humanitarian law as a law aims to mitigate hostilities for the protection of human lives. In this light, the mechanical interpretation of the principle of distinction contradicts their goal. To avoid such situations, the concept of peaceful purposes as a non-aggressive is more appropriate. The UN resolution 3314 covers only the attack by the armed forces of a State on the land, sea, or air forces, or marine and air fleets of another State, as well as another other forms of aggression which are difficult to apply in space conditions. This recognises Mr. Koplow arguing that Active defenses, enabling the putative victim to shoot back at an aggressor, would probably prove futile, too – space is an environment in which the offense has an inherent advantage over the defense.

Here we come to the second question of the proportionality. Noticeable in this context art. Fifty-six of the Additional Protocol to the Geneva Convention stated that even military facilities should not become objects of attack, if such an attack could cause the release of dangerous forces in such installations or facilities and subsequent heavy casualties among the civilian population. This is the prominent evidence of the balance of the principle of distinction and proportionality. The IHL prohibits the excessive attack in relation to the concrete and direct military advantage anticipated. But, each attack leads to probably creation of space debris and their harmful consequences depend on the destructive (explosion and disintegration) or non-destructive (spoofing, jamming) manner. The second one does not necessarily lead to the creation of space debris, but here is no clarity, to recognise like debris, the space objects should be non-functional or non-usable. In light of the adoption of the UN resolution "Destructive direct-ascent anti-satellite missile testing," we tend to the last one. According to the Liability Convention, a State is internationally liable for damage to other States or to their natural or juridical persons, caused by a space object or its component parts, if and to the extent provided for under international law, including international space law.

Rule 129 of the Milamos manual states, “International law does not contain explicit rights and obligations regarding the creation of space debris. However, to the extent necessary to comply with other rules of international law, States and international organisations shall limit the creation of space debris when carrying on space activities, including military space activities.” Unfortunately, the creation of space debris is not covered by UN resolution 1540. It does not belong to the weapon of the mass destruction, although it contains its features as a phenomenon. In any case, the creation of space debris during armed conflicts covers the article 56 of the Additional Protocol of the Geneva Convention about the release of dangerous forces. Therefore, even the realisation of the rights of self-defence to response the aggressive (I highlight here non-military actions) limited by the principles of proportionality prescribed in this article regardless of the distinction the combatants and civilians. From this perspective, we cannot talk about exclusion from the Liability Convention and legitimate the strike mixed-use satellite. Thus, any damage to space objects in space due to fault or unlawful activity of any State or the fault of persons for whom it is responsible should lead to international liability.