

Outer Space/Applicability of IHL in Space

The question of an arms race in space has been a subject for concern for many years. Over the years, many countries and international organizations have established policies regarding the possibility of an armed conflict in space, especially regarding the applicability of IHL in such a context.

Acknowledgments

Case prepared by Cyrielle Danzin, Master student at Université Paris-Panthéon-Assas, under the supervision of Professor Julia Grignon (Head of Assas International Law Clinic and Visiting Professor at Laval University).

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

A. STATEMENT BY THE INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC), DELIVERED BY VERONIQUE CHRISTORY, SENIOR ARMS ADVISOR, AT THE OPEN-ENDED INTERSESSIONAL INFORMAL CONSULTATIVE MEETING ON FURTHER PRACTICAL MEASURES FOR THE PREVENTION OF AN ARMS RACE IN OUTER SPACE

[Source: Statement by the International Committee of the Red Cross (ICRC), delivered by Veronique Christory, Senior Arms Advisor, at the open-ended intersessional informal consultative meeting on further practical measures for the prevention of an arms race in outer space, New York, 29 February 2024, available at: <https://www.icrc.org/en/un-outer-space-ihl-statement>]

[1] Mr Chair.

[2] As this is the first time that my delegation has taken the floor, let me, on behalf of the ICRC, thank you, Mr Chair, for your briefing this morning on the work of the Group of Governmental Experts (GGE).

[3] The ICRC is grateful for this opportunity to share our general considerations regarding the work of the GGE.

[4] We understood from the Chair's briefing that, pursuant to the GGE's mandate to "consider and make recommendations on substantial elements of an international legally binding instrument on the prevention of an arms race in outer space, including, inter alia, on the prevention of the placement of weapons in outer space", experts within this Group considered the evolving nature of outer space activities and space threats.

[5] This is indeed timely, as the continued militarization and the possible weaponization of outer space increase the risk of space systems – be they military in nature or dual-use – being targeted during armed conflicts, resulting in potentially significant harm to civilians relying on space-based services.

[6] Against this backdrop, a clear and strong reaffirmation that military operations in, or in relation to, outer space do not occur in a legal vacuum, but are constrained by existing international law, is critical to fulfilling the GGE's mandate. To this end, a new international legally binding instrument should recall that international law applies to outer space.

[7] This includes all the existing rules prohibiting or restricting weapons, means and methods of warfare in, or in relation to, outer space, including the United Nations (UN) Charter, treaties on outer space, and international humanitarian law (IHL), as well as international treaties in the field of disarmament and arms control, and the law of state responsibility, where relevant.

[8] We understand that the discussion on the applicability of IHL to outer space may have raised concerns over the possible legitimization of the use of force in space, among others. These are important considerations, which are addressed by Protocol I of 8 June 1977 additional to the Geneva Conventions. In particular, the Protocol states that IHL cannot "be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations".

[9] This could be reaffirmed in a new international legally binding instrument on the prevention of an arms race in outer space (PAROS).

[10] Indeed, IHL and the UN Charter are complementary: any resort to force by states, including in outer space, always remains governed by the prohibition of the threat or use of force under the UN Charter. In fact, IHL further contributes to the PAROS agenda as it contains rules that prohibit or limit the development and use of weapons, means and methods of warfare.

[11] Mr Chair,

[12] As a humanitarian organization, the ICRC is concerned primarily with the potential human cost to

civilians of the use of weapons and of other military operations in, or in relation to, outer space. Given the increasingly indispensable role of space systems in the provision of essential civilian services, humanitarian considerations should be a cornerstone of any multilateral discussion and of any normative development with regard to space security, including within the framework of this GGE.

[13] It is, in our view, essential for the outcome of this GGE to acknowledge the importance of the provision of critical space-based services to civilians and to humanitarian operations, to consider further measures to minimize the significant risk of civilian harm arising from threats to space systems, and to strengthen the protection of civilians from the harmful effects of military space operations.

[14] In our view, such a humanitarian approach also contributes to trust-building in connection with the PAROS agenda: any measures aimed at preventing disruption to, or damage or destruction of, space systems, in particular those supporting the provision of essential services on Earth, would be beneficial to the safety and security of both nations and their civilian populations.

[15] Firstly, space systems will often be afforded protection under existing international law, such as the prohibition of attacks on civilian objects and the special protection afforded by IHL to specific persons and objects during armed conflicts. Building upon these protections, and in light of the significant risk of civilian harm and possible escalatory effects, a new international legally binding instrument could require states to refrain at all times from conducting and/or supporting any military operation or other activity designed or expected to disrupt, damage, destroy or disable space systems necessary for the provision of essential civilian services and for the protection and functioning of persons and objects specifically protected under international law.

[16] Such systems include those that are critical to the production and maintenance of objects indispensable to the survival of the civilian population or that otherwise enable the delivery of essential civilian services, such as foodstuff, crops, livestock, drinking-water installations and supplies, irrigation works, and electricity and communications systems; those necessary for the protection and functioning of persons and objects specifically protected under international law, such as astronauts, humanitarian relief personnel and objects, civil defence organizations, cultural property, the natural environment, and medical personnel, activities and facilities; and those critical to the safety and operation of works and installations containing dangerous forces, such as nuclear power plants or infrastructure containing hazardous or toxic materials.

[17] For the purpose of reinforcing this protection, states may consider including elements on the identification, registration, marking, announcement or other indication of these space systems and, whenever feasible, on the physical or technical separation or segmentation of the civilian use of space systems from their military use.

[18] Secondly, an international legally binding instrument could include prohibitions on the development, testing and use of kinetic counterspace capabilities and other harmful operations that are designed or

expected to create space debris.

[19] Thirdly, an international legally binding instrument could include measures of international cooperation to increase the resilience of space-based services that humanitarian relief and emergency response efforts rely on in times of armed conflict and other emergencies.

[20] Mr Chair,

[21] We note that experts within this GGE have considered the existing legal and normative framework to be insufficient to prevent an arms race in outer space. In light of this, and in view of the significant risk of civilian harm, as the ICRC has repeatedly stated, states may decide to set general prohibitions or specific limits with regard to weapons, hostilities or other military operations in, or in relation to, outer space for a range of reasons, and humanitarian impact should not be missing among them.

[22] We are grateful to have been offered the opportunity to provide some recommendations for the GGE to consider in this respect.

[23] In any event, substantive elements of an international legally binding instrument must be consistent with, and build on and strengthen, the existing legal framework, including IHL.

[24] We thank you for your attention and stand ready to lend our expertise to any future discussion of the GGE.

[25] Thank you.

B. EU STATEMENT ON PREVENTION OF AN ARMS RACE IN OUTER SPACE

Source: Press and information team of the Delegation to the UN in Geneva, "EU Statement on prevention of an arms race in outer space", 28 March 2024, available at: https://www.eeas.europa.eu/delegations/un-geneva/eu-statement-prevention-arms-race-outer-space_en?s=62

European Union

Statement on Prevention of an Arms Race in Outer Space

Conference on Disarmament

Geneva, 28 March 2024

[...]

8. Mr. President,

9. The EU reaffirms the applicability of international law to outer space, including the United Nations Charter and the 1967 Outer Space Treaty, as well as international humanitarian law and consensual principles developed in the UN framework. The Outer Space Treaty as well as the guiding principles developed in the UN framework constitute the cornerstone of the global governance in outer space. We highlight the obligations of the Outer Space Treaty, in particular those comprised in Article IV that obliges the State Parties not 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. All space activities must be conducted in accordance therewith and encourage all States to ratify the Outer Space Treaty and fully implement its provisions. Thus, we underline the importance of the universalisation of the Outer Space Treaty for the preservation of a secure, safe, stable and sustainable outer space environment for present and future generation.

10. Strengthening and complementing the current international legal framework in preventing an arms race in outer space to enhance space security requires a concerted effort to fully implement the existing applicable law in good faith and to the best of our practical abilities. In this regard, we promote the application and implementation of international humanitarian law and human rights law in the context of outer space. It is essential that future instruments and measures, whether legally binding or non-legally binding, including political commitments, avoid rewriting or duplicating the provisions already established, as they may introduce legal uncertainty or create opportunities for “law shopping”. Instead, any future instruments and measures should serve as complementary elements, augmenting the existing legal regime. Any possible future legally binding frameworks for space security must be effective and verifiable and cover all relevant threats.

11. A robust legal regime for space security can encompass a variety of legally and non-legally binding instruments, including those based on capabilities and behaviours. Historically, many legally binding instruments on outer space and other domains drew from previous non-legally binding commitments and principles or through the adoption of different resolutions in the UN framework. Moreover, norms of responsible behaviours within legal regimes governing other domains, such as maritime, cyber or telecommunication, constitute good examples, best practices and lessons learned and can serve as inspirations for our endeavours.

[...]

15. Mr. President,

16. We remain concerned about the multiplication of ambiguous, unfriendly or hostile activities in outer space and underline the importance of addressing such developments promptly and as part of international efforts to prevent threats to space systems. Among the most urgent threats are destructive direct ascent anti-satellite tests, the harmful effects of which can be the destruction of the targeted satellite as well as the collateral generation of multiple space debris. We have urged on numerous occasions all States to refrain from destroying space objects and thus generating large amounts of space debris. Not only does it causes harm to the peaceful exploration and use of outer space but also increases the risk of miscalculation and unintended escalation. We have also welcomed the commitments made so far by 38 UN Member States, including all EU Member States and most recently Peru, not to conduct destructive direct-ascent anti-satellite missile tests. We encourage all States to make such commitment as soon as possible, welcoming increasing support for UN General Assembly Resolution 77/41.

17. As firm believers in multilateralism with the United Nations at its core, the EU and its Member States strongly believe that it is now urgent and in the interest of all States to pragmatically and immediately improve space security and to act swiftly in order to agree on a global, common and multilateral solution through greater coordination and cooperation, with the involvement of all UN Member States and relevant organisations. The EU reiterates the importance of an inclusive format and a multi-stakeholder approach including engagement with international organisations, commercial actors, and civil society representatives, when addressing space threats to international peace and security. The EU and its Member States therefore continue to be fully committed to engage actively and constructively in discussions that contribute to the overarching goal of the prevention of an arms race in outer space.

I thank you, Mr. President.

DISCUSSION

I. General questions

(Document A, paras 6-8, Document B, paras 8-11)

1. What is the scope of applicability of the Geneva Conventions and their Additional Protocols? Is IHL universal?

2.

a. What are the delimitations of outer space? What is the law applicable to outer space? Is IHL applicable in outer space?

b. What is the geographical scope of applicability of IHL? Could IHL be applicable in outer space even though it is not mentioned in its core treaties and customary law?

c. Could the targeting of a military objective in outer space affect the classification of an armed conflict? May it change the classification of a non-international armed conflict to an international armed conflict? What would be the determining factor in assessing whether an armed conflict conducted in outer space takes on

an international or non-international form? (GC I-IV, Arts 2 and 3; P I, Art. 1; P II, Art. 1)

II. Principle of distinction

(Document A, paras 4-5 and 15; Document B, para. 16)

3. What is a military objective? What is a civilian object? What differentiates the two? When an object is used for both military and civilian purposes, does the civilian or military nature prevail? Can it be targeted as a military objective? If so, under what conditions? (P I, Art. 52(1); CIHL, Rules 7-10)

4. How is a combatant defined under IHL? Could a civilian operating a military satellite be considered as taking direct part in hostilities? Could a civilian operating a civilian satellite used for military purposes be considered as directly taking part in hostilities? (P I, Art. 52(1); CIHL, Rules 1-6)

III. Principle of proportionality

(Document A, para. 15; Document B, para. 16)

5. What are the elements that must be taken into account when launching an attack in order to assess its proportionality? Would an attack causing space debris, which would then remain floating in outer space, be necessarily disproportionate? (P I, Art. 51(5)(b); CIHL, Rule 14)

6. How is the environment defined under IHL? Could it encompass outer space? If so, could attacks causing space debris systematically be considered as damage to the environment as prohibited by IHL? (P I, Arts 35(3) and 55(1); CIHL Rules 43-45; Convention on the prohibition of military or any hostile use of environmental modification techniques (ENMOD) Arts. I and II)

IV. Principle of precaution

(Document A, paras 13-15, Document B, para. 16)

7. How would the phrase “to the maximum extent feasible”, contained in article 57 of Additional Protocol I, apply in outer space? In a context of an attack creating outer space debris susceptible to causing harm to other outer space objects, would its meaning be diminished due to the unpredictability of the repercussions of attacks in outer space? What about the possible repercussions on Earth, especially the creation of debris falling from the sky? (P I, Arts. 57(1) and 58 (a); CIHL, Rules 15 and 24)

V. Miscellaneous/To go further

(Document A, paras 6-8 and 21; Document B, para. 17)

8. Are the current rules of IHL sufficient to cover all aspects of a potential “war in space”?

