



Legal Nature of Threats to Space Systems ---the Necessary Starting Point: Common Recognition of the Applicability of *lex lata*

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Outline

- I. Target of 75/36 and the suggested approach
- II. Legal uncertainties and controversies in terms of *lex lata* in the “grey areas” (national security space activities)
- III. challenges to the methodology of the “responsible/irresponsible” dichotomy





I. Target of 75/36 and suggested approach

- “Encourages Member States to study existing and potential threats and security risks to space systems, including those arising from actions, activities or systems in outer space or on Earth, characterize actions and activities that could be considered responsible, irresponsible or threatening and their potential impact on international security, and share their ideas on the further development and implementation of norms, rules and principles of responsible behaviours and on the reduction of the risks of misunderstanding and miscalculations with respect to outer space;”

----*Operative para. 5 of the Res. 75/36, 16 December, 2020*

- Target:
 - to develop a set of space norms, rules and principles
- Purpose:
 - reduce the risks of misunderstanding and miscalculations in space domain.





I. Target of 75/36 and suggested approach

- *“Encourages Member States to study existing and potential threats and security risks to space systems, including those arising from actions, activities or systems in outer space or on Earth, characterize actions and activities that could be considered responsible, irresponsible or threatening and their potential impact on international security, and share their ideas on the further development and implementation of norms, rules and principles of responsible behaviours and on the reduction of the risks of misunderstanding and miscalculations with respect to outer space;”*

----Operative para. 5 of the Res. 75/36, 16 December, 2020

- **Approach 1**

- recognize threats to space systems → distinguish responsible/irresponsible behavior → draft a set of norms, rules and principles

- **Approach 2 (suggested)**

- recognize common threats to space security → recognize the applicability of *lex lata* and the gaps → seek for common understanding of *lex lata* and draft complimentary rules (soft laws, treaty)



Significance to recognize *lex lata*

- Compliance with International Law...
- “..that States will comply with their obligations under international law, the United States offers the following for consideration as a concise set of starting points toward developing more specific voluntary, non-legally binding “norms, rules and principles of responsible behavior” for space operations, **intended to complement the existing international legal framework pertaining to national security space activities..**”

----United States of America National Submission to the United Nations Secretary General Pursuant to UN General Assembly Resolution 75/36 Reducing space threats through norms, rules and principles of responsible behaviours, p. 5, 7.





Significance to recognize *lex lata*

- “For the protection of the civilian population and civilian infrastructure, the ICRC believes that any “common understanding of how best to act to reduce threats to space systems” among States should include recognizing that military operations in outer space **do not occur in a legal vacuum but are constrained by existing law**, notably the Outer Space Treaty, the UN Charter and IHL, including prohibitions and limitations on the use of certain weapons, means and methods of warfare.

----The Potential Human Cost of the Use of Weapons in Outer Space and the Protection Afforded by International Humanitarian Law, Position paper submitted by the International Committee of the Red Cross to the Secretary-General of the United Nations on the issues outlined in General Assembly Resolution 75/36, para. 13, p. 4.





II. legal uncertainties and controversies of *lex lata* in the “grey areas”

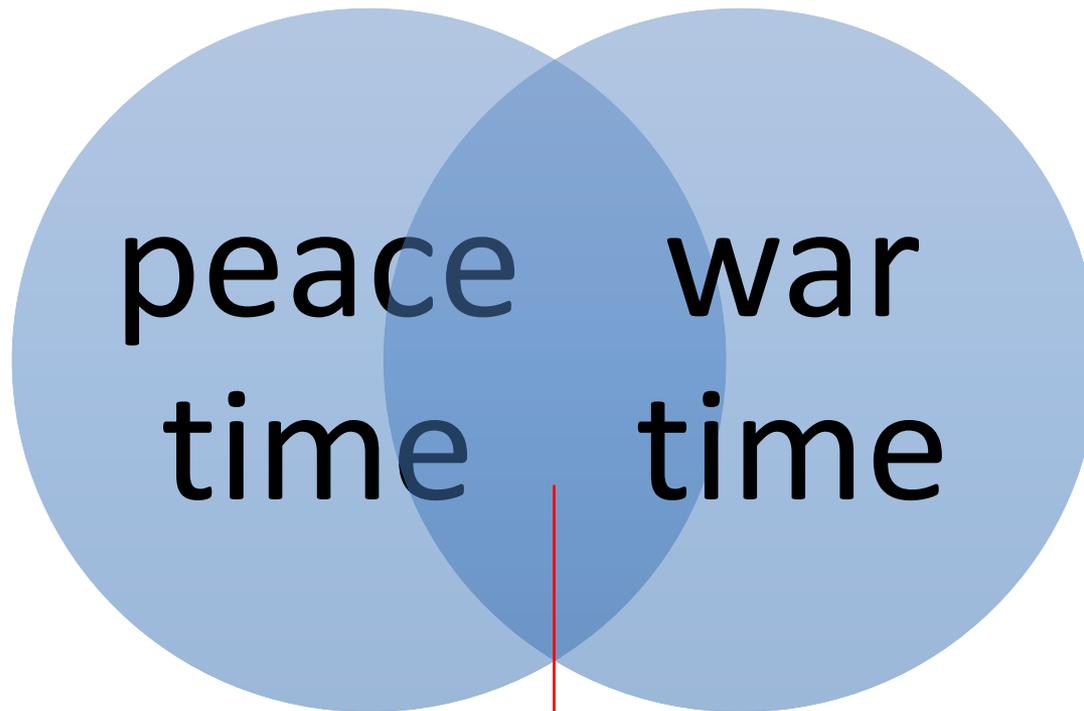
- legal uncertainties and controversies
 - international space law
 - customary international law
 - the law of State’s Responsibility
 - the law of use of force (*jus ad bellum*)
 - IHL (*jus in bello*)
 - Others...





II. legal uncertainties and controversies of *lex lata* in the “grey areas”

- legal uncertainties and controversies



Grey areas: national security space activities





II. legal uncertainties and controversies of *lex lata* in the “grey areas”

● international space law

- *If a State Party to the Treaty has reason to believe that an activity or experiment planned by it or its nationals in outer space, including the moon and other celestial bodies, would cause potentially harmful interference with activities of other States Parties in the peaceful exploration and use of outer space, including the moon and other celestial bodies, it shall undertake **appropriate international consultations** before proceeding with any such activity or experiment.*

---Art. IX, 1967 the Outer Space Treaty

- Whether prior consultation obligation is applicable in the scenario of military interference
 - ✓ navigation “warfare”
 - ✓ laser dazzling against satellite for counter-espionage purpose
 - ✓ RPO for surveillance, reconnaissance or deterrence
- due regard, Same level of requirements to civilian, commercial space activities? Whether the Rescue and Return regime is applicable to persons and space objects being engaged in military conflicts and confrontation?



II. legal uncertainties and controversies of *lex lata* in the “grey areas”

● customary international law

➤ Respect environment

✓ *The Court recognizes that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment. --Advisory opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons, 1996.*

➤ Whether it is applicable in space without any specific concerns?

● the law of State's Responsibility

➤ counter measure; distress; necessity; force majeure

➤ How to define these circumstances precluding wrongfulness in space scenario?



II. legal uncertainties and controversies of *lex lata* in the “grey areas”

- the law of use of force (*jus ad bellum*)
 - space weapon
 - space armed attack
 - use of force
 - proportionality
 - How to interpret and elaborate these definitions or elements in respect of exercising space self-defense?
- international humanitarian law (*jus in bello*)
 - danger to excessively apply the Distinction Principle
 - ✓ pace weapon is hard to define
 - ✓ Principle of Proportionality is hard to fulfil
 - insufficient effectiveness of required means and methods of warfare





II. legal uncertainties and controversies of *lex lata* in the “grey areas”

- danger to excessively apply the Distinction Principle in IHL
 - in space case, most of the satellite have dual-use function. It’s hard to tell whether it’s for civilian or for military purpose. One might argue that space infrastructure used for both civilian and military purposes is a military objective. Then it might lead to an excessive application of the distinction principle.
 - Or on the contrary, one might insist a clear cut between civilian and military objective, and any attacks against civilian objective violate the distinction principle, even if it serves for military purpose occasionally. Then it excludes the possibility to strike such an objective in a legal means, which again excessively apply the Distinction Principle.





II. legal uncertainties and controversies of *lex lata* in the “grey areas”

- insufficient effectiveness of required means and methods of warfare
 - not like space nuclear weapon or kinetic weapon, it's hard to determine the threshold of a component part of a space object being weapon when it's for dual-use purpose, for instance, the mechanic arms of a satellite could be used for removal space debris for the purpose of space environment protection, also could be used to seize an adversary's functional satellite for the purpose of attack or capture. Moreover, each Satellite *per se* could be used as a weapon, for instance, a suicide attack.
 - Besides, when talking about the legal way to use weapon in space, as a matter of fact, it's already in consistent with the legal spirit and rationale of PPWT, which inevitably trigger political debates again.
 - Space war poses unique challenges in this regard since space debris is always an inevitable concomitant with space armed conflicts. And space debris could destroy any object nearby or in its trajectory without any discrimination, that is, no matter is it a civilian satellite or military one. In other words, in space war, collateral damage is hard to avoid, that's why it's argued the most urgent issue is how to avoid space war rather than how to regulate space war.



III. challenges to the methodology of “responsible/irresponsible” dichotomy

- **i. less workable and practical**

- Lacking of common recognition of *lex lata*, the recognition of responsible/irresponsible space behavior has a high risk to lead to a political game, the process would be trapped in political debates rather than achieving legal consensus.
- Whereas, it is the political will and legal consensus providing the foundation to have a new set of norms, rules and principles.





III. challenges to the methodology of “responsible/irresponsible” dichotomy

● ii. Risky to bring confusions to the existing system of legal terms

➤ responsible, reasonable

- ✓ A space behavior which might be considered as irresponsible by someone could be deemed as reasonable by others.

➤ legitimate, legal, lawful

- ✓ Whether a responsible space behavior is always lawful, or whether an irresponsible one is unlawful in any circumstances?

➤ responsible in space law

- ✓ Responsibility refers to kinds of burden of a State, for instance, authorization and continuing supervision on it's national space activities.
- ✓ It's well-recognized as “responsible State” but not “responsible behavior” in space law.

➤ responsible in general international law

- ✓ Always means accountability, liability or any other legal consequences under the law of State's Responsibility.





III. challenges to the methodology of “responsible/irresponsible” dichotomy

- **iii. Inappropriately changing the requirement and nature of best practice (soft laws)**
 - encouraged to do so, on a voluntary basis
 - ensure to do so, on a mandatory basis (at least in the political sense)
 - lift up the threshold to get access to space, in particular to the non-spacefaring countries and new space actors.





Conclusions and remarks

- The approach of “responsible/irresponsible” is full of legal and political uncertainties. It would be hasty and risky to define responsible/irresponsible space behaviors, without common recognition of the legal nature of them, prohibited, allowed, not prohibited but restrained, not allowed but with a tacit permission..., then approach *per se* would be a risk of misunderstanding and miscalculations in global space security governance.
- Although the political will of States is the precondition to a legal will and consensus, it might be disaster of the rule of international law to take place of legal will by political one.
- Thus, to organize a serious legal discussion to seek for common understandings of the applicability of *lex lata* should be severed as a starting point to move forward after achieving basic recognition of the common threats, rather than adopting a “responsible/irresponsible” approach.



thank you!

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