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What does International Law Say About Military Use of Outer Space, Legal Analysis of the McGill Manual

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The recent publication of the first volume of McGill University's handbook on the law applicable in outer space for military actions follows the proliferation of legal handbooks written on the war in space. The 2017 Manual of International Law Applicable to the Military Uses of Outer Space (MILANOS) has paved the way for doctrinal literature on the subject and is expected to be complemented by the Woomera Manual, both written under the auspices of the Australian University of Adelaide.

Introduction

The McGill manual follows the same path as the San Remo manual on international law applicable to armed conflict at sea and sets out 52 rules under the work of 80 legal experts from around the world (civilian and military). It carries no official and almost no legal force and is to be considered a doctrinal work aimed at influencing decision-making at the military or civilian level (Cassandra Steer). They published this project to provide guidelines for any future legal work and tried to create a similar set of rules as the ones already developed on air, sea and cyberwarfare.

This set of rules includes both jus ad bellum and jus in bello, setting rules as well-established jus cogens and/ or accepted customs of international law.

However, it suffers from the lack of practical grounds being largely focused on theoretical grounds.

This work is inscribed within 65 years of outer space evolutions, driven by the main space powers (United States, Russia, France, Japan and India). The manual has the objective to tackle the false impression that space is the new Wild West. However, it is easily criticised by other experts as there is a giant gap between international law of outer space and state practice especially within the military field (Yun Zhao et Shengli Jiang).7

The supposed milestone manual is based upon the multiple's treaties ruling outer space, listed as follows:

- 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Outer Space Treaty);

- 1968 Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (Rescue and Return Agreement);

- 1972 Convention on International Liability for Damage Caused by Space Objects (Liability Convention);

- 1975 Convention on Registration of Objects Launched into Outer Space (Registration Convention); and

- 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Moon Agreement).

Lex analysis

Let us, therefore, focus on a legal analysis of the set of rules the 80 experts agreed upon. The most obvious remark will be that the whole set of rules is directly taken from the aforementioned set of treaties on outer space. Hence most of the set-out rules are carbon copies of legal articles.

However, rule 108, which bears the title "Definition and Delimitation of Outer Space" comes as follows:

"Rule 108 – Definition and Delimitation of Outer Space
The definition and delimitation of outer space have not been established in international law."

It is highly disturbing for a Manual on International Law Applicable to Military Uses of Outer Space to be unable to establish a sort of broad definition to bring forth a consensus on the matter. Questions can then be asked on the usefulness of such manuals, when unable to even present a small definition on the fundamental basis of the subject. A definition that can be found in other doctrinal works and military manuals (Maj Micah Smith et al).

The lack of a comprehensive consensus on the delimitation of outer space area, is a fundamental step in clarifying applicable law between outer space international law and international space laws.

Now take a look at the Rule 117 on the principle of non-intervention.

"Rule 117 – Non-Intervention

Space activities, including military space activities, shall be carried out in conformity with the principle of non-intervention under international law."

This is an ineffective rule, orbital path is generally not geostationary, especially when launched with a military purpose, spying, surveillance, or any other military mission carried out by a satellite. This rule remains too naive even from a purely theoretical point of view.

Another criticism arises from the physics nature of orbital space, and the issue of debris in orbit, addressed by:

Rule 116 – Ownership of Objects in Outer Space

1. Ownership of objects, including objects used for military space activities, launched into or constructed in outer space, including objects landed or constructed on a celestial body, and of their component parts, is not affected by their presence in outer space or on celestial bodies, or by their return to Earth.

2. The ownership of such objects and their component parts may be transferred when in outer space or on a celestial body, subject to applicable law.

Hence, space debris remains a state property that could strike another satellite and constitute a violation to the principle of non-intervention from another state on the normal conduct of a satellite orbital pathway.

The manual tries to address the question of debris in orbit, through the Rule 129;

Rule 129 – Space Debris

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.

This rule symbolises the main long-lasting problem of space warfare and the unpreparedness of the international community to address the subject related to the Kessler theory (Donald J Kessler & Burton G Cour-Palais). The use of such broad, unspecific reasoning is appalling in the face of a well-furnished legal corpus targeted as limiting the direct and indirect effect of warfare. Hence, an obligation to limit the creation of space debris imposed on military action is once again naive when facing facts, knowing that the last Chinese missiles created more than 2000 trackable debris and more than 150 000 particles capable of inflicting damage to other satellites (Pascal Imhof).

Chapter IX Use of Force

Rule 151 – Prohibition of the Threat or Use of Force

In carrying out space activities, including military space activities, States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.

Rule 152 – Right of Self-Defence

1. Under international law, including the Charter of the United Nations, an inherent right of individual or collective self-defence exists if an armed attack occurs against a State, until the Security Council of the United Nations has taken measures necessary to maintain international peace and security. This remains the case where the armed attack occurs in or from, or is directed through or towards, outer space.

2. The physical and legal characteristics of outer space must be taken into account in any exercise of a State's right of self-defence.

For the main part of both rules, it is a literal explanation of article 2.4 of the United Nation Charter and the jus ad Bellum. However, rule 152, 2 is more cryptic and can be interpreted as a reminder of the principle of proportionality in the execution of the right of self-defence with the constraint of space physics. Hence, Parties to international convention shall consider the exponential tendency of any destructive act in space due to the physics characteristics of this zone.

Conclusion

To conclude, the whole manual is part of a doctrinal classical way to address new fields of law, lacking experience in practical cases, hence suffering from a purely theoretical approach to the subject. Many critics stated that a “real-world” approach will be preferable and create a stronger legal foundation for national governments to engage in specific policies. The McGill manual clearly shows an incentive for other international military law manuals to develop an approach based upon “boots on the grounds” decision making as has been done in the Woomera Manual on International Law of Military Space”.

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