

Outer Space as a Military Operational Domain and 'The Law' (especially the *jus in bello*): The Woomera Manual as Point of Departure

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@ '*Jus in bello*'

- ◆ ICRC: “Seeking to limit the suffering caused by protecting and assisting its victims as far as possible”

→ Protecting various categories of humans involved



→ Protecting various categories of assets & items involved



Outer space as military domain (1)

- ◆ 1990-1991 Gulf War labelled ‘first space war’ ...



→ Application *jus in bello* focuses on use space assets (so far without humans) to support military operations, including use of armed force, *in terrestrial, maritime and airspace domains*

Outer space as military domain (2)

- ◆ 2019 NATO recognized space as operational domain



→ Application *jus in bello* has to focus on a *new domain*, not yet subject to armed force operations...-

The core problem

- ◆ Two distinct legal regimes interact for the first time
 1. ‘**Space law**’: *lex specialis* with regard to general public international law for the specific domain of outer space
 - So far premised on **aspirations of peaceful usage**
 - not addressing armed conflict scenarios
 2. ‘**Law of armed conflict**’: **also** *lex specialis* with regard to general public international law for specific armed conflict scenarios
 - So far premised on **reality of armed conflicts**
 - not addressing space domain

→ Two conflicting *leges speciales*...

	Belligerent	Neutral/Third State
Belligerent		
Neutral/ Third State		

→ Two conflicting *leges speciales*...

	Belligerent	Neutral/Third State
Belligerent	Generally, law of armed conflict supersedes space law in case of incompatible application (within space law structural parameters)	
Neutral/ Third State		

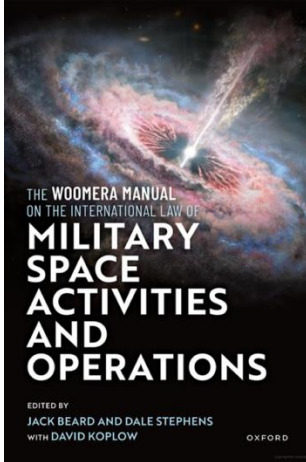
→ Two conflicting *leges speciales*...

	Belligerent	Neutral/Third State
Belligerent	Generally, law of armed conflict supersedes space law in case of incompatible application (within space law structural parameters)	
Neutral/ Third State		Space law rules; law of armed conflict mainly relevant to the extent of neutrality law parameters

→ Two conflicting *leges speciales*...

	Belligerent	Neutral/Third State
Belligerent	Generally, law of armed conflict supersedes space law in case of incompatible application (within space law structural parameters)	Law of armed conflict supersedes space law if clearly applicable to space – except for space law <i>erga omnes</i> obligations
Neutral/ Third State	Law of armed conflict supersedes space law if clearly applicable to space – except for space law <i>erga omnes</i> obligations	Space law rules; law of armed conflict mainly relevant to the extent of neutrality law parameters

→ Woomera Manual (1)



International research project spearheaded by U of Adelaide, U of Exeter, U of Nebraska & U of New South Wales, aided by individual experts & State consultations

“to develop a Manual that objectively articulates and clarifies existing international law applicable to military space operations”

→ Woomera Manual (2)

◆ Dissatisfaction with MILAMOS effort

Article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Too much focused on *lex ferenda* as discussed by experts as opposed to *lex lata* – treaty law as interpreted in accordance with Vienna Convention on the Law of Treaties and customary international law as per State practice & *opinio juris*

Manual – general approach

- ◆ Addressing main concepts, issues & rules from existing *jus ad bellum*, *jus in bello* & other elements of international law applicable to armed conflicts in the context of outer space & space activities – noting law of war and space law are both *leges speciales*
- ◆ 48 Rules with attendant notes explaining analyses, especially of treaty law, State practice & *opinio juris*, & conclusions – incl. allowance for lack of finality

Manual – substance (1)

- ◆ Four introductory sections
 - Introduction (especially on methodology: focus on treaty law, State practice & *opinio juris*)
 - Overview space law – introducing main relevant treaties
 - Legal connections between States and space objects – registration, responsibility, liability & ownership concepts
 - Delimitation outer space *versus* airspace – given lack of respectively full-fledged applicability of territorial sovereignty as baseline legal rule

Manual – substance (2)

1. Military space activities during peacetime
 1. Freedoms and restrictions related to the use of outer space
 2. Responsibility and liability
 3. Other obligations



Manual – substance (3)

2. Military space activities during times of tension and crisis
 1. Legal obligations and prohibitions of particular relevance during times of tension and crisis
 2. Response actions



Manual – substance (4)

3. Military space operations during armed conflict

1. Characterization of armed conflict
2. Conduct in or related to attack
3. Precautions in attack
4. Means and methods of warfare
5. Other obligations



→ Manual & *jus in bello* (1)

◆ Rule 31 – Attack

An ‘attack’, in the context of a military operation, including a military space operation, in the course of armed conflict, is an act of violence against the adversary (...).

- As per ‘means-based’ approach, accomplished by armed force & associated weapons, including non-kinetic weapons
 - *Note: problem of defining ‘space weapon’*
- Cyber: included if pursuant to ‘effects-based’ approach causes death, injury, destruction or damage

→ Manual & *jus in bello* (2)

◆ Rule 32 – Distinction

(...) [A] party to an armed conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct its military operations, including its military space operations, only against military objectives.

- Military operations by definition involve use of violence
- As for humans: so far essentially future-oriented
- As for objects → ...

→ Manual & *jus in bello* (3)

◆ Rule 34 – Military objectives

Military objectives are lawful targets in a military operation in a time of armed conflict, including a military space operation. Military objectives are those that by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, (...) offers a definite military advantage.

- Includes in principle satellites & ground stations
- Includes dual-use space objects (...!)

→ Manual & *jus in bello* (4)

◆ Rule 38 – Proportionality in Attack

A Party to an armed conflict may not make an attack, including an attack involving a military space operation, that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and direct military advantage anticipated.

- Calculation much harder to make in space – *cf. space debris!*
- Likewise with multi-purpose satellites

Concluding remarks

- ◆ Woomera Manual clearly first step in articulating wherever international *jus in bello* for armed conflicts in outer space may be concluded to exist
- Many gaps & uncertainties, as (*luckily!*) State practice is still largely wanting

***Note:* State practice in terms of outer space also includes ‘paper practice’: official declarations of legal positions – or absence thereof**

