

- Is there a legal right to use space for reconnaissance or commercial imagery collection if the user might have aggressive or otherwise illegal intentions?<sup>28</sup>

The OST and subsequent international agreements provide no clear-cut guidance about where the right of safe passage for peaceful purposes ends and the right of self defenses takes over. Thus, the countries with the most active military space programs have asserted that, for better or for worse, the OST's only operative constraints on military uses of space are its prohibitions on orbiting weapons of mass destruction and on conducting military activities on celestial bodies.

Although there are many other constraints on military space activities in treaty law, customary law, declaratory principles, and national rules of engagement, they cannot be aggregated into a comprehensive, coherent set of rules that would provide authoritative answers about which uses of space should be protected and when certain forms of interference should be prohibited or permitted.<sup>29</sup> Some rules are very narrow, such as when States Parties are prohibited from interference with satellites used to verify arms control compliance. Others, such as the admonition in the International Telecommunications Union's constitution against causing harmful interference to other countries' communications, include exemptions for military activities and for actions to block or limit transmissions that violate national laws or impact national security.<sup>30</sup>

Customary international laws are broad, binding on all states, and sometimes applicable during times of war as well as peace, but the ones most relevant to space conflict are also very subjective and permissive. For example, the customary International Law of Armed Conflict's principles of discrimination, proportionality, and necessity would prohibit deliberate attacks on space assets that serve no military function. But they would permit attacks on dual-use satellites, if the military advantage gained outweighed the collateral harm to civilian and neutral users on Earth, and there was no way to achieve the same military effect with less collateral damage. Some international lawyers have even suggested that if war

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<sup>28</sup> UNGA Res. 41/65 "Principles Relating to the Remote Sensing of Earth from Outer Space" (December 3, 1986) specifies that remote sensing should be conducted for mutual benefit and that the sensed state should have access to primary data and processed analyses of its territory on a non-discriminatory basis and at reasonable cost. In this statement of principles, though, remote sensing is defined as electromagnetic imaging being conducted for the purpose of improving natural resources management, land use and the protection of the environment, so the principles would not apply if the information was being collected or sold for aggressive purposes.

<sup>29</sup> U.S. military space lawyers have given these questions some thought, but with an eye to maximizing US freedom of action in space. See Maj. Elizabeth Waldrop, "Weaponization of Outer Space: US National Policy," *High Frontier* (Winter 2005) at <http://www.peterson.af/mil/hqafspc/news/images/journalwinter05.web> and Michael N. Schmitt, "International Law and Military Operations in Space," *Max Planck Yearbook of United Nations Law*, Volume 10, 2006, pp. 89-125.

<sup>30</sup> Article 48 of the ITU Constitution states that members "retain their entire freedom with regard to military radio installations," but that they must, so far as possible, still observe ITU Constitution rules and Radio Regulations provisions regarding measures to prevent harmful interference and to minimize all interference with other States' radiocommunications.