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The complex neutrality of commercial space actors in armed conflict

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During an international armed conflict, commercial space actors under the jurisdiction or control of a third, neutral state may find themselves implicated in the conflict in various ways, which could increase tensions and trigger misunderstandings between a belligerent and neutral state and risk the latter losing its neutral status.

In this post, part of a series on War, law and outer space, Professor Guoyu Wang of the Academy of Air, Space Policy and Law at the Beijing Institute of Technology discusses the potential legal issues raised by such involvement under both neutrality law and international humanitarian

law (IHL), including the significance of legal interpretation of the lex lata for space security governance.

ICRC Humanitarian Law & Policy Blog · The complex neutrality of commercial space actors in armed conflict

During an international armed conflict (IAC), commercial space actors under the jurisdiction or control of a third state (the neutral state) may provide services – such as telecommunications, navigation, and remote sensing – to one of the belligerent states. More sensitively, commercial space assets could be directly used in military operations in an IAC, through on-orbit operations like proximate approach, rendezvous and proximate operations, active removal operations, jamming, and spoofing. Under some extreme circumstances, commercial satellites could even be used as a weapon to collide with or attack another space object.

States have not yet started formal discussions on the applicability of neutrality law – the law governing the relationship between "belligerent" and "neutral" states – during the UN Prevention of Arms Race in Outer Space (PAROS) process. Some critical legal matters need to be clarified through, for instance, whether the neutral state violates its neutrality obligations due to the involvement of its commercial actors in others' armed conflicts, and whether such violations would subsequently cause it to lose its neutral status and become a belligerent.

When is commercial space activity an act of state?

The key to whether neutrality law applies lies in the relationship between the commercial space activity and the neutral state. When considering the legal impact of providing military assistance to a state engaged in an ongoing armed conflict, the law of neutrality *intersects* with other legal frameworks. Both space law and state responsibility law address the international responsibility of a state; respectively, the responsibility for the space activities undertaken by a non-governmental entity and the acts conducted by a person or entity. However, the standards to link such behavior and a state are substantively different in space law and state responsibility law, and the two links have different legal connotations.

Article VI of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (*the OST*) provides that a state shall bear international responsibility for "national activities in outer space" (national space activities), "whether or not such activities are by governmental agencies or by non-governmental entities". Insofar as international space law is concerned, state responsibility refers to responsibilities for its own activities; that is, its national space activities. Moreover, there are no "private space activities" which can stand alone under space law. Each and every space activity conducted by non-governmental entities must be defined as one particular state's "national space activities", although the OST keeps silent about the specific nexus between a non-governmental entity's space activity and its responsible state.

The standard of this determination is to be examined on a case-by-case basis. In most circumstances, the state of registry would bear international responsibility for the activities of the registered space object, since it retains jurisdiction and control over it according to *Article VIII of the OST*, unless it could be proven that another state has a more proximate connection with the space object and/or its activities than the registry state.

The term "state responsibility" is not expressly stipulated under space treaties; instead, it is "international responsibility", provided under *Article VI of the OST*, which has two categories of legal implications. One refers to the obligations of the responsible state for such private activities, for instance, "for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty", and "authorization and continuing supervision". The other relates to legal consequences that the responsible state shall bear, which serve as the remedies to certain negative results (such as damages) brought on by such non-governmental space activities. It should be

noted that when said negative results are caused by a state's internationally wrongful act, then its international responsibility under *Article VI of the OST* has similar legal connotations of "state responsibility" or "international responsibility" in the *Draft Articles of State Responsibility for Internationally Wrongful Acts (ARSIWA)*, i.e., state responsibility law, such as cessation and non-repetition, and reparation (Articles 30 and 31). Therefore, "international responsibility" under space law has broader legal implications than those under state responsibility law.

Violations of neutral obligations

The law of neutrality provides that any state that is not party to an international armed conflict shall maintain neutral status and must remain impartial, abstain from activities deemed unneutral, and take certain actions to end or prevent belligerent military activities that would violate its neutrality.

A number of academics, *the ICRC*, and some states point out that the law of neutrality applies to outer space. China has also raised concerns about the application of neutrality law in the case of the involvement of commercial space actors in IAC during the 3rd Session of the UN Open-Ended Working Group on Reducing Space Threats in August 2023. The author agrees that the basic principles and rules of neutrality law that constitute customary law shall apply in space, though the exact rules that are applicable and how they apply to outer space require further clarity. It is generally established that neutral states have a duty not to participate in hostilities and to be impartial in their conduct toward belligerents.

The issue of attribution should be weighed in. Though it requires a case-by-case analysis of the support provided, the neutral state would very likely be deemed as violating its neutral obligation if the involvement of the commercial space actor in the armed conflict is attributable to it under the law of state responsibility. Even if the attribution is not established under state responsibility law, the allocation of responsibility under space law still operates. For example, under the *Convention concerning the Rights and Duties of Neutral Powers in Naval War (Hague XIII)*, "a neutral Power is not bound to prevent the export or transit, for the use of either belligerent, of arms, ammunition, or, in general, of anything which could be of use to an army or fleet" (*Article 7*). However, as a responsible state for the above commercial space activities, if it imposes restrictions on exports or on the employment of space services on one belligerent, it shall do so to the other in an impartial way.

Moreover, neutral states are forbidden from providing "ammunition, or war material of any kind whatever" to belligerents (*Hague XIII, Article 6*), and "a neutral Government is bound to employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise or engage in hostile operations, against a Power with which that Government is at peace" (*Hague XIII, Article 8*). However, treaty law *does not require* neutral states to prevent private companies from selling munitions and war material. The traditional law of neutrality distinguishes between unlawful assistance by the neutral state and lawful assistance by private persons or private enterprises in a neutral state.*[1]* A further consideration is nonetheless necessary for determining whether and to what extent the military telecommunication or remote sensing service for the belligerent could be deemed as "war materials" or whether such service providing could be considered as "export" or "transit". This should be examined on a case-by-case basis.

Legal implications of neutrality violations

"*The law of neutrality is binary and a State is either a belligerent or neutral; there is no legal middle ground.*" A violation of the neutrality obligation by the neutral state however does not necessarily terminate this state's neutral status or lead to the loss of such status, or amount to an "act of war". More thorough standards should be discussed for determining when a state's assistance is sufficiently connected to a belligerent's combat operations that the assisting state

becomes a party to the conflict. Even if the matter of becoming a party to the conflict is governed by Common Article 2 to the Geneva Conventions, it does not provide specific rules to define the detailed threshold in such space scenarios.

The author submits that there are two key factors in examining the legal consequences, namely: the consequences of the involvement of commercial space actors in an armed conflict, and the establishment of attribution. From an objective perspective, the more serious the consequence, the more credible a claim that violations lead to a termination or loss of neutrality by a state. *Put differently*, "One way that a state can become a co-belligerent is through systematic or significant violations of its duties under the law of neutrality".

Again, the issue of attribution matters as well. If the commercial involvement is not attributable to the neutral state, it would be unlikely that the neutral state is made a party to the conflict, even if the law of neutrality is violated. It is still not clear whether *Article VI of OST* could serve as a legal basis to define attribution. It is also uncertain whether the threshold in *Article 8 of ARSIWA* would apply as the only standard to attribute a commercial space activity to a state. Without prejudice to the application of *lex lata*, no matter under space law or state responsibility law, the author submits that the subjective aspects of the neutral state should be examined. The more aware or supportive the neutral state is of such intervention, the more likely attribution will be established. In determining whether the neutral state loses its neutral status, the weight of the above factors may differ so as to leave enough room for mediation among the parties involved.

In addition, a "buffer zone" should be considered to create opportunities to solve disputes in a peaceful manner. According to *Schmitt*, "[t]he neutral state concerned would be obliged to take steps to terminate any 'non-neutral' service by non-governmental entities. If it does not, the opposing belligerent acquires a right to do so itself, although it must first demand that the neutral comply with its duty to put an end to the non-neutral activities. Further, the aggrieved belligerent may take only the minimum (but sufficient) actions necessary." In this case, one avenue of "buffer zone" would be for the affected state to raise a request of consultation with the neutral state based on *Article IX of OST*. For instance, the affected belligerent state may request that the neutral state take measures to refrain the payload/satellite operated by a commercial actor under its jurisdiction or control from providing military information or capacity to an opposing belligerent, and if the neutral state does not take necessary measures, the affected state is entitled to take countermeasures, like jamming or spoofing these space services, or any other means (even self-defense in case of an armed attack) which is necessary and proportional to the intervention acts.

Conclusion

States should opine on whether and how the law of neutrality applies to outer space, and discussions are encouraged at the international level to reach a common understanding of this issue. The relationship between attribution and neutrality and the correlation of space law, state responsibility law, neutrality law, and IHL should be clarified. It is IHL, not the law of neutrality, that is relevant to the determination of co-belligerency. The relevant states should accelerate their domestic legislative process and take corresponding measures to prevent commercial space actors from intervening in other parties' armed conflicts, and at the very least, to fulfill their authorization and continuing supervision obligations under OST.

States should promote and ensure respect for IHL and neutrality law domestically, as a commercial actor may not always be aware of the nature or consequence of their acts. Under both national and international law, there is a need for further discussion and development of principles and rules to prevent or regulate such acts of commercial space actors in order to avoid exacerbating the risk of misunderstanding and misperception among states.

[1] Michael Bothe, The Law of Neutrality, in Dieter Fleck (ed.), The Handbook of International Humanitarian Law, 4th ed, 2021.

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