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The relationship of international humanitarian law and territorial sovereignty with the legal regulation of outer space (2)

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AVOIDING LEGAL BLACK HOLES: INTERNATIONAL HUMANITARIAN LAW APPLIED TO
CONFLICTS IN OUTER SPACE

Abstract

The applicability of international humanitarian law (IHL) is not dependent on any domestic legal system, however its enforcement is at least partially subject to domestic application. There are scenarios in which States assert they can derogate from IHL and other rules of international law due to emergency and threats to security. One example is the controversial creation of US military commissions to prosecute suspected terrorists outside of the existing legal framework, leaving such persons floating in a legal black hole. When it comes to hostilities that take place in or through Outer Space, the fact that Outer Space may not be appropriated as territory means that regulation of military activities and their consequences are truly international. No State can exert exclusive jurisdiction over a breach of IHL that takes place “in” Outer Space. However this also means there is a greater risk of abuse of the rules of IHL by the creation of new legal black holes; if it’s up to individual States to interpret and apply these rules, they may attempt to justify unlawful derogation in the name of security.

The main issue to be dealt with in this paper is the continued application of the space treaties and of IHL in the midst of hostilities in or through Outer Space. Generally IHL must apply to space in the same ways it applies to terrestrial conflicts, in the sense that justifiable derogation for reasons of national security are truly exceptional and very limited. Similarly, the space treaties and other international sources of space law must also continue to apply, in order to ensure the core principles such as peaceful uses of outer space, and the freedoms of outer space, are upheld. The question then arises, what happens if these two branches of international law produce competing obligations in the event of hostilities? Which of them should be considered *lex specialis*? Can States derogate from either one of them or both of them under claims of State security? Or do these branches of law provide their own internal means of reconciliation, ensuring their continued application in times of conflict in Outer Space?