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Cyber-based security threats to space missions: establishing the legal, institutional and collaborative framework to counteract them (2)

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SPACE CRIME: A BASIS FOR INTERNATIONAL LAW TO CRIMINALIZE CYBER
INTERFERENCE OF SPACE ACTIVITIES**Abstract**

The Outer Space Treaty and its progeny treaties govern the behavior of space actors. However, they do not criminalize any conduct in outer space. Instead, the Outer Space Treaty allows for the indirect application of criminal law in space pursuant to Articles III and VI.

Outer Space Treaty Article III extends international law to outer space, which incorporates international criminal law. Article VI delegates to States the responsibility and duty to police the space activities of their nationals' and of nonstate actors. This police duty recognizes and authorizes States to promulgate or enact national law that criminalize acts viewed as misconduct in or relating to outer space. Thus, criminal law in space emerges from two distinct sources, which are international law and national law. The major difference is that universal jurisdiction exists under international law. Universal jurisdiction allows a State to criminally prosecute certain conduct even when the State lacks nexus to the conduct, perpetrator, or victim and the prosecution can proceed even though it is objected by the home State of the defendant and/or victim.

International law generally derives from treaties or customary international law, which derives from the practice or custom among States. Since the Outer Space Treaty and its progenies do not criminalize any conduct, In the absence of a treaty provision, State practice is the basis for criminalizing any space behavior at the international level. Historically, conduct recognized as criminal under customary international law includes piracy, slave trading, war crimes, genocide, and torture. Those prohibitions, however, are inadequate to corral the breath of conduct available to space actors. This circumstance is complicated by the Lotus principle, which equates the absence of prohibiting conduct under international law as a permissive rule allowing such conduct. Consequently, it is not international criminal behavior when a space actor engages in any conduct which does not breach the current customary crimes under international law.

Outer Space Treaty Article IX does prohibit a space actor from engaging in conduct which causes harmful interference to another's peace use and exploration of space. This paper will analyze and discuss Article IX's prohibition on harmful interference as a basis for customary international law criminalizing the use of cyber activity to interfere with a space mission.