

THE INTERNATIONAL SPACE TREATY REGIME IN THE GLOBALIZATION ERA

BY JOANNE IRENE GABRYNOWICZ

An emerging minority view held by some in the United States space community is that space law, and in particular the Outer Space Treaty, is outdated. Some go further and argue the United States should withdraw from the treaty altogether. These positions are wrong. The space treaty regime is an important and timely one that supports the United States' national security, commercial and environmental interests during this era of globalization.

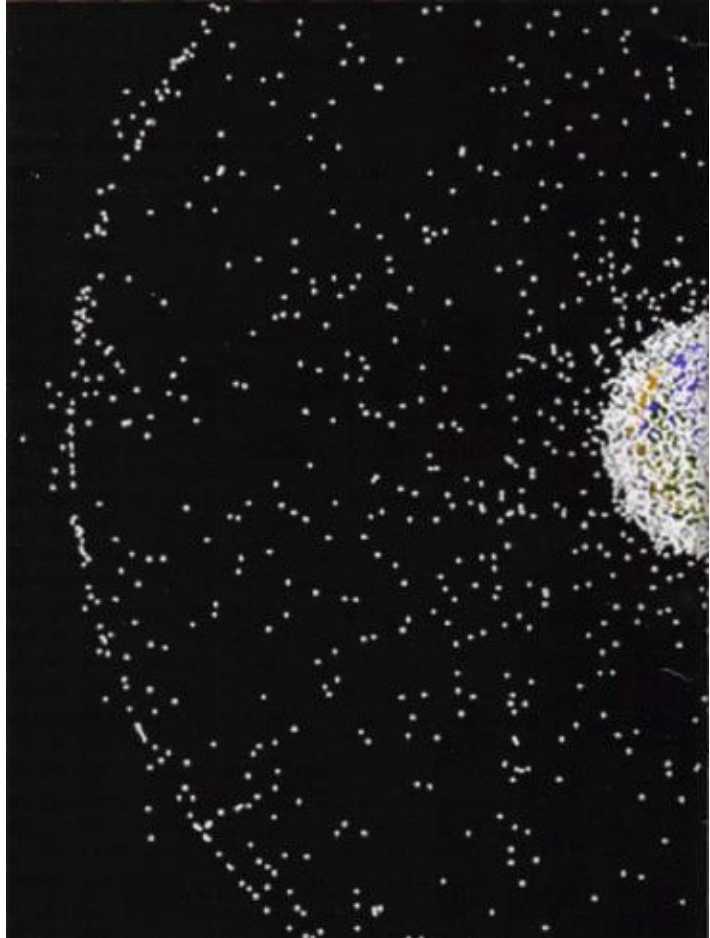
As traditional warfare evolves into information warfare, the importance of the space treaty regime for national security purposes has been clearly identified in *An Assessment of International Legal Issues in Information Operations*. It was published in 1999 by the Department of Defense's General Counsel and was co-authored by the General Counsels of the Army, Navy, Air Force, the National Security Agency and the Defense Information Systems Agency, as well as the Judge Advocates General of the military services and the Legal Counsel to the Chairman of the Joint Chiefs. The Assessment clearly refutes the idea that the treaties are out of date: "There is probably no other field of human endeavor that produced so much international law in such a short period ... Taken together, these treaties provide the foundations of existing space law. The four major space treaties together establish ... principles directly relevant to information operations. These principles have been so widely accepted that they are generally regarded as constituting binding customary international law, even for non parties to these agreements."

Regarding commercial interests, the debate surrounding the existence of property rights in the space treaty regime has reduced the entire array of complex commercial interests to a single issue. Lost in the binary argument of "do they or don't they" exist are the many critical legal conditions that are also required for a successful, thriving commercial environment: legal stability, an accepted liability regime, and recognized private law and contractual practices. Property rights absent of these necessary legal conditions are insecure and unprotectable.

The overall fact is that space is, and has been for almost five decades, a stable, legal, political and operational environment due in large part to the rule of law and diplomatic measures:

- The Outer Space Treaty has 98 ratifications and 27 signatures.
- The Return and Rescue Agreement has 88 ratifications, 25 signatures and one acceptance of rights and obligations.
- The Liability Convention has 82 ratifications, 25 signatures, and two acceptances of rights and obligations.
- The Registration Convention has 45 ratifications, four signatures, and two acceptances of rights and obligations.

The space treaty regime includes a liability regime that incorporates many tried and true commercial legal standards and mechanisms including negligence, gross negligence, strict liability, allocation of risk, joint and several liability, apportionment, indemnification and compensation in the injured party's own currency. These apply to the signatory states, and because they do, these foundational standards and mechanisms have been available to "flow down" from the treaties to national legislation and regulation for use by commercial entities.



WHO NEEDS SPACE-BASED WEAPONS ... WHEN THE HEAVENS ARE LITTERED WITH POTENTIALLY DAMAGING SPACE DEBRIS, AS SHOWN IN THIS ILLUSTRATION OF BOTH LOW EARTH ORBIT AND GEOSYNCHROUS EARTH ORBIT.

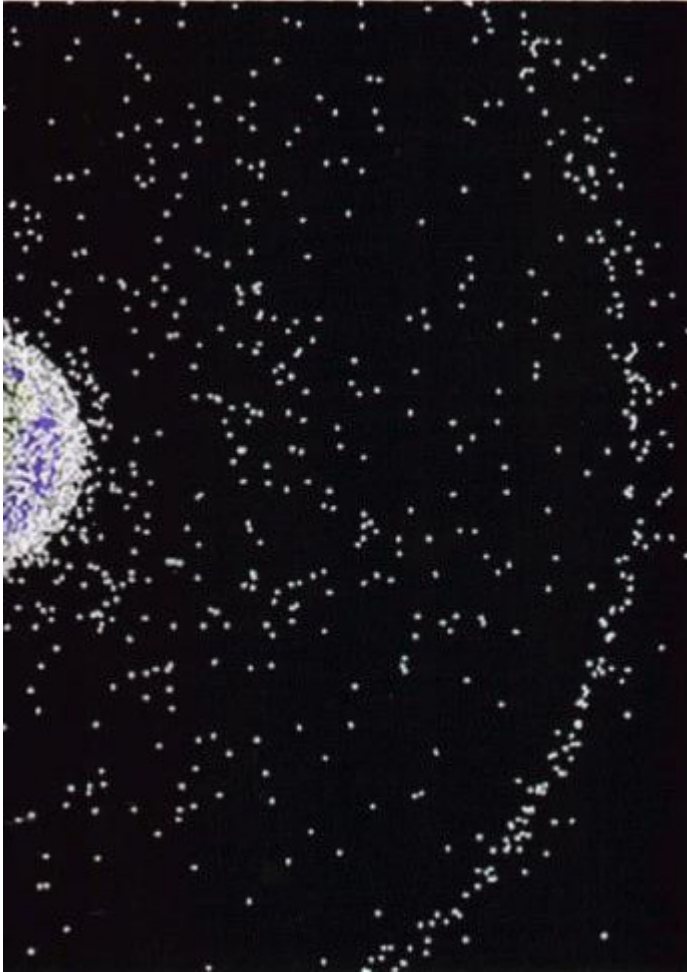
Image Credit: NASA

For example, because the United States is ultimately responsible to the international community for harm caused by its nationals' space activities, U.S. launch law contains insurance standards and a liability cap for launch providers, an undeniable benefit for space commerce. The recognized contractual practices of the aerospace industry includes these basic legal tools and add to the predictability, as far as they can, of commercial activities.

As regards to property rights per se, the Outer Space Treaty is silent. It contains no prohibition. Here it is important to note that the space treaty regime is comprised of interrelated treaties that are all specifically based on the Outer Space Treaty. Rejecting the Outer Space Treaty because it is silent on property rights will bring into question the rest of the regime that contains the fundamental legal structure needed for commercial activities. It will also call into question the future applicability of the private law that has developed over the years in the form of contracts and insurance agreements. If the treaty regime needs further clarifica-

tion regarding property rights, the answer is to develop the political will to do precisely that, and not to cause legal instability by eliminating the existing legal structure.

By rejecting the space treaty regime, the right of the private sector to operate in space could be jeopardized. When the space treaties were negotiated, it was far from obvious that the legal



regime would allow commercial activities and private actors. In fact, the not unexpected position of the former Soviet Union was that the only proper actors in space were nation states. The also not unexpected position of the United States was that private entities were to be legally recognized actors. Article 6 of the Outer Space Treaty contains the compromise that allows private actors to participate in space under government supervision. In the case of U.S. law, this supervision exists in the form of licensing regulations for launches, remote sensing systems and other applications. Without this specific provision, it should not be assumed that the private sector would be accepted as legal space actors. In the era of globalization, communist ideology may no longer be available to threaten private actors in space, but as popular anti-globalization demonstrations grow in size and strength around the world, so does the evidence that other ideologies may have arisen that can do the same.

Protecting the space environment is another critical aspect of the existing space treaty regime. Orbital debris has become enough of a concern for spacefarers and space users alike that both national legal systems and international organizations have been earnestly addressing the problem in recent years. Growth of the orbital debris population threatens future space access for all. Rejecting the space treaty regime would place into question the obli-

gations that signatories currently have to avoid harmful interference with the space environment. The flip side of that particular coin is that the concomitant obligations to avoid contamination and adverse changes in the Earth environment would also be called into question.

How to proceed then? To be effectively addressed, actual problems, not just potential possibilities must be identified. Once again, the assessment clearly states why—it is important for "solutions that can be tailored to the actual problems that have occurred, rather than to a range of hypothetical possibilities ... the development of international law concerning artificial earth satellites provides a good example. If the nations had sat down with perfect foresight and asked themselves, 'Should we permit those nations among us that have access to advanced technology to launch satellites into orbit that will pass over the territory of the rest of us and take high-resolution imagery, listen in to our telecommunications, record weather information, and broadcast information directly to telephones and computers within our borders?' a very restrictive regime of space law might have resulted."

Once a specific problem has been clearly identified and carefully framed, advocates who think that the space treaty regime requires modification have two options. The first is to clarify the treaty through the amendment process. The main objection to this route has been that the treaties are too ambiguous to provide for effective amendment. Ambiguity itself is not an obstacle. It is a vehicle by which agreements can be reached so that other agreements can be reached in the future as conditions evolve.

For example, the U.S. Constitution guarantees "due process," a term no less ambiguous than those used in the space treaty regime. Originally, due process only applied to the federal government and its courts and agencies. The end of the U.S. Civil War raised the very difficult issue of applying the due process principle to state governments, agencies, and courts. The solution was to amend the Constitution, not to reject it. Like the Constitution, the treaties can also be amended. Whether or not they are depends on political will. The issue is political, not legal.

The second option for modifying the space treaty regime is to establish national laws that fill in or clarify legal gaps in the international regime. Like the development of the maritime law that preceded it, the national laws of spacefaring and space-using nations can develop space law. This approach has been taken in numerous space activities: launches, telecommunications, commercial remote sensing, Earth observations and astronaut codes of conduct, among others.

Now is a particularly relevant time for this particular route. In 1999, the United Nations held the Third United Nations Conference on the Exploration and Peaceful Uses of Outer Space [UNISPACE III]. It produced the Vienna Declaration that contained a key recommendation to further develop space law. Since then, both established and newly active space nations have focused on space law capacity building. There have been numerous national and international meetings and workshops that have produced documentation intended to influence space law development.

In short, the international space treaty regime is widely-accepted, relevant and serves a number of important U.S. interests. It is strongly supported by many of the world's most important spacefaring nations and U.S. allies. It is a regime in which a new wave of development at the national and international level began in 1999.

The minority view that the international space treaty regime, particularly the Outer Space Treaty, is outdated and irrelevant is simply wrong. That the United States ought to withdraw from the space treaty regime in the stages of the globalization era is also wrong. It is analogous to arguing that a team should not return to the field after half-time in a tie game. It may be easier simply to not deal with the other team, but the team that quits forfeits the game. **