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ANTI-SATELLITE WEAPONS (ASATs)

WEAPONIZATION OF SPACE FROM THE LENS OF INTERNATIONAL LAW

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On 15th November 2021 Russia performed a direct-ascent anti-satellite (DA-ASAT) test, destroying one of its own space objects in low-earth orbit, a defunct satellite.[1] The test garnered worldwide attention and was swiftly and publicly denounced as dangerous and irresponsible—not because of the cloud of deadly, uncontrolled debris it generated endangering both space assets and human spaceflight for years to come.[2] Anti-satellite weapons of novel sorts (often abbreviated "ASAT") pose a danger to the peaceful exploration and utilisation of space. Unless and until public international law intervenes swiftly, the precarious stability of outer space, economic and military dependence on satellite technology will be compromised. Satellite communications have grown pervasive in all facets of contemporary life, sustaining both the civilian economy and military activities on a global scale. Secure communications lines provide the everyday variety of television coverage, telephone voice and fax connections, Internet searches and email messages, online shopping and ATM banking that we have come to expect. Satellite sensors provide the data necessary for daily global weather forecasting, as well as for monitoring earth resources such as seasonal agricultural harvests, rain forest encroachment, and the consequences of global warming. Satellites of the Global Positioning System provide low-cost, precise navigation by aeroplanes, ships, and a rising fleet of private vehicles.[3]

Satellites currently serve as crucial linkages in the United States' "critical infrastructure," and its benefits have spread to a number of other nations worldwide. According to one estimate, about 1100 firms currently exploit space in some way.[4] Kazakhstan is the forty-seventh country to conduct civilian space activities[5]—and there is no sign that this proliferation will

[1] Nivedita Raju, "Russia's Anti-Satellite Test Should Lead to a Multilateral Ban | SIPRI," www.sipri.org, 2021, https://www.sipri.org/commentary/essay/2021/russias-anti-satellite-test-should-lead-multilateral-ban.

[2] Carnegie Endowment for International Peace and Ankit Pandey. (2021)."The Dangerous Fallout of Russia's Anti-Satellite Missile Test," 2021.

[3] Robert G. Joseph. (2007).Under Sec'y for Arms Control & Int'I Security, Assuring Amer- ica's Vital Interests, Remarks on the President's National Space Policy [hereinafter Remarks of Robert Joseph]. See generally STEVEN case (Cong. Research Serv., Issue Brief For Congress, Doc. No. IB92011, 2006) Available At Http://Digital.Library.Unt.Edu/Govdocs/Crs/Permalink/Meta-Crs-10507:I (Last Visited March 15, 2022); SPACESECURITY.ORG, SPACE SECURITY 2008, At 68-111 (2008), Available At Http://Www.Spacesecurity.Org/SSI2008.Pdf (Last Visited March 15, 2022).

[4] SPACE SECURITY 2008, supra note 3, at 50, 69; see also SPACESECURITY.ORG, SPACE SECURITY 2009 ch. 3 (forthcoming 2009) (draft on file with author) [hereinafter SPACE SECU- RITY 2009), (reporting that, in 2008, Vietnam and Venezuela also joined the roster of countries undertaking space activities, and "Algeria, Brazil, Chile, Egypt, India, Malaysia, Nigeria, South Africa, and Thailand are all placing a priority on satellites to support social and eco- nomic development").

[5] MICHAEL KREPON & CHRISTOPHER CLARY, HENRY L. STIMSON CTR., SPACE AS- SURANCE OR SPACE DOMINANCE? THE CASE AGAINST WEAPONIZING SPACE 44 (2003), available at www.stimson.org/wos/pdf/spacefront.pdf (last visited March 15, 2022) (citing space policy expert James Oberg, who expected the cumulative U.S. investment in outer space to equal the value of all U.S. investment in

abate anytime soon. Global commercial space sales have surpassed $140 billion annually, and some anticipate that direct US investment in outer space could soon approach half a trillion dollars, surpassing the level of US capital investment in Europe.[6] There are presently around 850 operational satellites, and outer space traffic has grown crowded, particularly in the most advantageous orbital positions; rivalry for the allocation of precious radio frequency slots for communication with those spacecraft has also risen.[7]

Threats due to ASATs

As governments increasingly use and benefit from outer space for military and civilian reasons, it's unsurprising that their adversaries and prospective adversaries consider techniques to deny and destroy such applications during times of war. Indeed, the more governments spend in satellites, the more reliant they grow on them, increasing the payout for a hostile force capable of disrupting their operations—and increasing the chance that an initial ASAT assault would spark retaliation, spiralling into general conflict. As the US and others place an increasing number of eggs in the outer space basket, we all become more sensitive to hostile actions that would undermine the rising reliance.[8]

Europe); SPACE FOUND., THE SPACE REPORT 2009: THE AUTHORITATIVE GUIDE TO GLOBAL SPACE ACTIVITY 4 (2009) (describing the global space industry as a $257 billion business); SPACE SECURITY 2008, supra note 3, at 91 (estimating that global space revenues were $143.31 billion in 2006, an increase of 23 percent over 2005 figures); cf FUTRON CORP., SATELLITE INDUS. Ass'N, STATE OF THE SATELLITE INDUS- TRY REPORT 3 (2008), available at http://www.sia.org/files/2008SSIR.pdf (last visited March 15, 2022) (estimating world satellite industry revenues at $123 billion in 2007, with revenues growing an average of 11.5 percent since 2002); Frank Slijper, From Venus to Mars: The European Union's Steps Towards the Militarisation of Space, TRANSNAT'L INST., Nov. 2008, at 30 (reporting $251 billion in space-derived industrial revenues globally in 2007).

[6] SPACE SECURITY 2008, supra note 3, at 40-4 I; Marc Kaufman, U.S. Finds It's Getting Crowded Out There: Dominance in Space Slips as Other Nations Step Up Efforts, WASH. PosT, July 9, 2008, at Al.

[7] See Marc Kaufman & Walter Pincus, Effort to Shoot Down Satellite Could Inform Military Strategy, WASH. PosT, Feb. 20, 2008, at A3 (quoting Thomas Fingar, Deputy Director of National Intelligence for Analysis, as stating: "It would not be that difficult to inflict significant, serious damage to our capabilities over [a] couple of days with ASAT weapons"); Paul Tighe & Takashi Hirokawa, Japan, Australia Ask China to Explain Space Missile, BLOOMBERG, Jan. 19, 2007, http://www.bloomberg.com/apps/news?pid=2060I087&sid= aQSEcxOJNoPl&refer=home (last visited March 15, 2022) (quoting Rep. Edward Markey (D-Mass.) as saying, "American satellites are the soft underbelly of our national security").

[8] SPACE SECURITY 2008, supra note 3, at 140, 147 (noting the difficulties in detecting an ASAT attack and characterizing it as such, and concluding that "if an actor has the ability to overcome these natural defenses [i.e., the speed and distance involved in engaging satellite targets], there are few options for physically protecting a satellite against a direct attack"); Theresa Hitchens & David Chen, Forging a Sino-US "Grand Bargain" in Space, 24 SPACE PoL' Y 128 (2008), available at http://www.cdi.org/pdfs/HitchensGrandBargain.pdf (last visited March 15, 2022) (describing steps that would have to be taken to ensure greater survivability for U.S. satellites).

Satellites, on the other hand, make good targets. They are still relatively few in number (so destroying or damaging even a handful could have a significant impact); they are "soft" (lack heavy shielding or the ability to defend themselves against attack); they typically follow well-defined, predictable orbital paths with little capability for evasive manoeuvres (making them easily trackable "sitting ducks"); and they are typically not equipped with onboard sensors that could provide local "situational awareness" (States and private corporations do not maintain standby fleets of spares, to rapidly reconstitute a satellite architecture that was suddenly degraded by hostile action).

As a result, the top spacefaring nations started developing ASAT weapons almost as soon as they acquired an interest in satellites themselves—for the US, the earliest ASAT programme, an Army feasibility study, was finished within six weeks after the Soviet Union's first Sputnik orbit in 1957.[9]

Tryst Between International Law and ASATs

Given the inability of treaty law to properly handle ASAT challenges across the decades, diverse parties should now investigate alternate mechanisms. This Article discusses one such possibility: the strengthening of international customary law. Non-attorneys, and even lawyers who are not formally trained in public international law, may be unaware of CIL's strength and prestige. Thus, this Part describes this jurisprudence, explains how it is developed and works, and assesses the degree to which it may be used in lieu of or in addition to formal treaty talks to achieve PAROS goals.

CIL is an old, albeit sometimes hazy, type of obligation derived from States' unwritten practise; it is still a significant and well-respected source of international law, on a level with treaties.[10]

[9] PAUL B. STARES, THE MILITARIZATION OF SPACE: U.S. POLICY, 1945-1985, at 14-18 (1985).
[10] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. I, intro. note (1987). See generally IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 4 (4th ed. 1990); ANTHONY D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 74-97 (1971); JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNA- TIONAL HUMANITARIAN LAW, INTERNATIONAL COMMITTEE OF THE RED CROSS (2005) [hereinafter ICRC]; DAVID H. OTT, PUBLIC INTERNATIONAL LAW IN THE MODERN WORLD 13 (1987); Rogers.

CIL is specifically mentioned in the Statute of the International Court of Justice (ICJ) as a suitable set of requirements for the court to apply,[11] and the ICJ,[12] as well as federal courts in the United States, do so on a regular basis.[13] Although CIL is frequently less "definite" than treaty law—it can be difficult to ascertain the precise content of a putative CIL rule, to determine whether it has achieved the status of CIL, and to determine which States are bound by it—it is nevertheless a significant, dynamic, and prominent component of the international legal structure, routinely introduced and applied with decisive effect.[14]

According to the American Law Institute's Restatement of the United States' Foreign Relations Law, CIL arises "from a general and consistent practise of states, which is followed by them out of a feeling of legal responsibility."[15] To establish a binding rule, two criteria must be established: the "objective" criterion seeks a widespread, longstanding pattern of concordant

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Clark, Treaty and Custom, in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS 171 (Laurence Boisson de Chazoumes & Philippe Sands eds., I 999); Jack L. Goldsmith & Eric A. Posner, A Theory of Customary International Law, 66 U. CHI. L. REV. 1113 (1992); J. Patrick Kelly, The Twilight of Customary International Law, 40 VA. J. INT'L L. 449 (1999); W. Michael Reisman, The Cult of Custom in the Late 20th Century, 17 CAL. W. INT'L L.J. 133 (1987) (identifying a resurgence of CIL); Anthea Elizabeth Roberts, Traditional and Modem Approaches to Customary International Law: A Reconciliation, 95 AM. J. INT'L L. 757 (2001); Paul Rubenstein, State Responsibility for Failure to Control the Export of Weapons of Mass Destruction, 23 CAL. W. INT'L L.J. 319 (1993).

[11] Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055, T.S. No. 993.

[12] *See* generally S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 30 (Sept. 7) (surveying relevant international practice and finding no principle of international law precluding Turkey from instituting prosecution of French ship captain); Asylum (Colom. v. Peru), I 950 I.CJ. 266, 277 (Nov. 20) (finding that "it is not possible to discern in all this any constant and uniform usage, accepted as law" establishing Colombia's claim regarding grant of asylum); Right of Passage (Port. v. India), 1960 I.CJ. 6, 39-43 (Apr. 12) (holding that a constant and uniform local practice permitted free passage of private persons and goods-but not of armed forces or police-across Indian territory).

[13] *See*, e.g., Ware v. Hylton, 3 U.S. (6 Dall.) 199 (1796); Sosa v. Alvarez-Machain, 542 U.S. 692 (2004); Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); The Paquete Habana, 175 U.S. 677 (I 900).

[14] A similar conclusion may be reached via a different jurisprudential route: In addition to customary international law (CIL), "general principles of law" are recognized as an authoritative source for the ICJ and other decision-makers. ICJ Statute, Art. 38(1)(c); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102.4, cmt. L (1987). Among those general principles is the obligation not to injure other States. See infra notes 199-215 and accompanying text. The United Nations Survey of International Law concluded that "[t]here has been general recognition of the rule that a State must not permit the use of its territory for purposes injurious to the interests of other States in a manner contrary to international law." Memorandum, The Secretary-General, Survey of International Law in Relation to the Work of Codification of the International Law Commission, 'I[57, U.N. Doc. A/GN.4/1/Rev.1 (Feb. IO, 1949). Judge Lauterpacht of the IO concluded that this maxim is "one of those general principles of law applicable under Article 38(1)(c) of the Statute of the International Court of Justice." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES pt. VI, intro. note (1987); see also Harry H. Almond, Jr., General Principles of Law-Their Role in the Development of the Law of Outer Space, 57 U. Co LO. L. REv. 871 (1985); Niels Petersen, Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation, 23 AM. U. INT'L L. REV. 275 (2008) (differentiating between CIL and general principles of law).

[15] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102.2 (1987)

state practise; the "subjective" or "psychological" criterion seeks to attribute that pattern of practise to a "sense of obligation," rather than to habit, courtesy, indifference, or political expediency.

Element of Purpose

The objective aspect of CIL does not need complete unanimity or uniformity in the evolving custom, although the more States that engage, the better, and the conduct of the "leading" States (those that are particularly active in or impacted by the specific sector) will be weighted more heavily.[16] As the International Court of Justice remarked in the *Nicaragua v. United States* ruling of 1986,

"The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule."[17]

Additionally, in the present day, the customary criterion that the observed pattern of state activity be "longstanding" has been relaxed. If the agreement amongst States is genuinely vast and profound, its brief duration may be neglected. The oxymoron "instant customary law" may be implemented in some areas where technology advances swiftly or when states rapidly shift their laws and attitudes. The Restatement cites as an example of this phenomena the quick crystallisation of a rule permitting coastal States to assert exclusive claims to the resources of the adjacent oceanic continental shelf.[18] As the ICJ noted in the 1969 *North Sea Continental*

[16] In the *1969 North Sea Continental Shelf Cases*, the ICJ indicated that the criteria for evaluating state practice for forming a CIL rule include: (a) the amount of time the rule has been adhered to; (b) the number and type of States adhering to the rule (especially States having a special interest in the subject); and (c) the uniformity of the practice. North Sea Continental Shelf (F.R.G. v. Neth.), 1969 I.CJ. 3, 41-45 (Feb. 20).
[17] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 98 (June 27).
[18] *Ibid*; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES§ 102 reporters' note 2 (1987) (noting the traditional requirement that a rule of CIL could be established only over an extended period of time, but that this rule began to lose its force after World War II, when improved international communications made the emerging practices of States well-known more quickly).

Shelf Cases, the passage of merely a little period of time does not preclude the establishment of a new norm of customary international law.[19]

CIL considers the complete spectrum of a country's words and acts, silences and inactions, and oral and written pronouncements when evaluating relevant State conduct. Diplomatic contacts, public statements, and, of course, overt military, economic, or political power are all considered. The appropriate measures may be conducted alone or in collaboration with others. However, silence or inactivity is often difficult to understand; is it regarded as acceptance of the new norm or as a failure to perceive it?[20] While the majority of important state behaviours are typically exercised by the executive branch of a government, under appropriate situations, the legislative and judicial branches may also play a role. Occasionally, even non-state actors (the United Nations or non-governmental organisations such as the International Committee of the Red Cross) might contribute to the rise of CIL. Nowadays, certain very active States propagate so much globally significant "activity" those other nations must carefully monitor the stream, lest their inaction be perceived as endorsement.[21]

The Element of Subjectivity

CIL's subjective component (the "opinio juris sive necessitatisis") is often much more perplexing. To begin, it may be impenetrably difficult to ascertain why a specific State acted in a certain way—was it "out of a feeling of legal responsibility" or for other, more trivial reasons? States do not typically disclose their objectives, and a national decision-making process may be influenced by a number of opposing influences.[22]

At a deeper level, this psychological aspect presents a conundrum—it seems that a growing pattern of state conduct qualifies as CIL only if states act in accordance with the pattern because of a feeling of legal obligation. If they instead believe they are engaging in purely voluntary

[19] North Sea Continental Shelf, 1969 I.C.J., at 44.
[20] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES§ 102 cmt. B (1987); JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, INTERNATIONAL COMMITTEE OF THE RED CROSS (2005) [hereinafter ICRC] at xxxii; John B. Bellinger, III & William J. Haynes II, Letter to Jacob Kellenberger, Nov. 3, 2006, at 1-2 (critiquing ICRC methodology for assessing sources of CIL).
[21] ICRC, *supra* note 20, at xxxiv-xxxv.
[22] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES§ 102 cmt. C (1987); Bellinger & Haynes, supra note 20, at 2.

actions from which they may withdraw at any time without incurring international legal duty, when will a CIL norm emerge?[23]

One way around this problem is to claim that a CIL norm may grow slowly or gradually when a state's pattern of conduct shifts from "voluntary" to "compulsory." That is, an individual State may behave in a certain manner only for self-interested reasons, without implying that it (or others) is compelled to do so. However, when other States see the wisdom and nobility of such action, they may begin to emulate it. And maybe over time, that emergent "pattern" of conduct is willingly adopted by new States, eventually coalescing into a common thread. At some point, states may begin to "expect" that others will continue to follow the pattern; they may grow to "rely" on that continuity; and they may finally come to believe that continuing to follow the pattern is "legitimate" and departing is "improper." Eventually, conformity may reach a point where the worldwide consensus is regarded to have "crystallised" or "hardened" into a legally enforceable rule of CIL, from which deviation is no longer only "unwelcome" or "regrettable," but downright "criminal." Any State may be astonished to realise that what began as a voluntary and individual practise has matured into a binding and universal international regulation, but that is the process through which CIL creates law.[24]

Weighing the Objective and Subjective Components of International Customary Law

Scholars disagree on the relative relevance of CIL's objective and subjective components. Certain "positivists" advocate for a concentration on the bare facts of state activity, without any examination into the underlying reason, justification, or motive. For example, the International Law Association approved a "Statement of Principles" in 2000 endorsing that assumption,

[23] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES§ 102 reporters' note 2 (1987); Sienho Yee, The News That Opinio Juris "ls Not a Necessary Element of Customary [International] Law" Is Greatly Exaggerated, 2000 GERMAN Y.B. INT'L L. 227.
[24] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES§ 102 reporters' note 2 (I 987).

noting that "it is not normally essential to establish the subjective element before a customary rule may be claimed to have evolved."[25]

Several well-known cases display a similar slant. In *Paquete Habana*, the United States Supreme Court established the notion for the first time in 1900,

"international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations."[26]

To ascertain the relevant rights in that case (which involved the seizure of two fishing vessels operating out of Havana as prizes of war at the outbreak of the Spanish-American War), the Court combed through some 500 years of maritime history, determining whether a pattern of state practise had become sufficiently entrenched to exempt certain categories of coastal fishing ships from seizure. The Court examined the cognizable activities of England, Japan, and other States in that careful exegesis, but made little comments on their expressed justifications or perceived legal necessity supporting those externally visible behaviours.[27] By contrast, the Restatement and the majority of modern authorities continue to stress both subjective and objective factors, distinguishing mere habit or comity from legally enforceable law. Indeed, some authorities would prioritise the subjective factor, implying that if States feel something is prohibited (or permissible, or necessary, depending on how the standard is framed), it is less crucial that their actual conduct conforms to that standard.[28]

Filartiga v. Pena-lrala,[29] a well-known 1980 Second Circuit Alien Tort Claims Act case, demonstrates this point. It opened US courts to human rights actions seeking relief for state-sponsored torture committed in a foreign country. There, the court relied on "the universal condemnation of torture" in numerous global and regional human rights treaties and on "the

[25] Int'l Law Ass'n [ILA], Comm. on Formation of Customary Int'! Law, Statement of Principles Applicable to the Formation of General Customary International Law: Report of the Sixty-Ninth Conference, London, 712, 713 (2000).
[26] The Paquete Habana, 175 U.S. 677, 700 (1900).
[27] *Ibid.* at 686-710.
[28] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES§ 102 cmt. C (1987); Bin Cheng, United Nations Resolutions on Outer Space: "Instant" International Customary Law?, 5 IND. J. INT'L L. 23, 36 (1965).
[29] Filartiga v. Pena-Irala, 630 F.2d 876 (1980).

renunciation of torture as an instrument of official policy" in the national constitutions of at least fifty-five States.[30] On the other hand, the court had to acknowledge that this outlawry of torture was "in principle if not in practice,"[31] and it dropped a footnote explaining that the fact that the prohibition of torture is often honoured in the breach does not diminish its binding effect as a norm of international law.[32]

The ICJ continues to advocate for both of these criteria as necessary for CIL.[33] The ICJ noted in its landmark 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons that nuclear weapons had not been used in battle since 1945, a period of more than half a century.[34] (Eight nations have performed 2051 nuclear weapons explosion tests since 1945.)[35] Despite this objective pattern of constraint, the court was unable to identify a CIL barring nuclear weapons due to the lack of an *opinio juris* element. The nuclear-armed states maintained that, in accordance with their deterrent policy and practise, they had always retained the legal right to threaten, and even use, their nuclear weapons in self-defense. Additionally, several treaties regulate—but do not explicitly prohibit—nuclear weapons, implying their legality. As the ICJ put it, the reason for avoiding using nuclear weapons "is not on account of an existing or nascent custom but merely because circumstances that might justify their use have fortunately not arisen."[36]

Development of a Treaty on the Law of ASATs

The General Assembly of the United Nations and the Conference on Disarmament are not included in the standard lists of "sources of public international law." Unlike the United Nations

[30] *Ibid.* at 880.
[31] *Ibid.*
[32] *Ibid.* at 884.
[33] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.CJ. 14, 109 (June 27) (holding that "[e]ither the States taking such action or other States in a position to react to it, must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it'" (quoting the North Sea Continental Shelf (F.R.G. v. Neth.), 1969 I.CJ. 3, 44 (Feb. 20)); Continental Shelf (Libya v. Malta), 1985 I.C.J. 13, 29-30 (June 3) ("It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and opinio juris of States."); ICRC, *supra* note 20, at xxxii (asserting "there can be no customary law without confirmation of the rule in state practice").
[34] Legality of Threat or Use of Nuclear Weapons, Advisory Opinion, I 996 I.CJ. 226 (July 8).
[35] Arms Control Ass'n, Fact Sheet: The Nuclear Testing Tally (2007), available at http://www.armscontroI.org/system/files/NuclearTestingTally.pdf (last visited March 15, 2022).
[36] Legality of Threat or Use of Nuclear Weapons, 1996 I.CJ. at 254.

Security Council and the International Court of Justice, for example, the UNGA and the CD do not benefit from Member States' long-standing promises to follow the organisations' decisions as enforceable law. Rather than that, their enactments are often framed as suggestions or exhortations, pushing States to conform their conduct to the specified standards, but they do not bear the weight of international law in and of themselves.

On the other hand, the UNGA (and, within the specialised field of weapons control, the CD) may contribute significantly to the expansion of CIL. The UNGA provides the most accessible place for nations to express their perspectives on a broad variety of global events—perspectives that may directly contribute to both the objective and subjective criteria that underpin CIL. A UNGA resolution—depending on its wording, the drafters' objectives, and the degree to which it is widely supported—can provide as compelling proof of the existence and substance of a putative CIL rule.[37]

Similarly, the CD serves as the world's premier forum for gathering and disseminating States' perspectives on arms control standards. Where States actively choose to use this venue to voice their views on weapons-related activities they deem undesirable, necessary, or laudatory, such proclamations may also directly contribute to CIL, whether or not they also result in the formulation of a new treaty. In this sense, the CD, like the UNGA when discussing a larger range of subjects, expresses the global community's expectations for the existing and likely future status of the CIL of armament.

Surprisingly, the CIL-based version of the law of outer space would acquire a greater geographic scope than the treaty-based version. Half of the world's governments have not yet ratified the OST; even bigger cohorts have taken no action to associate with other critical space-related documents. By contrast, all countries would be bound by the CIL governing outer space; it is difficult to imagine any "persistent objectors" who would be exempt from any aspect of the now-established custom, and any new States that enter the world scene would be automatically covered by the body of space-related CIL, even if they do not join the treaties affirmatively.

[37] Legality of Threat or Use of Nuclear Weapons, 1996 I.C.J. at 254.

Conclusion

Outer space exemplifies the UNGA's legislative responsibility. When the legal regime for space was developing, several nations saw the UNGA as the most appropriate forum for expressing their views on the supposed norms governing exoatmospheric interaction; their words at this "global town meeting" are taken into account in evaluating new CIL. Successive UNGA resolutions, including the 1963 Outer Space Declaration[38] (which established and stated many of the concepts ultimately codified in the OST), were prepared with seriousness (and voted unanimously), implying a deliberate legislative purpose.

As noted in the Restatement,

"[t]he Outer Space Declaration, for example, may have become law even without a formal treaty, since it was ratified by all parties, including the major "space powers." According to a US State Department spokeswoman, the Declaration "reflected international law as accepted by the members of the United Nations," and both the US and the USSR affirmed their intention to abide by the Declaration."[39]

Of course, not every UNGA decision (much less the activities of the CD) is automatically entitled to the status of CIL, but the illusive mechanics of customary law-making sometimes accord extra weight to those global instrumentalities' most weighty resolutions.

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[38] Declaration of Legal Principles Governing the Activities of States in the Explora- tion and Use of Outer Space, G.A. Res. 1962, U.N. GAOR, 18th Sess., Supp. No. 15, U.N. Doc. Af55 l 5 (Dec. 13, 1963). Much of the language of this UNGA resolution was adopted directly into the text of the Outer Space Treaty; see also Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, G.A. Res. 2222, U.N. GAOR, 21st Sess., U.N. Doc. NRES/21/2222 (Dec. 19, 1966) (commending the Outer Space Treaty and hoping for the widest possible adherence to it).
[39] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES§ 102 reporters' note 2 (1987); Andrei D. Terekhov, U.N. General Assembly Resolutions and Outer Space Law, in SPACE LAW, supra note 20, at IOI, 103--05.