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Technology, Politics, and the New Space Race: The Legality and Desirability of Bush’s National Space Policy under the Public and Customary International Laws of Space

Jacob M. Harper*

I. INTRODUCTION

Since the terrorist attacks of September 11, 2001, the War on Terror has affected US defense policy in lands as far flung as Afghanistan, Southeast Asia, and Iraq. Recently, President George W. Bush has expanded the scope of the War on Terror into a new area: space. On August 31, 2006, President Bush authorized the new National Space Policy (“NSP06”), an assertion of the US’s right to defend itself in outer space. In it, the US reserves the right to “deny, if necessary, adversaries the use of space capabilities hostile to [US] interests.”1 It also declares that “[p]roposed arms control agreements must not impair the rights of the [US] to conduct . . . activities in space for [US] national interests.”2 The NSP06 thus grants the US wide unilateral discretion to protect its national interests in space.

Predictably, the international response has not been enthusiastic. A London Times editorial piece summed up the consensus view on the NSP06: “SPACE: no longer the final frontier but the [fifty-first] state of the United States.”3 Russia claims that the US “want[s] to dictate to others who else is

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2 Id.

3 Bronwen Maddox, America Wants it All—Life, the Universe, and Everything, London Times Online (Oct 19, 2006), available online at <http://www.timesonline.co.uk/tol/comment/columnists/brownen_maddox/article605583.ece> (visited Nov 17, 2007) (arguing that the NSP06 stands among many US efforts to exert its influence universally).
allowed to go there” and has called the NSP06 “the first step toward a serious deepenings of the military confrontation in space.” Meanwhile, China recently launched its first antisatellite missile in January 2007 in an apparent response to the US’s increasingly assertive position in space. The US’s aggressive assertion of space rights through the NSP06 has spurred strong responses from China and Russia, the primary rivals of the US for space power. The NSP06 may be unpopular, but is it illegal?

This Development argues that it is not. Although a backdrop of international treaties requires peaceful, nonmilitary use of outer space and the moon, these treaties do not bar space regulation as proposed by the NSP06. In addition, customary international law of space also suggests that the NSP06 is legal. Section II grounds the NSP06 in the historical context of space competition from the Cold War to the War on Terror, as well as in general national security policy since the September 11th attacks. It further argues that the current space treaty regime does not invalidate the NSP06. Section III analyzes the customary international law of space and posits that it also would not conflict with the NSP06. Section IV concludes by investigating implications of the NSP06’s legality in light of current international politics.

II. NATIONAL SPACE POLICY UNDER THE MOON AND OUTER SPACE TREATIES

A. COLD WAR TENSIONS LEAD TO DEVELOPMENT OF CURRENT SPACE LAW REGIME

Space policy-related tensions arise from two main factors: development of technology capable of expanding countries’ power in space and underlying political tensions between countries holding that technology. Today, that technology involves satellite surveillance and ballistic missile defenses of countries vying for power in the midst of the war on terror. Current space treaties, however, developed during another era of blossoming technology and political tensions: the Cold War.

As early as the 1950s, the US and USSR engaged in a struggle for space dominance. Both countries feared that, because each possessed nuclear

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there would combine its space-based technical expertise with nuclear knowledge to obliterating the other. Nonetheless, both powers viewed space technology as critical to both their civilian and non-nuclear military futures. International consensus developed that the powers should use space for nonaggressive purposes. The consensus was codified in five space treaties that, since 1967, have provided the general principles defining positive international law governing space generally. Two of these—the Outer Space Treaty and Moon Treaty—articulate three main principles governing space use specifically. First, “[o]uter space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.” Second, the “moon and other celestial bodies shall be used by all states Parties to the Treaty exclusively for peaceful purposes.” Third, “any threat or use of force or any other hostile act on the moon [or other celestial bodies] is prohibited.”

Despite the efforts to define an international law of space, critics have complained that the governing space treaties serve little use because of their “very general” language. For example, both treaties require that outer space be reserved for “peaceful” purposes, but neither the treaty nor international legal norms define the word. Thus, it is unclear whether the treaties allow for satellite-based military surveillance of other countries. It is also unclear what constitutes “national appropriation.” If the US invoked the NSP06 to prevent a foreign

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8 See Tannenwald, 29 Yale J Intl L at 372–73 (cited in note 6).

9 Id.

10 Agreement on the Activities of States on the Moon and Other Celestial Bodies, General Assembly Res No 34/68, UN Doc A/34/664 (1979) ("Moon Treaty"); Convention on Registration of Objects Launched into Outer Space (1975), 28 UST 695; Convention on International Liability for Damage Caused by Space Objects (1972), 24 UST 2389; Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space (1968), 19 UST 7570; Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (1967), 18 UST 2410 ("Outer Space Treaty").

11 Outer Space Treaty, art II (cited in note 10).

12 Id, art IV, ¶ 2.

13 Moon Treaty, art III, ¶ 2 (cited in note 10). See id, art I, ¶ 1 ("The provisions of this Agreement shall also apply to other celestial bodies within the solar system, other than the earth.").

14 See, for example, Tannenwald, 29 Yale J Intl L at 370 (cited in note 6).
country's vehicles from coming within a mile of US military satellites, such an action arguably constitutes a "national appropriation" in violation of the treaty. Finally, the definition of "outer space" itself remains vague—while outer space includes the moon and "other celestial bodies," it is not clear what else, if anything, outer space encompasses. Perhaps the ambiguities of positive international law of space explain why the treaties contain the caveat that the treaty be applied consistent with customary "international law." Where the treaties fail to provide clear answers, customary international law norms fill the treaties' gaps.

Despite their shortcomings, the space treaties carried the superpowers through the Cold War with no space-based military conflicts. Proxy wars occurred in Vietnam and Afghanistan, but the space between the moon and Earth remained conflict free. Peace was probably not so much a result of the treaties' collective language, which remained difficult to interpret, as the continuing spirit of cooperation that guided the concomitant decline of the Cold War during the 1970s and 1980s.

B. SPACE POLICY BEFORE THE WAR ON TERROR

Every president since Dwight D. Eisenhower has crafted statements of policy declaring how to execute space law and policy. Space policies generally have paralleled the goals of the space treaties: reservation of space for peaceful purposes, prohibitions on sovereignty over celestial bodies, and free travel of spacecraft. They sometimes elaborate on other space policy goals, but they generally have not conflicted with the broad and ambiguous provisions of the space treaties.

President Bill Clinton's National Space Policy of 1996 ("NSP96"), which remained in effect until Bush's 2006 revision, is an example of US policy reaffirming the broad policies of the space treaties. Like the Moon and Outer Space Treaties, the NSP96 rejects "any claims to sovereignty by any nation over

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15 See generally Moon Treaty (cited in note 10).
16 Moon Treaty, art 2 (cited in note 10).
18 Id.
19 For a list of these documents, see Key Documents in the History of Space Policy, available online at <http://history.nasa.gov/spdocs.html> (visited Nov 17, 2007) (citing several important documents regarding US national space policy).
outer space or celestial bodies”21 and views “as an infringement on sovereign rights” the “purposeful interference with space systems.”22 The NSP96, however, generally fails to resolve the space treaties’ ambiguities. For example, NSP96 refers to “peaceful purposes” without defining the term. It also fails to outline enforcement mechanisms. Overall, the NSP96, like its predecessor NSPs, reaffirmed the space treaties but did little to clarify them. Terms remained ill-defined while an enforcement mechanism remained elusive.

Nonetheless, the space-based threats from other countries remained minimal during the 1990s. In contrast to the period leading up to the development of the Moon Treaty, no significant political threats from other space powers threatened to disrupt the 1990s extraterrestrial equilibrium. Thus, it did not matter whether the space treaties or NSPs were easy to interpret or to enforce because the political situation suggested that enforcement was unnecessary.

At the same time, space technology was beginning to render the space treaties obsolete. By 1996, satellites had become increasingly essential to the US economy and military, but the space treaties provided no explicit protections for them.23 If a space power became a political threat and shot down a US satellite, the space treaties offered—and continue to offer—no recourse. The US would have to look to customary international law to protect its satellites. Not viewing the lack of legal protection over satellites as a credible political threat, the US and other actors apparently saw no need to redraft or to interpret existing international law to account for unlikely threats to rapidly improving space technology.

Ultimately, existing space law failed to keep pace with developing technologies by the 1990s. However, political parity among the world’s space powers rendered the obsolescence unimportant. None viewed space-based military threats as viable; the space treaties, therefore, remained ambiguous and largely unenforceable, and the NSP96 did nothing to clarify them.

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21 Id. The reference to “outer space or celestial bodies” of NSP96 distinguishes “outer space” from “celestial bodies.” By contrast, the Space Treaty ambiguously defines “outer space” as “including the moon and celestial bodies.” The ambiguity is important because it is not clear whether the Space Treaty protects against areas surrounding celestial bodies, or pertains to celestial bodies themselves.


23 Id at 372 (noting that satellites do not qualify as a “celestial body”).
C. THE NSP06 DOES NOT CONTRADICT THE SPACE TREATIES

1. Technology and Politics Render the Space Treaties Obsolete

Since the 2001 terrorist attacks, circumstances have changed along both technological and political dimensions to make alterations in space law inevitable. Space technology has rapidly improved while the world economy and many countries' militaries increasingly depend on it. Satellite technology now links phone calls together for cellular phone networks, identifies travel positions for GPS, and powers improving cable television technology. As a result, civilian cellular telephone networks, mapping systems, television, and internet service increasingly rely on satellite communications. Military weapons and communications systems depend on them to an even greater degree.\(^\text{24}\)

Politically, the US has declared its War on Terror and waged it against amorphous sets of enemies around the world, most notably terrorist groups in Iraq and Afghanistan. While neither of these countries possesses sufficient space power to threaten US space interests, specific threats to US space interests come from two main sources: terrorist groups in the short term and other countries in the long term. In the short term, the US fears that terrorist groups will acquire weapons that can hijack US space targets, including satellites.\(^\text{25}\) In the longer term stand fears that countries such as China or Russia may emerge as political competitors and threats to peace in space.\(^\text{26}\)

Many criticize NSP06 as prompting a new space-based arms race, but perhaps it merely addresses the failings of the now-obsolete Moon and Outer Space Treaties. Changes along the technological and political dimensions have brought uncertainty to the international space law regime similar to those last seen in the 1960s, during the development of the current Space Treaty system. Just as technological and political novelties of the 1960s rendered existing law of the pre-space age insufficient to address the new threats of the Cold War and Space Race, the War on Terror and the modern economy’s growing reliance on new space technologies have similarly rendered the space treaties insufficient to ensure security in space today.


\(^\text{26}\) China’s secret launch of antisatellite missile tests in January 2007 underscores the reality of this threat. See Broad and Sanger, *Flexing Muscle,* NY Times at A1 (cited in note 5).
2. The NSP06 Does Not Violate the Space Treaties

Unlike the NSP96, the NSP06 arguably fills the gaps left by existing space law. The NSP06 affirmatively “den[ies] . . . adversaries the use of space capabilities hostile to [ ] national interests,” thereby establishing the effective power to enjoin competitors from space. The NSP96, the Moon Treaty, and the Outer Space Treaty, in contrast, all failed to articulate such a means for enforcing the requirement of “peaceful” uses. The political parity that characterized adoption of the Moon and Outer Space Treaties, and continued when the NSP96 was drafted, probably guaranteed peace; the space treaties themselves likely did nothing. In reserving power to “deny” adverse uses of space, the US has asserted itself as the enforcement mechanism that current space law sorely lacks.

Additionally, in denying adversaries the use of space capabilities, the NSP06 is consistent with, though not contemplated by, the Moon and Outer Space Treaties. The provision most at odds with the NSP06’s right to deny adversaries the use of space is the Outer Space Treaty’s declaration that “[o]uter space . . . is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.” On the one hand, the US’s unilateral prevention of another’s use of space seems to constitute “appropriation.” If appropriation is the taking possession of property, and property arises through the power to exclude others, then the NSP06 would contradict the treaty. On the other hand, the US limits denial of use to “adversaries” only; it does not reserve the right to exclude all others, as “appropriation” implies. Moreover, the Outer Space Treaty qualifies “appropriation” with “by claim of sovereignty” and “by means of use or occupation”—both of which imply exclusion in the broad sense of colonization, not the narrower sense of protecting national interests. Thus, even the provision most at odds with the NSP06 does not render NSP06 unlawful.

Additionally, the Outer Space Treaty’s “international consultations” provision has only an illusory conflict with the NSP06. The provision provides that states must engage in “international consultations” where it “has reason to believe that an activity . . . would cause potentially harmful interference with activities of other States Parties in the peaceful exploration and use of outer space.” If the US were unilaterally to deny another country’s hostile use of space, it arguably would violate this provision. Nonetheless, the language again

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27 NSP06, art II, ¶ 5 (cited in note 1).
28 Outer Space Treaty, art II (cited in note 10).
29 Id.
30 Id, art IX.
depends on nondescript notions of “peace.”31 If the US finds that another adversary uses space in a manner “hostile to national interests,” then acts, without international consultation, to stop that adversary’s use of space, it is not clear that the treaty would prohibit that denial.32 The Outer Space Treaty’s vague language thus does not contradict the US’s ability to stop adversaries from using space in a hostile manner.

In addition, the Moon and Outer Space Treaties say very little because of the ambiguities and platitudes that pervade them. They fail to control spacefarer behavior because their language prohibits very little. From a practical standpoint, technological and political changes in the forty years preceding NSP06 have rendered the earlier space treaties obsolete. Applying the Cold War-era Moon and Outer Space Treaties to the modern era of satellites and the War on Terror is like imposing regulations governing Civil War cannons on nuclear weapons.

III. NATIONAL SPACE POLICY UNDER CUSTOMARY INTERNATIONAL LAW OF SPACE

The NSP06 does not contradict the Moon and Outer Space Treaties; underlying the treaty regime, however, may rest a customary international law of space to govern space relations in the absence of positive law. If so, then the NSP06’s legality would depend on consistency with customary international law as well. The possible presence of a customary international law of space raises three questions related to the NSP06: (1) does customary international law matter in the first place; (2) if yes, does it exist; and (3) if it exists, does the NSP06 contradict it?

A. DOES CUSTOMARY INTERNATIONAL LAW MATTER?

Positive law might not set boundaries for the NSP06, but customary international law might instead. From one view, customary international law may, by itself, lack legally binding force and thus would not matter. Despite a tradition of interpreting international law as “part of our law,”33 US courts have held that Congress can validly contradict international law through duly enacted

31 See Section II.B (discussing the Outer Space Treaty’s vague language).
32 See Robert A. Ramey, Armed Conflict on the Final Frontier: The Law of War in Space, 48 Air Force L. Rev 1, 77 (2000) (“Assuming the hostile act were lawfully directed at an asset in conformity with the jus ad bellum this requirement would not require consultation with the opposing belligerent State as it would not be engaged in the ‘peaceful exploration and use of outer space.’”).
33 The Paquete Habana, 175 US 677, 700 (1900).
It is nonetheless unclear whether the President can contradict customary international law through unilateral policy measures such as the NSP06. If international law is “part of our law,” then the President must act consistent with it to fulfill his duties under the Take Care Clause to “faithfully execute” the laws of the US. On the other hand, the President also has responsibility for maintaining national security. The extent of Presidential power vis-à-vis customary international law is murkiest when these duties conflict.

However, even if the President has authority in the US to violate international law, foreign policy provides good reasons not to do so. First, international law may itself impose liability on the President’s actions. Second, following customary international law has a series of benefits compared to the unworkable space treaty system. For example, it might prescribe rules protecting civilian or military satellites, an area that the space treaties do not cover. It might also prescribe means of enforcing the space-based rights of countries, including the US. Moreover, it can evolve to accommodate technological and political changes because customary international law is derived from practices among several countries. Overall, customary international law potentially fills many of the gaps that the current treaty system leaves. Third, perceptions that the US is violating customary international law may themselves have negative foreign policy consequences.

Domestically, a violation of customary international law might undermine the President’s Take Care duties; internationally, it might undermine

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34 See, for example, United States v Yousef, 327 F3d 56, 93 (2d Cir 2003) (noting that where Congressional intent is clear, statutes are enforceable “irrespective of whether the statute conforms to customary international law”).


37 US Const, art 2, § 2.


40 See Broomfield, 75 Geo Wash L Rev at 115 n 66 (cited in note 35) (asking whether “it [is] wise for the United States to be seen as violating international law among its allies, not to mention among its enemies”).
international perceptions of the US as obedient to international law. Given that customary international law matters, the NSP06 should not prevail if it violates that law.

B. WHAT IS THE CUSTOMARY INTERNATIONAL LAW OF SPACE?

Generally, no binding customary international law exists until, over time, countries’ practices have established norms that govern practices between states. Two theories might suggest the availability of a customary international law of space: “instant custom” and Earth-based analogies to space.

1. Nearly “Instant Custom” Allowing Preemptive Strikes Generally

Under the theory of “instant custom,” customary international law can form if a state takes unilateral action and other states follow or acquiesce. Rapid changes in geopolitics require equally rapid development of customary international law. The instant custom theory accounts for such rapid changes; although international law formation still requires international acceptance, it can be formed in a much shorter amount of time, and by fewer countries, than traditionally required.

Under the instant custom theory, customary international law arises out of (1) an articulation of the putative law and (2) an act in support of it or

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41 See Ramey, 48 Air Force L. Rev at 67–70 (cited in note 32) (noting that “[c]ustomary law is of far lesser importance and its significance for outer space activities has, in many respects, not been secured.”) (internal citations omitted).

42 It is not clear, however, that customary international law even exists. At first glance, a lack of space custom undermines the entire concept of a customary international law of space. According to one estimate in 2000, only six to ten countries had been sufficiently involved in space relations to consider their actions as contributing to international space law. See id at 70–71. Generally, without customs, there is no law. And if no customary international law of space exists, then the NSP06 cannot violate it.


44 See Guzman, 27 Mich J Intl L at 157 (cited in note 43) (noting that state practice is still required to show some form of custom).
acquiescence demonstrating acceptance of it.\textsuperscript{45} Generally, an articulation comprises treaties, conventions of the International Law Commission, or UN General Assembly resolutions.\textsuperscript{46} Acts or showings of acquiescence occur over a short period of time to demonstrate that a norm has developed.

The Bush Doctrine, which asserted the US right to engage in preemptive strikes, might represent the articulation of custom also allowing the NSP06.\textsuperscript{47} Under this theory of instant custom, the Bush Doctrine was incorporated into international law by the announcement of US preemptive strike doctrine and subsequent acts of other states demonstrating acquiescence to it, including the international force joining US efforts in Afghanistan and Iraq.\textsuperscript{48} If the Bush Doctrine asserted an instant custom sufficient to establish customary international law, then the US retains the legitimate right to strike adversaries preemptively.\textsuperscript{49} One reading of the NSP06, which excludes space use to those “hostile to US interests” though not necessarily having harmed the US itself, embodies this preemptive strike principle of the Bush Doctrine and merely applies it to space.\textsuperscript{50}

Scholars have criticized the instant custom theory as incompatible with customary international law. According to this argument, quick acceptance of a norm, rather than deliberate actions consistent with the norm taking place over a long period of time by several states, does not develop custom.\textsuperscript{51} However, in areas of law where technology and politics change rapidly, the traditional deliberative process is too slow.\textsuperscript{52} Moreover, the ICJ itself noted in one case that lack of long-established practice does not preclude the making of customary international law.\textsuperscript{53}

\textsuperscript{45} See Langille, 26 BC Intl & Comp L Rev at 151 (cited in note 43).
\textsuperscript{46} Id.
\textsuperscript{47} Id at 154–56 (arguing that the instant custom theory established the Bush Doctrine as customary international law).
\textsuperscript{48} Id.
\textsuperscript{49} Nonetheless, some scholars have noted international law-based objections to the Bush Doctrine. See Donna M. Davis, Preemptive War and the Legal Limits of National Security Policy, 10 Intl Legal Theory 11, 46-7 (2004).
\textsuperscript{50} NSP06, Principles (cited in note 1).
\textsuperscript{51} See, for example, Reuven Young, Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and its Influence on Definitions in Domestic Legislation, 29 BC Intl & Comp L Rev 23, 65 (2006) (noting, in context of international law governing terrorism, that “[a]lthough the potential for ‘instant custom’ was recognized in the North Sea Continental Shelf case, it requires extensive and virtually uniform state practice, including that by particularly affected states”).
\textsuperscript{52} See Section II.C.1 for a discussion of how technology and politics render even the space treaties obsolete.
\textsuperscript{53} The North Sea Continental Shelf Cases, 1969 ICJ 3, ¶ 74 (cited in note 43). Note, however, that the ICJ prefers that states act uniformly when custom arises within a short period of time.
The instant custom theory suggests that no customary international law of space would undermine the NSP06. To the extent that the Bush Doctrine represents a valid implementation of preemption to international law corpus, customary international law may even embrace the NSP06.

2. Analogies Relating to Exclusion in Space

The instant custom theory is not, however, the sole possible source of a customary international law of space; applied to space, Earth-based analogies could fill the role of customary international law. In developing the positive law foundations of space law, countries looked to analogies to other forms of open frontier, including Antarctica, airspace, the high seas, and unclaimed lands generally. The analogies provided a legal structure for addressing the problems associated with unclaimed areas. By drawing on the customs developed in the ostensibly similar contexts of Antarctica, airspace, the high seas, and unclaimed lands, states had a reasonable structure of established custom for interacting in the new frontier: space.

Thus, if states acted consistently with one of these analogies in its spacefaring behavior, then their laws may serve as a good approximation for the customary international law of space. This section argues that the Antarctica and airspace analogies fail, but that high seas and unclaimed lands analogies are plausible.

a) Antarctica analogy. One potential analog to space rights arises from world treatment of Antarctica. Based on treatment of the world’s only uninhabited continent, the Antarctica analogy would treat space as a nonmilitarized no man’s land. In some ways, the Antarctica analogy works well because the Moon and Outer Space Treaties support this analogy; the current laws governing outer space and Antarctica both reserve their respective jurisdictions for “peaceful purposes” only. This makes the Antarctic analogy especially well-suited to governing the moon. However, the Antarctica analogy fails to apply to nonmoon space for two primary reasons. First, the Outer Space Treaty prohibits, in space not consisting of celestial bodies, only weapons of mass destruction. Second, while the Moon Treaty explicitly bans all military uses, it

54 See Tannenwald, 29 Yale J Intl L at 372 (cited in note 6) (discussing the origins of the space regime).

55 The Antarctic Treaty (1959), art 1, ¶ 1, 12 UST 794 (“Antarctic Treaty”), codified the customary international law governing use of Antarctica. See also Tannenwald, 29 Yale J Intl L at 374 (cited in note 6).

56 Antarctic Treaty, art 1, ¶ 1 (cited in note 55); Moon Treaty, art III, ¶ 1 (cited in note 10); Outer Space Treaty, art IV, ¶ 1 (cited in note 10).

57 Outer Space Treaty, art IV, ¶ 1 (cited in note 10).
does so only on the moon and other celestial bodies.\textsuperscript{58} Taken together, the Moon and Outer Space Treaties suggest that while celestial bodies must remain demilitarized, the space between them generally remains open to military use. Incongruities between Antarctica and outer space therefore prevent the former’s laws from applying to the latter.

\textit{b) Airspace analogy.} The airspace analogy would take a less peaceful, more sovereignty-based view of space. In modern airspace law, states maintain exclusive control over airspace directly above their territories—they have the right to attack foreign aircraft in their airspace.\textsuperscript{59} Unlike the Antarctica analogy, the airspace analogy allows for military strikes for self-defense purposes when a foreign state threatens to breach a given area. In addition, it implicitly allows military buildup within a given region in order to deter potential military strikes from others. The space treaties also allow for limited military buildup by specifically prohibiting military presence only on celestial bodies.\textsuperscript{60} The airspace analogy thus appears better suited than the Antarctica analogy as a basis for a customary international law of space.

The airspace analogy nonetheless suffers fatal flaws. For example, the airspace analogy allows strikes against airspace over a given territory. If this were to apply to space, then anytime an American satellite flew over China or Russia, those countries would have the right to shoot it down. As recent US anxiety over China’s deployment of its antisatellite system suggests, however, countries probably would not accept a state shooting down a foreign satellite merely because it orbits within that state’s airspace. Moreover, enforcing the airspace laws in space is highly impractical. Unlike aircraft within Earth’s atmosphere, satellites and other orbitals generally do not remain over a given country only. Since the global economy greatly depends on sovereignty-ignoring orbital satellites, it is unlikely international custom would favor a law that allows countries to shoot them down.

\textit{c) High seas analogy.} Traditionally, politicians and legal scholars have compared space to the high seas.\textsuperscript{61} The law of the high seas preserves the ocean as a common resource for all to use. No country can exclude another’s use.\textsuperscript{62} In space, the law would allow unlimited use of space by any country so long as the use did not interfere with another’s usage rights.

\footnotesize{\begin{itemize}
\item \textsuperscript{58} Moon Treaty, art III, ¶ 4 (cited in note 10).
\item \textsuperscript{59} Tannenwald, 29 Yale J Intl L at 373-74 (cited in note 6).
\item \textsuperscript{60} See note 58 and accompanying text.
\item \textsuperscript{61} Tannenwald, 29 Yale J Intl L at 374 (cited in note 6).
\item \textsuperscript{62} Id.
\end{itemize}}
Arguably, the Moon and Outer Space Treaties already create a regime based on the law of the high seas. For example, the Outer Space Treaty provides that “[o]uter space, including the moon and other celestial bodies, shall be free for exploration and use by all States . . . on a basis of equality.” Moreover, except on celestial bodies, it neither restricts the right of countries to engage in military maneuvers and appear to allow the storage of non-nuclear weapons.

The high seas analogy has several benefits. First, by treating space as a public good, it provides all countries an equal opportunity to use space. Second, it does not encourage countries to develop space technologies only for military purposes. In a space legal regime governed under the high seas analogy, countries would allocate resources to nonmilitary as well military commitments. Third, states appear to endorse the high seas analogy, at least implicitly. Countries have developed and launched both commercial and military satellites, and other countries have not attempted to shoot them down.

Although this view is traditionally accepted, it is not necessarily correct because countries have not acted to support it to the exclusion of other possible analogies. Thus, it is not a governing custom. For the most part, only the US and Russia have explored space to any significant extent. The law of the high seas requires that all countries have equal access to the medium at hand. But if another ten countries suddenly possessed technology to explore space to the extent of the US or Russia, it is not clear that the countries acquiring space technology would permit equal access. Overall, however, the high seas analogy remains plausible.

d) Unclaimed land analogy, or the law of terra nullius. Under the doctrine of terra nullius, countries compete for sovereignty over certain lands. Countries can claim and protect territory based on the occupation of a given territory. In *The Island of Palmas Case*, the US and the Netherlands maintained competing claims to a previously unclaimed island off the Philippine coast. The US based its claim on preexisting occupation of the Philippines; the Netherlands grounded its argument in the fact that it exercised authority and policed the island. Ultimately, the Permanent Court of Arbitration held that the Netherlands held title to the island because of its “peaceful and continuous” display of authority over the island. The ICJ reaffirmed the claim and occupation principle in *The Minquiers*.

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64 See generally id.
66 Id at 9–11. See *The Island of Palmas Case (US v Neth)*, 2 RIAA 829 (Perm Ct Arb 1928).
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and Ecrehos Case,\(^{68}\) in which the Court affirmed UK possession over an island group after the UK established forms of governance over the islands.\(^{69}\) The law of unclaimed territory thus takes the law of the high seas a step further. Instead of reserving space for all of mankind, it allows countries to take possession of it and to exclude it from the use of others.

**Terra nullius** law has a number of advantages. First, it would reward countries with technological superiority and encourage those lagging behind to further develop their own technology. On Earth, if countries wanted pieces of unclaimed territory, they had to develop their economies to compete against others. Space-based **terra nullius** law might encourage more countries to improve their technologies in order to challenge Chinese, Russian, and US dominance in space.

Second, **terra nullius** law would avoid the enforcement problems that threaten the current space regime. In seeking unclaimed territory, the prevailing law depended not on coordination but economic prowess. In *The Minquiers and Ecrehos Case*, the UK won possession of an otherwise unclaimed island because of its ability to monitor the area with customs houses and census data collection.\(^{70}\) International law rewards the ability to enforce unclaimed territories with sovereignty, a function of its economic strength. By implication, weaker countries cannot govern the area effectively and thus lack claims. In space, instead of countries equivocating about their rights in space or depending on vague treaty enforcement provisions, the more powerful countries would define the laws of space.

Third, the law of **terra nullius** would deal well with the problems of technology and politics that trouble the current space law regime. In contrast to the airspace analogy and obsolete Moon and Outer Space Treaties, new technological developments do not decrease the applicability of **terra nullius** law. Actually, new technology helps it—the more advanced a country’s technology is over its competitors', the better that country can defend its new territory. Unlike the modern space treaty regime, moreover, political conflicts do not endanger the law’s usefulness. Instead, they encourage countries to assert their rights to the otherwise unclaimed territories. Countries rush to claim unused lands for their own benefit.

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\(^{68}\) (UK v FR), 1953 ICJ 47, 57 (Nov 17, 1953) ("What is of decisive importance . . . [is] evidence which relates directly to the possession of the land in question."). See Heflin, 1 Asian-Pac L & Poly J at 14 (cited in note 65).

\(^{69}\) For example, the UK built custom houses and collected census data from island inhabitants. See Heflin, 1 Asian-Pac L & Poly J at 14 (cited in note 65).

\(^{70}\) See id (discussing the UK's means of staking claim to islands).
The three virtues of *terra nullius* law—encouragement of innovation, establishment of enforcement mechanisms, and adaptability to changing circumstances—render it a potentially ideal law for the extraterrestrial frontier.\(^7\)

**C. IS THE NSP06 CONSISTENT WITH CUSTOMARY INTERNATIONAL LAW?**

Whether the NSP06 is valid depends on where it stands in light of the three viable customary international law schemes. Under the instant custom and *terra nullius* schemes, the NSP06 appears valid, but under the law of the high seas scheme, it does not.

1. **Validity under the “Instant Custom” of the Bush Doctrine**

   The Bush Doctrine establishes the US international law right to strike its adversaries preemptively.\(^7\) The NSP06 provision in question—the US reserves the right to “deny, if necessary, adversaries the use of space capabilities hostile to [US] interests”\(^3\)—merely rearticulates the preemption principle and applies it to space. Both conditions of the instant custom theory of international law, therefore, have been satisfied: the Bush Doctrine articulates the justifying policy, and the NSP06 acts on that articulation. The Bush Doctrine thus appears to validate the NSP06 in the eyes of customary international law.

2. **Validity under the Plausible Analogies to Space**

   a) **Terra nullius doctrine applied to space.** While the Bush Doctrine validates the NSP06’s preemption aspects, the *terra nullius* doctrine as applied to space validates the NSP06’s claim that the US can exclude other countries from space use.\(^7\) In unclaimed land cases, once a state stakes a claim and occupies a given territory, that state acquires title, which implies the right to exclude other states from using the territory.\(^7\)

   Arguably, the US already occupies space for *terra nullius* purposes. It has long been one of space’s primary occupants. The US conducts various tasks of

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\(^7\) See Section III.B.1.

\(^7\) NSP06, Principles (cited in note 1).

\(^7\) See id (reserving right to deny use of space to adversaries).

\(^7\) See note 68 and accompanying text.
space exploration and it maintains a key role in maintenance of the international space station. Consequently, the US may already have established itself as dominating space enough to assert rights to exclude space from other states’ use. On the other hand, some countries have started nascent space programs, and China’s increasing accumulation of space power might threaten whatever dominance in space the US currently holds.

However, because the ICJ requires acts evincing governance of unclaimed territory to support a claim, two reasons suggest that the US might have valid rights to exclude other countries under customary international law. First, the US’s current space involvement, including its international space station and other space exploration tasks, serve analogous ends of the customs house and census collection data of the *The Minquiers and Ecrehos Case*. Like the customs house and census collection, current US space involvement includes exploration and data collection. In addition, the significant monetary expenditure required for governance suggests that, like the UK in the unclaimed island case, the US presumably has the resources to use and defend the unclaimed space efficiently. Second, the NSP06 itself may be the assertion of possession that the ICJ requires. If the US allocates resources to place weapons in space, then it would be acting in accordance with claims to exclude adversaries from the use of space, under the *The Minquiers and Ecrehos Case* paradigm. In both cases, customary international law of unclaimed territory suggests that the NSP06’s exclusion provision is valid.

b) Invalidity under the law of the high seas applied to space. Nonetheless, if the law of the high seas were to apply, then Bush’s NSP06 appears to contradict customary international law. If, as the NSP06 provides, the US retains power to “deny, if necessary, adversaries the use of space capabilities hostile to [US] interests,” then it violates the essential premise that no country can exclude

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76 See, for example, NASA, Missions, available online at <http://www.nasa.gov/missions/highlights/index.html> (visited Nov 17, 2007) (summarizing latest examples of US involvement in space).

77 See NASA, *Space Station: Resupplying the Station*, available online at <http://www.nasa.gov/mission_pages/station/resupply/index.html> (visited Nov 17, 2007) (listing times the US resupplied and maintained the International Space Station over the last two years).


79 See *The Minquiers and Ecrehos Case*, 1953 ICJ at 57 (cited in note 68).

80 Id.

81 See Section III.B.2.d for a discussion of efficiency considerations behind *terra nullius* doctrine.

82 In addition, placement of weapons may also satisfy the “instant custom” theory that validates the Bush Doctrine.
space from any other's use. On the high seas, any party can engage in nonoffensive military practice hostile to another country's interest without fear of retribution. Iran could shoot cruise missiles at dummy US warships, but the law of the high seas forbids the US from retaliating against Iran. Alternatively, if the US were to "deny" the ocean to Iran because that country made use of it "hostile to [US] interests," then such a denial would be illegal under international law, potentially as a blockade—an act of war. Similarly, if the US were to deny China use of its space satellites as target practice, then the US action would become an act of war.

As noted, however, the law of the high seas works because a credible enforcement mechanism is in place to stop violations. No such mechanism exists in space.

IV. CONCLUSION: IS THE NSP06 DESIRABLE?

The NSP06 is no doubt unpopular internationally, but it is not clearly illegal. The NSP06 does not contradict established international law. First, the space treaties' pervasive ambiguities fail to clearly prohibit the actions proposed by the NSP06. Meanwhile, the treaties' growing obsolescence brings their viability into question. Second, customary international law does not prohibit the NSP06, either. The instant customary international law represented by the Bush Doctrine actually contemplates, not prohibits, the space-based military preemption that the NSP06 embodies. The long-settled customary international law of terra nullius, as applied to space, also does not prohibit the NSP06's provisions.

International law would contradict the NSP06 only if the law of space were based on the law of the high seas. However, the high seas analogy probably should not apply for the same reason that technology and politics render the space treaties obsolete: its lack of viable mechanism for keeping order in space. Without such a mechanism or the prevailing law, the law might as well not exist. However, although distasteful because it allows militarily dominant countries to control the medium—whether space or sea—at issue, the Bush Doctrine and the law of terra nullius fill the enforcement gap.

Nonetheless, better enforcement does not mean a better regime. Chinese and Russian reactions to the NSP06 indicate that the policy may be sacrificing peace for enforcement. Though the NSP06 may be legal, it may also incite

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83 NSP06, Principles ¶ 5 (cited in note 1).
85 See Section III.B.2.c.
extraterrestrial violence in stark contrast to the half-century of peace that has ensued in space. Perhaps the strength of an international space regime rests not in the clarity and enforceability that the NSP06 favors, but in the vague notions of international spirit of cooperation that the space treaties imply but do not explicitly require.