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# From Soft Law to Hard Law
# A Particular Trend in International Space Law

## Introduction

International space activities are governed by a wide variety of sources, including bilateral and multilateral international treaties, customary international law and so-called soft law instruments.[2] Until the 1980s, 1990s, international law-making in space law was characterised by creating legally binding norms. During the 1960s, 1970s states concluded several international treaties, including the following five main multilateral treaties (hereinafter: space law treaties): Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and other Celestial Bodies – 1967 (hereinafter: Outer Space Treaty); Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space – 1968 (hereinafter: Rescue Agreement); Convention on the International Liability for Damage Caused by Space Objects – 1972 (hereinafter: Liability Convention); Convention on Registration of Objects Launched into Outer Space – 1975 (hereinafter: Registration Convention); Agreement Governing the Activities of States on the Moon and Other Celestial Bodies – 1979 (hereinafter: Moon Agreement). These treaties led down the basic rules of international space law and are particularly important ever since their conclusion.

However, during the 1980s, 1990s the category of soft law also started to spread and gradually gained more and more ground.[3] At the same time, a decline of the traditional treaty method started in the era of law-making in outer space.[4] It can be observed in the recent years as well, as states are choosing to assert their interests and opinions through soft law documents rather than adopting new

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[2] Aust 2010: 11.
[3] Tronchetti 2013: 14, 85.
[4] Neef 2021: 572–573.

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binding international treaties or amending existing ones.[5] Due to this, several authors[6] believe that for now, soft law has become the dominant and primary tool for the development of international space law.[7] For this reason, it is of particular importance to examine the special features of soft law documents and the impact they have, or could have, on international space law.

## Soft law documents in international space law

### *Examples and special features of soft law*

Soft law instruments are legally non-binding documents, the aim of which is generally to establish standards and principles for a particular activity. Due to their non-binding nature, the modest enforcement mechanisms of international law are not applicable for them. It means for example, that the neglect of soft law must not entail countermeasures (reprisals) and soft law documents cannot be invoked before UN bodies.[8] Nevertheless, as soft law documents are easy to create, they can undoubtedly provide a flexible solution to issues that require urgent action and they can help to adapt to new situations and technological developments.

In the field of space law, there has been an increasing amount of non-binding soft law material since the 1980s and 1990s.[9] The reason of it is that by the 1980s and 1990s, the process of creating international treaties in the field of space law had clearly come to a halt.[10] Some authors argue that this can be seen on the example of the Moon Agreement, which has only 18 State Parties and the fact that after this agreement no multilateral treaty could be concluded in international space law.[11] According to these authors, the lack of new binding norms has led

5 Ferreira-Snyman 2021: 34.

6 Tronchetti 2013: 14, 85; Byrd 2022: 834; Neef 2021: 572–573.

7 The important role of soft law documents has been recognised by the United Nations Committee on the Peaceful Uses of Outer Space (COPUOS). *Report of the Committee on the Peaceful Uses of Outer Space* 30.

8 Schmalenbach 2012: 42.

9 Tronchetti 2011: 619.

10 Martinez 2020: 523.

11 Rachel Neef raises, among other issues, the failure of the draft treaty between China and Russia on the prevention of the threat of arms sales and violence in outer space. Neef 2021: 573.

members of the international community to turn to the category of soft law, which has gradually gained more and more importance.[12]

Examples of soft law include memorandum of understanding; certain UN General Assembly resolutions that do not have the status of customary law;[13] various directives; guidelines; declarations; recommendations; programmes and codes of conduct.[14] There are many examples of each of the above categories in the field of space law, but only two categories will be briefly described here for illustrative purposes. First of all, it is worth mentioning the category of directives, which are numerous in many areas of space law. For example, the United Nations Committee on the Peaceful Uses of Outer Space (COPUOS) has been developing documents of this kind since the 1990s, dealing with important issues such as space debris[15] and the sustainability of space activities.[16] The other example of soft law is the category of Memorandum of Understanding (MoU) documents, about which many authors note that they are important tools in the hands of the parties, a large number of bilateral and multilateral MoUs are created every year.[17] Among these documents, it is important to highlight the so-called Artemis Accords,[18] which will be examined in detail in the third part of the study.

### *The potential impact of soft law on international space law*

Although soft law instruments are not binding, they may significantly influence states' behaviour and contribute to the progressive elaboration and consolidation of international law. Soft law documents may have several functions, which, according to Fabio Tronchetti, fall into 4 categories: 1. soft law can give guidance on how to interpret and implement existing treaty provisions;[19] 2. it may represent

[12] Tronchetti 2013: 14, 85.
[13] Tronchetti 2013: 7.
[14] Martinez 2020: 522; Aust 2010: 11; Kolb 2016: 171; Remuss 2011: 539.
[15] Space Debris Mitigation Guidelines. Martinez 2020: 530.
[16] Freeland–Zhao 2020: 416–417; U.N. Office for Outer Space Affairs s. a.
[17] Aust 2010: 51–52.
[18] The official English title of the document is *Artemis Accords. Principles for a Safe, Peaceful, and Prosperous Future* (hereinafter: Artemis Accords). NASA 2020.
[19] Francis Lyall and Paul B. Larsen also emphasise this guiding character of soft law. Lyall–Larsen 2009: 51–52.

the beginning of a process leading to an international treaty;[20] 3. it may contribute to the formation of customary law;[21] and 4. it may be declaratory of existing unwritten rules.[22]

From these opportunities, it is worth paying attention to the case when a soft law instrument becomes customary international law. The category of customary international law has two conditions, namely a general and consistent practice of states and the so-called *opinio iuris sive necessitatis*.[23] For the first condition, the practice of so-called specially affected states is important, which means that "in the examination of custom, the practice of the states concerned or interested in the matter in question is of primary importance".[24] In connection with this, time factor is also relevant, however, it is important to highlight that, given a sufficiently large number of representative practice pointing in the same direction, it does not necessarily take a long time for customary law to develop.[25] Several authors have argued that in case of space law, a short period of time is usually sufficient, so-called instant customary law is very common in this area.[26] As for the second condition, the *opinio iuris sive necessitatis* requirement means that states must regard a given practice as a legal obligation and follow it accordingly.[27] Generally speaking, if States establish rights and obligations on a particular practice and enforce them for example before international courts, the condition of *opinio iuris* can be established.[28]

The above-mentioned conditions of customary international law might be met in case of soft law documents as well. Consequently, if a soft law document

[20] Laura C. Byrd also mentions this function of soft law. Byrd 2022: 34.

[21] Anel Ferreira-Snyman stresses that soft law may function as a basis of law-making. Ferreira-Snyman 2021: 34–35.

[22] Tronchetti 2011: 624.

[23] Tronchetti 2011: 625.

[24] Mineiro 2012: 25.

[25] Pershing 2019: 153–154.

[26] Klabbers 2013: 49–50; Pershing 2019: 153–154.

[27] Wouters 2019: 257. This is also mentioned in Article 38 of the Statute of the International Court of Justice, which refers to customary law as a general practice accepted as law. Statute of the International Court of Justice, Article 38 (1) (b).

[28] Klabbers 2013: 49–50.

is applied generally and consistently in practice and is regarded as law, then the document acquires customary law status and thus becomes legally binding. However, this could have further consequences. Since there is no hierarchy between the sources of international law, treaties and customary law are on the same level. It means that a soft law instrument, which becomes customary international law may confirm, but also derogate international treaties. The term derogation refers to the creation of customary law contrary to an international treaty, which more precisely means that after the conclusion of an international treaty, the parties to the treaty may engage in practices contrary to it. In such a case, thanks to the principle of *lex posterior derogat legi priori,* the latter rule derogates the earlier one. It is important to note that customary international law rarely derogates a whole treaty, but rather has this effect only on one or more certain provisions.[29]

## A practical example: The Artemis Accords

The above statements can be illustrated by the example of the document named *Artemis Accords.* This document was initiated by the United States and signed by eight states in a virtual ceremony on the 13th of October 2020 at the 71st International Astronautical Congress.[30] These states were Australia, Canada, Italy, Japan, Luxembourg, the United Arab Emirates, the United Kingdom and the United States.[31] Other signatories later joined,[32] including Bahrain, Brazil, Colombia, France, Israel, Mexico, New Zealand, Poland, Romania, Saudi Arabia, South Korea, Singapore and Ukraine.[33]

[29] Szalai 2018: [69].
[30] COPUOS 2021b: 19.
[31] NASA 2020.
[32] The document itself provides the possibility of expanding the number of signatories. Artemis Accords, final provisions.
[33] Thus, the Accords now has 21 signatories (NASA 2020). Furthermore, it can be mentioned that the Isle of Man, a British Crown Dependency, has also declared that the Accords can be applied for the isle. Government of the Isle of Man 2021.

Artemis Accords is a non-binding soft law document,[34] more precisely a *memorandum of understanding* (MoU).[35] Several facts refer to this type, for example the wording in the preamble, according to which the document is intended to establish a political understanding among the parties.[36] This is confirmed by the first section, which states that the Accords merely represents a political commitment by the parties to the principles it contains.[37] The soft law character of the document is further confirmed by the fact that formally it is not divided into articles, as international treaties, but into sections, and that in several cases the document uses the term principles to refer to the matters it contains.[38] Another important factor is that the parties did not wish to register the document in the United Nations Secretariat's United Nations Treaty Collection of international treaties.[39] The final provisions of the document expressly state that the Government of the United States shall maintain the original text of the Accords and transmit a copy to the Secretary-General of the United Nations, but the document shall not be registered under Article 102 of the Charter of the United Nations.[40] Finally, it is worth mentioning that the final provisions of the document state that the signatories commit to periodically consult to review the implementation of the principles contained in the Accords and to exchange views on potential areas of future cooperation.[41] All of these suggest that the parties did indeed intend to create a non-binding, soft law document, a memorandum of understanding, which could be easily reviewed and amended if necessary.

[34] COPUOS 2021b: 3.

[35] The concept of these documents has not yet been defined, but it is certain that they can be created between states and between states and international organisations. According to Francis Lyall and Paul B. Larsen, the term MoU refers to a document that is more than a gentlemens' agreement, but less than a treaty. Lyall – Larsen 2009: 37. Anthony Aust mentions that a large number of bilateral and multilateral MoUs are concluded every year on all kinds of issues. Aust 2010: 51–52.

[36] Artemis Accords, Preamble.

[37] Artemis Accords, Section 1.

[38] The title, the preamble, the first and second sections and the final provisions of the document all contain the term principles. Artemis Accords.

[39] According to the UN Charter, "any international treaty concluded after the entry into force of the Charter [...] shall be registered with the Secretariat as soon as possible [...]". Charter of the United Nations, Article 102.

[40] Artemis Accords, Section 13.

[41] Artemis Accords, Section 13.

After clarifying the form of the document, it is worth paying attention to the content of the Artemis Accords. The table below sets out the issues covered by the document, comparing them with the relevant provisions of space law treaties.

*Table 1: The content of space law treaties and the Artemis Accords*

| | **Artemis Accords** | **Outer Space Treaty** | **Rescue Agreement** | **Liability Convention** | **Registration Convention** | **Moon Agreement** |
|---|---|---|---|---|---|---|
| Peaceful purposes | Preamble and Section 3 | Preamble and Article IV | Preamble | Preamble | Preamble | Article 3 |
| Transparency | Section 4. | Article XI | – | – | – | – |
| Interoperability | Section 5 | – | – | – | – | – |
| Emergency assistance | Section 6 | Article V | Articles 1 and 2 | Article XXI | – | Article 10 |
| Registration of space objects | Section 7 | – | – | – | Preamble, Articles II and III | – |
| Release of scientific data | Section 8 | – | – | – | – | – |
| Preserving outer space heritage | Section 9 | – | – | – | – | – |
| Space resources | Section 10 | Article II | – | – | – | Articles 6 and 11 |
| Deconfliction of space activities | Section 11 | Article IX | – | – | – | Article 2 |
| Orbitral debris | Section 12 | – | – | – | – | – |

*Source:* Compiled by the author.

Based on the content of the above-mentioned provisions, it is possible to establish that most sections of the Accords only confirm the content of the five main multilateral space law treaties. These sections govern the questions of peaceful

purposes, transparency, emergency assistance and registration of space objects.[42] Furthermore, some sections supplement the existing rules of space law as they contain issues that are not mentioned in the space law treaties. These sections are in connection with interoperability, release of scientific data, preserving outer space heritage and orbitral debris.[43] Both the confirmation and the supplementation is in conformity with space law treaties.

However, there are two sections in the Accords that raise fundamental questions and thus need to be examined more precisely. These sections are about space resources and deconfliction of space activities. In connection with the first question, the Accords makes it possible to extract and utilise space resources including any recovery from the surface or subsurface of the Moon, Mars, comets, or asteroids. As for the second issue, the document gives opportunity for states to create so-called safety zones.[44] The document records that the extraction of space resources does not inherently constitute national appropriation under Article II of the Outer Space Treaty and that safety zones are necessary in order to implement notification and coordination and thus to avoid harmful interference and fulfil the obligation of due regard.[45]

Based on the above, it can be established that the document tries to create a legal basis for activities in question and regards them as lawful methods. Arguments might be found both for and against this view. Many authors argue that Section 10 of the Accords is not in conformity with Article II of the Outer Space Treaty, and Articles 6 and 11 of the Moon Agreement.[46] Others believe that the extraction and utilisation of space resources is clearly legitimate.[47] There is

[42] In this respect, the content of the Accords is in line with the preamble of the document, which says that the Accords's goal is to reinforce the provisions of the Outer Space Treaty, the Rescue Agreement, the Liability Convention and the Registration Convention. Artemis Agreement, Preamble.

[43] With regard to space debris, it is important to note that the UN Committee on the Peaceful Uses of Outer Space has developed specific guidelines on this issue, but it is beyond the scope of this study to explore them. United Nations 2007.

[44] Mallowan et al. 2021: 156.

[45] Artemis Accords, Sections 10 and 11.

[46] According to these authors, the resources of outer space are the common heritage of mankind and any form of appropriation or acquisition of ownership is prohibited. Mosteshar 2020: 601–602; Hasin 2020: 105–106; Pershing 2019: 154, 156.

[47] Goehring 2021: 582.

a third category of authors, who prefer not to take a position on the issue.[48] The situation is very similar in the case of safety zones, many authors argue for the lawful nature of these zones,[49] while others consider that the zones exhaust the prohibition of extending state sovereignty to outer space.[50]

The contradictory opinions presented here are based on the different interpretations of the articles in question.[51] Due to this, arguments can be made for and against the legality of the Artemis Accords. I believe that the document is trying to exploit the uncertainties described above and the shortcomings in the interpretation of the space law treaties and aims to disseminate a specific interpretation of certain disputed provisions of space law treaties. The point of this interpretation is that safety zones may be established in outer space in order to fulfil the principle of due regard and to avoid harmful interference, and neither these, nor the extraction and commercial use of space resources constitute appropriation. In other words, the Accords wants to suggest that these activities are in conformity with the above-mentioned provisions of space law treaties.[52]

The aim of the document is to disseminate this interpretation as widely as possible.[53] By doing so, the Accords presumably intends to establish customary international law in questionnary issues.[54] According to some authors, this objective can be a reality in the near future if the space-faring states[55] follow

[48] Diego Zannoni, Elya A. Taichman and Sa'id Mosteshar, for example, all believe that there is no international consensus on the status of space resources and the legality of their extraction and use, and that the issue cannot be clearly decided. Zannoni 2020: 334; Taichman 2021: 114; Mosteshar 2020: 598–600. According to Gershon Hasin, the reason for the uncertainty on the subject is that there is no widespread public practice on space mining that would support one view or the other. Hasin 2020: 80–81, 105–106.

[49] These authors mention as a comparison the lawfulness of keep-out zones, safety zones in the law of the sea and the Air Defence Identification Zones. Mallowan et al. 2021: 160; Newsome 2016: 43–48.

[50] Many authors consider that security zones have many similarities with territorial sovereignty, as they provide the possibility of exercising exclusive control over a territory, which violates the right of free access to outer space. Mosteshar 2020: 601–602; Ferreira-Snyman 2021: 31–32; Neef 2021: 570–572; Larsen 2021: 42–43.

[51] Mallowan et al. 2021: 157.

[52] Prahalad 2021: 444.

[53] According to the Preamble, the document tries to achieve a global consensus on critical issues regarding space exploration and use. Artemis Accords, Preamble.

[54] Mosteshar 2020: 601–602; Smith 2021: 661, 687; Taichman 2021: 131–132.

[55] In case of space law, there is no exact list about these states, however, the United States, North Korea, India, Iran, Israel, Japan, China, Russia and the European Space Agency states can be

a consistent practice in line with the Accords and if they regard the document as legally binding.[56] In this respect, it can be noted that, with a sufficiently large number of representative practice pointing in the same direction, it does not necessarily take a long time for customary law to develop.[57] Several authors have argued that, in case of space law, a short period of time is usually sufficient, and that in this area, so-called instant customary law is very common.[58]

There are already some facts that refer to this direction, for example the domestic law regulation in some states. For example, the United States, Japan, Luxembourg and the United Arab Emirates have already adopted legislation in their domestic law that considers the extraction and commercial use of space resources lawful and not appropriation of outer space. The same regulation and practice may arise in other states in the future.[59]

If this happens, if all the two conditions of customary international law are met, Sections 10 and 11 of the Artemis Accords may acquire customary law status.[60] However, this would have a significant impact on Article II of the Outer Space Treaty and Articles 6 and 11 of the Moon Agreement. These articles would be in some sense undermined and derogated by the customary nature of Sections 10 and 11 of the Accords. This would mean that the states that have signed the document and followed a consistent practice in line with its content would be bound by the content of the Accords as customary law, instead of the aforementioned provisions of the space law treaties.[61] However, in this context, it is worth clarifying that derogation may only arise in the sense and to the extent that the texts of space law treaties and the Accords are considered to be in conflict with each other.

confidently regarded as such. Spacepolicy Online s. a.

56 Elizey 2021: 234; Anderson et al. 2021: 227–258; Wouters 2019: 257.

57 Pershing 2019: 153–154.

58 Klabbers 2013: 49–50; Pershing 2019: 153–154.

59 Klabbers 2013: 49–50; Pershing 2019: 159.

60 According to Scot W. Anderson and Charles Elizey, the process is moving in the direction of making the interpretation of the Artemis Accord common law. Anderson 2021: 227–258; Elizey 2021: 208.

61 This customary law, however, cannot be applied for persistent objectors. For example Russia and China have already expressed their opposition to the Artemis agreement. For this reason, it is likely that China and Russia will not be bound by the currently evolving customary law under Articles 10 and 11 of the Artemis Agreement.

## Conclusion

Based on the findings of this study, it is possible to declare that the category of soft law has several advantages. With the help of these documents, states are able to lay down principles of interpretation or forms of conduct for themselves without the strict requirements of international treaties. Due to this easy way of creation, soft law might be useful, or even necessary and desirable in certain cases. The category of soft law can undoubtedly provide a flexible solution to issues requiring urgent action and can help to adapt to new situations and technological developments.[62]

However, soft law instruments may also raise questions if they become legally binding hard law. By acquiring customary law status, soft law documents have the opportunity to derogate international treaties. This may well be the case with the Artemis Accords, as the specific interpretation contained in the document may well become customary international law in the future. As we could see, this would in fact provide an opportunity to circumvent or undermine certain provisions of space law treaties. Moreover, this purpose of the Accords is not particularly obvious, as the document seeks to conceal the real reason for its creation by exploiting the uncertainties inherent in the interpretation of certain provisions of space law treaties and by invoking their clarification.

In my view, the Artemis Accords and the possible impact of soft law documents as described above poses a significant challenge for future international space law, but also to the sources of international law and to international justice. These areas must provide answers to the questions raised by this trend, including its legal or illegal nature, and define the framework for this specific law-making process. This is by no means a simple task, however, due to the current needs of states and to the fact that soft law enjoys a growing support, it is undoubtedly necessary.[63]

[62] Lyall–Larsen 2009: 51–52.
[63] Tronchetti 2011: 632.

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