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The Role of Soft Law Instruments in the New Space Age

INTRODUCTION

International space law is an increasingly important and dynamically developing field, which is currently facing new challenges, demands and situations. The nature of space activities is gradually changing, while new types of activity and new actors are continuously appearing on the stage of outer space. This article will present only some of the examples that could be mentioned, but they clearly show that the field of space law is constantly evolving. These changes need to be governed by international regulation, which should serve as an essential starting point and framework for all space activities. However, international law-making relating to outer space is also facing challenges in the New Space Age and among these, the changes regarding the form and possibilities of regulation deserve particular attention.

Until the 1980s, international space legislation was clearly dominated by the creation of legally binding norms, mainly international treaties. Since then, however, binding documents have been increasingly overshadowed by the emergence of non-binding, so-called soft law instruments.[1] This type of regulation has gradually gained more and more ground, and nowadays the members of the international community seem more inclined to apply these flexible regulatory options instead of creating new legally binding treaties or amending existing ones. The possible reasons for and the consequences of this

[1] Neef 2021: 572–573.

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changing role of soft law deserves special attention due to the inevitable role of international legislation in space law.

With these trends in mind, this study deals with the question of how and why soft law has become the new and main form of international space legislation. In order to analyse this question, it is first necessary to consider the definition and the specificities of the binding and non-binding instruments governing outer space and to identify the exact differences between the two categories. With the help of these clarifications, the reasons for and the consequences of the changing role of soft law instruments can be better understood, as well as the impact the use of soft law instruments have had, or may have, on international space law.

HARD LAW AND SOFT LAW IN INTERNATIONAL SPACE LAW

Legally binding regulatory instruments governing outer space

As noted in the introduction, during the 1960s and 1970s international legislation regarding outer space was characterised by the creation of legally binding documents – so-called hard law[2] – mainly international treaties. The exploration and use of outer space and the principles of space law were laid down in a number of international treaties[3] of which the following five multilateral treaties deserve to be mentioned (these treaties are hereinafter collectively referred to as space 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 Return of Objects Launched into Outer Space, 1968* (hereinafter: Rescue Agreement)

[2] According to Peter Martinez: "The international legal framework for space activities rests on two pillars: hard law and soft law." MARTINEZ 2020: 522.

[3] TRONCHETTI 2011: 626.

- *Convention on 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 laid down the basic rules of international space law and have been particularly important ever since their conclusion. The common feature of all these documents is that they are multilateral international treaties,[4] meaning that their aim is to create legally binding rights and obligations for the parties and to achieve as broad cooperation as possible, depending on how many entities wish to become parties to the agreements. On this issue, it is worth examining the number of the parties to each treaty individually: the Outer Space Treaty has 112 parties, the Rescue Agreement has 99, the Liability Convention has 98 and the Registration Convention has 72.[5] Compared to this, the number of parties to the Moon Agreement is much smaller, with only 17 parties having expressed their consent to be bound by the treaty.[6] Based on this, it can be seen that compared to the Outer Space Treaty, the number of the parties to international agreements on outer space has gradually decreased over the years. While not very significant, but discernible for the Rescue Agreement, the Liability Convention and the Registration Convention, in case of the Moon Agreement, however, the decrease is much more dramatic.

The small number of the parties in the Moon Agreement was the beginning of a tendency that can be described as the marginalisation of binding multilateral international treaties within space law. This tendency does not mean the

[4] This term refers to the fact that the agreements regulate the relations of more than two parties. United Nations 2012: 33.

[5] Data as of 1 January 2022. UN Committee on the Peaceful Uses of Outer Space 2022: 10.

[6] According to Balázs Bartóki-Gönczy, the reason for the small number of parties of the Moon Agreement "was basically that the nations with advanced industry were not willing to give up in advance the possibility of not appropriating the resources of the celestial bodies". Bartóki-Gönczy 2020: 95.

eclipse of existing international treaties governing the outer space, but instead refers to the fact that despite the original plans, the Moon Agreement did not gain wide support and that states did not manage to conclude any multilateral international treaties regarding space law after 1979.[7] This failure of the Moon Agreement[8] and later binding legislation to attract interest shows that by the 1980s, the process of concluding international treaties in the field of space law had clearly come to a halt.[9] Several explanations have suggested that the reason for this was that the main space treaties have exhausted the issues on which states were prepared to enter into international legal obligations.[10]

Therefore, as the creation of new binding international treaties was impossible, the members of the international community had to turn to other regulatory methods, including the creation of soft law documents, the development of customary international law, or the conclusion of special bilateral or plurilateral treaties.[11] Among these options, soft law has gained a leading role, thus this category deserves further examination.

Soft law instruments in international space law

As has been noted, the category of non-binding soft law started to proliferate in the 1980s, by which time it had become clear that states could not agree to create new binding norms.[12] In connection with this phenomenon, the first question concerns what exactly is meant by the term soft law. Although it is not possible to provide a totally clear definition, the category of soft law most likely includes documents that: 1. have some legal relevance but do not appear in the form of a legal source recognised by international law; 2. and also those that appear in

7 Rachel Neef, for example, mentions 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.

8 Freeland–Yun 2020: 432.

9 Peter Martinez opines that the "discussions on legally binding instruments have become deadlocked". Martinez 2020: 523.

10 Tronchetti 2011: 628–629.

11 Tronchetti 2013: 14, 85.

12 Tronchetti 2013: 148, 85; Tronchetti 2011: 619.

the form of a source of law recognised by international law, but which – because of their generality, vagueness or subjectivity – cannot be invoked or enforced.[13] The most typical examples of soft law include memoranda of understanding,[14] certain UN General Assembly resolutions which do not have the status of customary law,[15] various directives, principles, guidelines,[16] declarations, recommendations, programmes[17] and codes of conduct.[18]

While there are many examples of each of the above categories in the field of international space law, only some of them will be briefly described here for illustrative purposes. Firstly, in connection with the category of Memoranda of Understanding, one of the latest examples of these are the so-called Artemis Accords,[19] which was initiated by the United States. The signature of this document was organised as a virtual ceremony on 13 October 2020 at the 71st International Astronautical Congress. At this time, 8 states signed the document,[20] which was later followed by a further 26 states,[21] bringing the total

[13] László Blutman states with regard to the concept of soft law that although the term does not have a clear legal definition, it has the two mentioned distinct meanings. Blutman 2008: 28.

[14] According to Anthony Aust, these agreements are important tools in the hands of the parties, with a large number of bilateral and multilateral MOUs being created every year. Aust 2010: 51–52.

[15] According to Steven Freeland and Zhao Yun "UNGA resolutions are a major type of soft law documents". Freeland–Yun 2020: 417.

[16] Freeland–Yun 2020: 413.

[17] Martinez 2020: 522; Aust 2010: 11; Kolb 2016: 171.

[18] For example, the European Union draft Code of Conduct for outer space activities. Su–Lixin 2014: 34–39.

[19] The official English title of the document is *Artemis Accords. Principles for a Safe, Peaceful, and Prosperous Future* (hereinafter: Artemis Accords).

[20] These states were Australia, Canada, Italy, Japan, Luxembourg, the United States of America, the United Arab Emirates and the United Kingdom. NASA 2020.

[21] The agreement itself provides for the possibility of expanding the number of signatories, as its final provisions stipulate that after 13 October 2020, any state wishing to become a signatory to the agreement may notify the U.S. Government of its intention to do so. Artemis Accords, Final provisions.

number of signatories to 34.[22] The importance and the role of this document will be mentioned later in the study. Examples of principles that have been adopted internationally include those adopted by the General Assembly of the United Nations, for example the Declaration of Legal Principles Governing the Activities of States in the Exploration and Uses of Outer Space; or the Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries. Resolutions of the General Assembly include: Resolution 1721 A and B (XVI) of 20 December 1961: International Co-Operation in the Peaceful Uses of Outer Space; Resolution 68/74 of 11 December 2013: Recommendations on national legislation relevant to the peaceful exploration and use of outer space. It is also worth mentioning the category of guidelines, which are also numerous in many areas of international space law. For example, the United Nations Committee on the Peaceful Uses of Outer Space (hereinafter: UN COPUOS) has been developing documents of this type since the 1990s, dealing with important issues such as space debris[23] and the sustainability of space activities.[24]

In connection with the aforementioned principles, resolutions and guidelines, it is important to note that their content may reflect customary international law, if it can be proved that states follow a general and consistent practice in relation to a certain issue and if they regard this practice as law, or in other words as an obligation. With these conditions, a certain rule contained in a soft law document may be binding, and this phenomenon will be discussed

[22] The acceding countries were Angola, Argentina, Bahrain, Belgium, Brazil, Bulgaria, Colombia, the Czech Republic, Ecuador, France, Germany, Iceland, India, Israel, Mexico, the Netherlands, New Zealand, Nigeria, Poland, the Republic of Korea, Romania, Rwanda, Saudi Arabia, Singapore, Spain and Ukraine. Interestingly, the Isle of Man, a British Crown Dependency, has also declared itself a signatory to the agreement. Government of the Isle of Man 2021.

[23] UNOOSA 2010; Martinez 2020: 530.

[24] Committee on the Peaceful Uses of Outer Space 2018; Freeland–Yun 2020: 416–417.

later in this study. At this point, based on the mentioned examples it can be stated that soft law has been prominent in international space law since the very beginning of the regulation of this field. However, whereas during the 1960s and 1970s its role was merely to supplement or prepare the hard rules contained in space treaties, from the 1980s onwards it has gradually taken a leading role and has become the primary instrument for the international regulation of outer space. In order to explore the causes and consequences of this process, it is worth comparing the specific features of soft law documents with those of binding international treaties.

SPECIFICITIES OF INTERNATIONAL TREATIES AND SOFT LAW INSTRUMENTS

International treaties and soft law instruments differ in a number of respects. The first and most important difference between them is that, while international treaties are legally binding documents, soft law is not.[25] In practice, this is reflected in the fact that while international treaties can be enforced by the means provided for by international law, the same cannot be said of soft law instruments.[26] This means, among other things, that disregarding soft law does not give rise to international responsibility and that these documents cannot be invoked before UN bodies.[27] Furthermore, no countermeasures can be applied and no compensation can be claimed if soft law is not upheld.[28] These specificities also mean that states do not have to comply with soft law but are free to choose to ignore it.[29]

[25] Tronchetti 2013: 6–7.
[26] Schmalenbach 2012: 41.
[27] Schmalenbach 2012: 42; Tronchetti 2011: 622.
[28] Tronchetti 2011: 622.
[29] Byrd 2022: 831.

In addition to the legal aspects, there are also significant differences in the content of international treaties and soft law documents. International treaties usually contain terms referring to the existence of binding force, including the words "to subject", "subjection", "right", "obliged" or "obligation".[30] In non-binding soft law documents, the parties tend to omit these terms or to replace them with words such as "to aspire", "endeavour", "to intend" or "intention."[31] In this respect, it is worth noting that the name of a document should not be taken as a guide, since some documents

> "may at first sight appear to be international treaties, both in terms of the title and the parties, but the words and expressions used in it in several cases show that the document is drawn up by States to settle their affairs quickly, to express their political will, to reach a flexible agreement and not to conclude an international treaty".[32]

In addition to the issues of content, there are also differences in the way these documents are created and the form they take. The conclusion of international treaties is a complex and lengthy process, each step of which is precisely regulated by the international law of treaties. No such constraints exist on soft law instruments, and the parties have practically complete freedom in the drafting of such material. As a result, the creation of soft law is usually much easier, quicker and simpler than that of international treaties.[33]

A further difference is that international treaties are required by the Charter of the United Nations to be registered in the United Nations Treaty Collection. According to the Charter: "Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with

[30] Such expressions in a given document indicate that the parties intended to create a binding agreement, an international treaty. Kolb 2016: 19; Aust 2010: 54, 398.

[31] When such terms are used, it is likely that the parties did not intend to attach binding force to the document, but merely to create a soft law instrument. Klabbers 2013: 45.

[32] Szalai 2018: 16.

[33] Remuss 2011: 539.

the Secretariat and published by it."[34] However, such registration is not required for soft law instruments.[35]

By identifying these characteristics of international treaties and soft law instruments, it is possible to determine in practice which category a given document belongs to. In connection with this question, it is first and foremost the intention of the parties that determines whether the document is legally binding or not. The main factors that help to reveal the intention of the parties are the content of the document and the circumstances in which it was drawn up.[36]

To illustrate this process of classification, it is worth taking the example of the Artemis Accords mentioned earlier, which may appear to be an international treaty at first glance. However, several details reveal that the signatories intended to create a non-binding document. This is suggested by the wording of the preamble, which states that the document is intended to establish a political understanding between the signatories.[37] Besides, the first clause states that the agreement merely represents a political commitment to the principles it sets out.[38] The soft law nature of the document is further confirmed by the fact that it is formally divided into sections rather than articles, and that the document uses the term principles in several instances to refer to the matters it contains.[39]

Another important aspect of the Artemis Accords is that the signatories did not wish to register the document in the United Nations Treaty Collection. The final provisions of the document expressly state that "the Government of the United States of America will maintain the original text of these Accords and transmit to the Secretary-General of the United Nations a copy of these Accords, which is not eligible for registration under Article 102 of the Charter of

[34] Charter of the United Nations, Article 102.

[35] As Anikó Szalai notes, soft law instruments "do not need to be registered in the UN Treaty Collection, nor do they need to be promulgated or published in domestic law". Szalai 2018: [17].

[36] Aust 2010: 52.

[37] Artemis Accords, Preamble.

[38] Artemis Accords, Section 1.

[39] The title, the preamble, the first and second sections and the final provisions of the document all contain the term principles. NASA 2020.

the United Nations".[40] Finally, it is worth highlighting that the final provisions of the Accords state that the signatories commit to consult periodically on the implementation of the principles contained in the document and on potential areas for future cooperation.[41]

All of the above suggests that the signatories intended to create a non-binding document that could be easily reviewed and amended, if necessary, in the light of future needs. Based on this, it can be concluded that the Artemis Accords takes the form of a non-binding *soft law* document, namely a Memorandum of Understanding.[42]

POSSIBLE CAUSES AND CONSEQUENCES OF THE RISE OF SOFT LAW INSTRUMENTS

Having identified the characteristics of international treaties and soft law instruments, it is now possible to examine the causes of the rise of the use of soft law documents and the consequences of this process, namely the effect of soft law on international space law.

Based on the characteristics of soft law instruments described in the previous section, it is clear that these documents have a number of advantages. They are quick and easy to create and amend, therefore they can undoubtedly provide an immediate and flexible solution to issues requiring urgent action.[43] They can thus help to adapt to new situations and technological developments,[44] which is particularly important in the rapidly changing field of international space law.[45] These features of soft law are clearly preferable to the lengthy and complex process of preparing and amending international treaties, and the resulting

40 Artemis Accords, Section 13.
41 Artemis Accords, Section 13.
42 Committee on the Peaceful Uses of Outer Space 2021: 3.
43 Tronchetti 2011: 626.
44 According to Peter Martinez: "Soft law can also be more responsive to developments in technology than legally binding instruments." Martinez 2020: 562.
45 Byrd 2022: 832.

uncertainty that they will enter into force.[46] In addition, soft law documents can be signed even by those actors of the international community that do not have, or do not clearly have the capacity to conclude international treaties.[47] A further advantage of such soft law agreements is that, since the documents do not create rights and obligations, their signatories can comply with or ignore the content of these materials according to their needs and will. This is an attractive alternative for interest-driven states, who for the above-mentioned reasons prefer to create soft law instruments.[48] Due to these advantages, soft law was able to help to overcome the deadlock caused by the impossibility of concluding international treaties[49] and has become the dominant approach[50] and the primary instrument for space governance and for the development of space law.[51] This crucial role of soft law has also been recognised by the UN COPUOS.[52]

It has become evident that the simple and quick creation of agreements and the freedom given to their signatories are the main reasons for the rise of soft law instruments. Keeping this in mind, it is also worth examining the possible consequences of the trend related to the prominence of the documents in question. In this respect, it is important to note that, although soft law documents do not have binding force, they can influence the behaviour of

[46] Kolb 2016: 270; Boyle 2019: 102.

[47] These include, among others, transnational corporations or non-governmental organisations. Lyall–Larsen 2009: 51–52.

[48] According to Robert Kolb, the following circumstances play a role in the rise of non-binding instruments: the need for flexibility and short reaction times, the desire to involve non-state actors, and the possibility of confidentiality, of keeping the agreement secret. Kolb 2016: 270.

[49] Freeland–Yun 2020: 415.

[50] Neef 2021: 572–573.

[51] Fabio Tronchetti, for example, argues that the adoption of soft law instruments is currently the most viable way to deal with space issues at international level. Tronchetti 2013: 85; Byrd 2022: 834; Neef 2021: 572–573; Ferreira-Snyman 2021: 34. Łukasz Kułaga also argues that over the past 40 years "general international space law has developed primarily through soft law instruments". Kułaga 2023: 28.

[52] United Nations 2019: 30.

states and other entities along with the development of international space law in a number of ways.[53] Among these, the following options deserve mention:

1. Soft law can provide guidance on the interpretation and implementation of the provisions of international treaties.[54]
2. Soft law can be the starting point of a process leading to an international treaty.[55]
3. Soft law can contribute to the development of customary international law.[56]
4. Soft law may be suitable for unification if its content is made binding in the national legislation of several spacefaring States.
5. Soft law can be declaratory in nature, setting unwritten rules that already exist in practice in international law.

Among these possibilities, it is worth paying particular attention to situations when a soft law document contributes to the development of customary international law. In order to achieve customary status, two conditions are necessary, namely the general and consistent practice of states and the so-called *opinio iuris sive necessitatis*.[57] These conditions can easily be met in case of soft law documents, which in fact means that if a soft law document is generally and consistently applied by states in practice and is regarded as law, it acquires the

[53] Tronchetti 2011: 624.

[54] Francis Lyall and Paul B. Larsen also emphasise this guiding character of soft law. The authors further argue that soft law can effectively complement binding rules on outer space, which in turn contributes to the effectiveness of space law. Lyall–Larsen 2009: 51–52. Peter Martinez explains that soft law material relating to a treaty can be considered an expression of subsequent practice in the application of the treaty and should be taken into account in the interpretation of the treaty under Article 31(3) of the 1969 Vienna Convention on the Law of Treaties. Martinez 2020: 531.

[55] This function of soft law is also mentioned by Laura C. Byrd. Byrd 2022: 834.

[56] Anel Ferreira-Snyman confirms that soft law can serve as a basis for binding standards in the future. Ferreira-Snyman 2021: 34–35. According to Peter Martinez, widely adopted and implemented non-binding technical standards, guidelines and other resolutions can be cited as evidence of customary international law. Martinez 2020: 531.

[57] Tronchetti 2011: 625.

status of customary law.[58] As a result, an originally non-binding document can become a legally binding norm.[59] This process, namely law-making through soft law documents, means that it is possible to influence the development of international space law through non-legally binding material without the strict requirements of international treaties.

The above-mentioned way of regulation may seem flexible and expedient and it can undoubtedly be useful, and even necessary in certain cases, especially when urgent action is required.[60] However, this process may also be open to abuse,[61] for instance to circumvent or undermine certain provisions of international treaties.[62] This may happen, for example, when states interpret an international treaty in the manner stipulated in a soft law document. If states regularly and consistently apply and invoke the originally soft law document in practice, and regard it as law, the document – and the interpretation contained in it – may gain customary law status and thus may become a legally binding norm. If this interpretation is consistent with the object and purpose of the original treaty, then no problem arises. However, it may also open up the possibility of a kind of disguised circumvention of the object and purpose of the treaty, which raises considerable difficulties.

The above-mentioned phenomenon can be illustrated by the example of the Artemis Accords. According to the document, the agreement is designed to provide a safe, transparent and sustainable framework for current and future space activities for the benefit of all humanity, and to promote international cooperation in space.[63] The Accords state that they aim to establish principles,

[58] Freeland–Yun 2020: 432. According to Tanja Masson-Zwaan, this is why soft law documents should not be underestimated, as they can become customary law and thus binding for states, given the right state practice and opinio iuris. Masson-Zwaan 2023: 47, 89.

[59] According to Fabio Tronchetti, this has already been the case for a number of UN General Assembly resolutions. Tronchetti 2011: 625; Aust 2010: 11.

[60] Peter Martinez argues that in some situations, soft law is preferable to a legally binding document. Martinez 2020: 562.

[61] Lyall–Larsen 2009: 51–52.

[62] Szalai 2018: [69].

[63] Artemis Accords, Preamble and Section 1.

guidelines and best practices to enhance the governance of the civil exploration and use of outer space with the intention of advancing the Artemis Program.[64]

In order to achieve the mentioned goals, the Accords lays down several principles, some of which merely repeat and confirm certain provisions of space treaties.[65] This is the case for those parts of the document that cover the peaceful uses of outer space, the provision of transparency and data sharing, the establishment of an obligation to provide emergency assistance and the requirement for registration. However, the document also contains two sections – namely sections 10 and 11 in connection with the exploitation of space resources and the creation of safe zones – that raise significant questions. Addressing these issues, several authors have claimed that the content of the Accords is incompatible with relevant rules of international space law,[66] as outer space and space resources are the common heritage of mankind, in connection with which any form of appropriation, acquisition of property or extension of state sovereignty is prohibited.[67] These authors argue that the Outer Space Treaty and especially the Moon Agreement govern these questions and that the mentioned rules have customary law status as well, irrespective of

[64] Artemis Accords, Section 1. Artemis is a multi-stage programme, one of the key goals of which is to put the first woman and the next man on the Moon in 2024 and establish a permanent presence there. The experience gained will be used for future expeditions to Mars. Mallowan et al. 2021: 156. The Programme is mentioned in the preamble and the first section of the Accords. Both parts state that the signatories intend to use the Accords to support the future exploration and use of space, in particular the Artemis Program. Artemis Accords, Preamble and Section 1.

[65] In this respect, the content of the Accords is in line with the objective of the preamble, which is to reinforce the provisions of the Outer Space Treaty, the Rescue Agreement, the Liability Convention and the Registration Convention. Artemis Accords, Preamble.

[66] Mosteshar 2020: 601–602.

[67] Hasin 2020: 105–106. According to Sa'id Mosteshar, the Artemis agreement in fact undermines certain provisions of the space treaties. Mosteshar 2020: 601–602. Many authors consider that security zones bear many similarities to territorial sovereignty, in that they provide for the possibility of exercising exclusive control over a territory, thereby infringing the right of free access to outer space. Ferreira-Snyman 2021: 31–32; Neef 2021: 570–572; Larsen 2021: 42–43.

the mentioned treaties.[68] According to these commentators, the customary status of the rules in question can be proved by reference to the preparatory materials for the Outer Space Treaty and the unanimous UN General Assembly resolutions adopted prior to the treaty.[69] However, other authors consider that the exploitation of space resources and the creation of safety zones is possible, because the Outer Space Treaty does not explicitly prohibit these activities and the existence of prohibiting customary transparency and data sharing, the establishment of an obligation to provide emergency assistance and the requirement for registration. However, the document also contains two sections – namely section 10 and 11 in connection with the exploitation of space resources and the creation of safe zones – that raise significant questions. Addressing these issues, several authors have claimed that the content of the Accords is incompatible with relevant rules of international space law,[70] as outer space and space resources are the common heritage of mankind, in connection with which any form of appropriation, acquisition of property or extension of state sovereignty is prohibited.[71] These authors argue that the Outer Space Treaty and especially the Moon Agreement govern these questions and that the mentioned rules have customary law status as well, irrespective of the mentioned

[68] These authors believe that Article II of the Outer Space Treaty prohibits all forms of appropriation, hence the prohibition on the acquisition of property and the extension of sovereignty extends to the celestial bodies themselves and their resources. They also argue that the Moon Agreement explicitly states that the acquisition of property and the extension of sovereignty are prohibited both on the surface and in the subsurface of the Moon, and that the collection and transport of natural resources is only possible for the purposes of scientific research, on the basis of the principle of equitable sharing and within the framework of an international regime for exploitation. Moon Agreement, Articles 6 and 11; Nagy–Jeney 2002: 368, 370; Pershing 2019: 151.

[69] Pershing 2019: 154, 156.

[70] Mosteshar 2020: 601–602.

[71] Hasin 2020: 105–106. According to Sa'id Mosteshar, the Artemis agreement in fact undermines certain provisions of the space treaties. Mosteshar 2020: 601–602. Many authors consider that security zones bear many similarities to territorial sovereignty, in that they provide for the possibility of exercising exclusive control over a territory, thereby infringing the right of free access to outer space. Ferreira-Snyman 2021: 31–32; Neef 2021: 570–572; Larsen 2021: 42–43.

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[73] Pershing 2019: 154, 156.

[74] These authors argue that neither the acquisition of ownership, nor the exploitation and sale of the internal material of celestial bodies, or for example asteroids can be considered prohibited activities. Punczman 2020: 40; Cheng 1997: 273; Zannoni 2020: 334. In connection with the legality of safety zones, several authors argue that there is also a so-called keep-out zone around the International Space Station, where special rules of conduct apply. Other authors have pointed to the legality of existing safety zones in maritime law, which are provided for in the 1982 UN Convention on the Law of the Sea at Montego Bay. Hasin 2020: 153; Mallowan et al. 2021: 160; Newsome 2016: 43–44.

[75] John S. Goehring, Elya A. Taichman, Gershon Hasin 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. Similarly, Ádám Punczman states that "the legal status of the commercial appropriation of celestial resources is questionable". Goehring 2021: 585–586; Taichman 2021: 114; Hasin 2020: 105–106; Mosteshar 2020: 598–600; Punczman 2020: 36.

[76] Hasin 2020: 80–81. This is reinforced by the fact that only 4 of the 193 UN member states have so far been able to collect samples from space. These states were the United States, the Soviet Union/Russia, China and Japan. Punczman 2020: 33–34.

Based on the above, arguments can be made both for and against the legality of the Artemis Accords. However, what seems to be clear is that the Artemis Accords is trying to exploit the uncertainties and shortcomings in the interpretation of the space treaties by setting out a particular interpretation of the disputed provisions of the treaties. According to this specific interpretation, safety zones may be established in outer space in order to act with due regard and to avoid harmful interference, and neither these zones, nor the exploitation of space resources, nor the commercial use of the resources exploited, constitute an appropriation.

By following the above-mentioned interpretation, the presumed aim of the United States is to create customary law in the field of space law, by disseminating the specific interpretation contained in the Accords as widely as possible.[77] This is evident, for example, from the Preamble of the document, which says that the Accords seeks to achieve global consensus on critical issues related to space exploration and use.[78] If a large number of states apply the parts in question of the Accords and if they regard it as law, accepting the binding nature of Sections 10 and 11, then all the conditions of customary international law may be met.[79]

This would, however, have a significant impact on Articles II of the Outer Space Treaty and Articles 6 and 11 of the Moon Agreement, which would be, in a sense, undermined by the customary nature of Sections 10 and 11 of the Accords.[80] The reason for this possibility is that there is no hierarchy between the sources of international law, so that international treaties and customary international law are on the same level. Thus, it is conceivable that, after an international treaty has been concluded between the parties, they may engage in contrary practices. In such a case, by virtue of the principle of *lex posterior*

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

[78] Artemis Accords, Preamble.

[79] According to Charles Elizey, the process is moving in the direction of making the interpretation of the Artemis Accords customary international law. Elizey 2021: 208.

[80] The term derogation refers to the creation of customary law contrary to an international treaty, which is described by the foreign word desuetudo. Szalai 2018: [69].

derogat legi priori, the later rule derogates from the earlier one.[81] In case of the Artemis Accords, this would mean that the States which have signed the document and followed its practice – in other words which have participated in forming customary international law[82] – would be bound by the content of the Artemis Accords as customary law, rather than by the above-mentioned provisions of space treaties. Thus, a kind of derogation of certain provisions of space treaties may occur.

Recognising these possible difficulties, several authors have drawn attention to the dangers of misusing soft law documents. In addition to the derogation of international treaties, some authors have pointed out another problem regarding soft law. In recent years these documents have often been regarded as representing the final stage in the legislative process, which means that members of the international community do not attempt to create a binding document to regulate a particular issue, but settle instead for an easily created non-binding soft law document.[83] In relation to this tendency, many authors argue that it would be more appropriate to consider soft law as a starting point or intermediate step in the process of legislation.[84] The author of this study also believes that the usage of soft law documents should only serve as an exceptional stop-gap solution and not a final method of legislation. This means that while soft law documents should be used in situations where it is not possible to wait for the creation of a binding norm due to time constraints

[81] In this respect, Anikó Szalai explains that customary international law rarely impairs the entire treaty, "but rather has a terminating effect only on certain provisions". Szalai 2018: [69].

[82] As Gábor Sulyok states: "states are bound only by the rules of international law which they have participated in creating or, if not, which they have expressly recognized as binding". Sulyok 2005: 68.

[83] Remuss 2011: 539. "As a result, the direction of development of law – which assumes that one should first negotiate a soft law document and then, on its basis, a treaty or other binding instrument – is no longer evident." Kułaga 2023: 28.

[84] Pecujlic 2017: 150.

or other circumstances,[85] members of the international community should continue to favour transparent, legally binding regulatory approaches.[86]

CONCLUSION

As this study has demonstrated, at present in the field of international space law, states are choosing to assert their interests and opinions through soft law instruments rather than adopting new binding international treaties or amending existing ones.[87] This is undoubtedly an easier and much quicker solution than concluding binding treaties, thus soft law documents can provide a flexible solution to issues that require urgent action. They can also help to adapt to new situations, technological developments and to reach agreements with entities outside states and international organisations.[88] They can be used for example to establish interpretative principles or forms of conduct that the signatories wish to follow and which – in time and with the necessary conditions – may become legally binding customary international law.[89]

However, the use of soft law instruments can also raise difficult questions, including the misuse of these materials, which may mean circumventing and undermining certain provisions of international treaties. Moreover, it is worth mentioning that this kind of misuse is not always entirely obvious, as the document may hide its real purpose behind interpretative issues. This is the case, for example, with the Artemis Accords, which seemingly aim to affirm the content of space treaties, while actually aiming to apply a special interpretation of certain provisions of the Outer Space Treaty and the Moon Agreement, thus creating customary international law.

[85] Masson-Zwaan 2023: 4.
[86] Lyall–Larsen 2009: 51–52.
[87] This tendency can be called a "turning away from multilateralism". Bartóki-Gönczy – Nagy 2023: 891.
[88] Lyall–Larsen 2009: 51–52; Kolb 2016: 270.
[89] Neef 2021: 578–580.

Based on all the above, it can be seen that the role of soft law instruments has changed significantly in the field of international space law during recent decades, particularly in the last few years. From being a simple, secondary tool that supplements hard law rules, soft law has nowadays become a primary tool for regulating and developing international space law.[90] Although the original use of soft law was to fill in the gaps created by the lack of further legally binding international treaties and norms, this category far exceeded this target, gaining a leading role in the legislation of outer space.[91] The questions and issues arising from this phenomenon should be addressed and resolved, with particular regard to defining the framework for this specific law-making process.

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[90] Steven Freeland and Zhao Yun argue that "more recently, a slightly different phase of soft law development for space activities has emerged". Freeland–Yun 2020: 416.

[91] Martinez highlights that soft law instruments have arisen as a pragmatic response to pressing problems by facilitating international cooperation and acting as a bridge between the formalities of treatymaking and the exigencies of international life. Martinez 2020: 564.

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