Contradictio in terminis or Realpolitik? A Qualified Plea for a Role of 'Soft Law' in the Context of Space Activities

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I. The issue of ‘soft law’ in the context of space activities

The ongoing globalisation of law and legal developments and the increasing diversity of actors, stake-holders and interest-holders in the international community over roughly the last seven decades has — amongst many other things — put considerable pressure on the traditional perception of ‘law’ and its role in the international community.

As will be argued, the more targeted discussions on ‘soft law’, whether it exists and if so what it means, form a specific component thereof. ‘Soft law’ instruments in this context could for instance purport to specify rules of conduct, but do not emanate from the traditional “sources” of public international law — a definition illustrating in a very clear manner the internal contradiction in the concept which will be shown to be at the core of the discussions about its existence and viability. Moreover, the issue, is not a merely academic one anymore, and for a variety of reasons the above is probably even more true in the area of space activities. It is also from this perspective that many analyses have addressed the Werdegang of space law from the dawn of the space age onwards.²

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1 Steven Freeland, The Role of ‘Soft Law’ in Public International Law and its Relevance to the International Legal Regulation of Outer Space, supra, 19 (emphasis added).
In terms of space law, so the story goes, it all started with a handful of internal administrative and/or non-legally binding United Nations General Assembly resolutions between 1958 and 1963, such as Resolutions 1348 (XIII)\(^3\) and 1472 (XIV)\(^4\) establishing the Committee on the Peaceful Use of Outer Space (UN-COPUOS) firstly as an ad hoc, then as a permanent committee, and Resolutions 1721 (XVI)\(^5\), 1962 (XVIII)\(^6\) and 1963 (XVIII)\(^6\) setting out some principles to be adhered to in the conduct of space activities.

A next phase, roughly encompassing the second half of the sixties and the first half of the seventies, saw the establishment of a handful of binding instruments: multilateral treaties, developed in the bosom of UN-COPUOS. The first four of those treaties — the 1967 Outer Space Treaty,\(^7\) the 1968 Rescue Agreement,\(^8\)

\(^3\) Question of the peaceful use of outer space, GA Res 1348 (XIII) of 13 December 1958; Resolutions adopted on the reports of the First Committee, General Assembly — Thirteenth Session, at 5.

\(^4\) International co-operation in the peaceful uses of outer space, GA Res 1472 (XIV) A of 12 December 1959; Resolutions adopted on the reports of the First Committee, General Assembly — Fourteenth Session, at 5.


\(^7\) Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (hereafter Outer Space Treaty), London/Moscow/Washington, done 27 January 1967, entered into force 10 October 1967; 610 UNTS 205; TIAS 6347; 18 UST 2410; UKTS 1968 No. 10; Cmdnd. 3198; ATS 1967 No. 24; 6 ILM 386 (1967). As of the moment of writing, the Outer Space Treaty has 100 States Parties in addition to 26 Signatory States.

\(^8\) Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (hereafter Rescue Agreement), London/Moscow/Washington, done 22 April 1968, entered into force 3 December 1968; 672 UNTS 119; TIAS 6599; 19 UST 7570; UKTS 1969 No. 56; Cmdnd. 3786; ATS 1986 No. 8; 7 ILM 151 (1968). As of the moment of writing, the Rescue Agreement has 92 States Parties in addition to 24 Signatory States.
the 1972 Liability Convention\(^9\) and the 1975 Registration Convention\(^{10}\) — were to enjoy widespread, almost universal adherence, especially (in particular with reference to the Registration Convention with its considerably lower overall number of States Parties) where it concerned those States active in or with regard to outer space.

A number of authors also considered the 1963 Partial Test Ban Treaty\(^11\) to be part of this core corpus juris spatialis, even though the treaty did not only concern the area of outer space but also the Earth's atmosphere and the oceans. Moreover, though enjoying ratification by a large group of nations, soon key States becoming threshold or near-nuclear powers turned out to not be amongst those nations raising major concerns regarding relevance and status of the legal regime as such. Meanwhile the development of a new, Comprehensive Test Ban Treaty\(^{12}\) has caused the legal situation to become even more complicated in this context, so these treaties will not be further taken into consideration.

In any event, the last truly multilateral treaty to arise out of United Nations-level negotiations and UNCOPUOS, the 1979 Moon Agreement\(^{13}\), turned

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\(^9\) Convention on International Liability for Damage Caused by Space Objects (hereafter Liability Convention), London/Moscow/Washington, done 29 March 1972, entered into force 1 September 1972; 961 UNTS 187; TIAS 7762; 24 UST 2389; UKTS 1974 No. 16; Cmnd. 5068; ATS 1975 No. 5; 10 ILM 965 (1971). As of the moment of writing, the Liability Convention has 90 States Parties in addition to 23 Signatory States.

\(^{10}\) Convention on Registration of Objects Launched into Outer Space (hereafter Registration Convention), New York, done 14 January 1975, entered into force 15 September 1976; 1023 UNTS 15; TIAS 8480; 28 UST 695; UKTS 1978 No. 70; Cmnd. 6256; ATS 1986 No. 5; 14 ILM 43 (1975). As of the moment of writing, the Registration Convention has 55 States Parties in addition to 4 Signatory States.

\(^{11}\) Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water (hereafter Partial Test Ban Treaty), Moscow, done 5 August 1963, entered into force 10 October 1963; 480 UNTS 43; TIAS 5433; 14 UST 1313; UKTS 1964 No. 3; ATS 1963 No. 26. As of the moment of writing, according to the US State Department's website (http://www.state.gov/r/isn/4797.htm; pages 7-9) the Partial Test Ban Treaty has 117 States Parties (94 having ratified, 23 having acceded to the treaty) in addition to 11 Signatory States. For completeness' sake, it should be added that the United Kingdom and Russia are the two other depositary States; their respective lists should, but may not exactly, match the list provided by the United States as depositary.

\(^{12}\) Comprehensive Test Ban Treaty, New York, done 24 September 1996, not yet entered into force; 35 ILM 1439 (1996); S. Treaty Doc. No. 105–28 (1997). As of the moment of writing, 154 States have ratified the treaty whereas 28 States have signed but not (yet) ratified it.

\(^{13}\) Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (hereafter Moon Agreement), New York, done 18 December 1979, entered into force 11 July 1984; 1363 UNTS 3; ATS 1986 No. 14; 18 ILM 1434 (1979).
out to fail precisely to achieve any measure of ratification by major space-faring States, causing most of the non-space-faring States at the time to also not bother with ratification. Whilst the number of ratifications over the last years has gone up slightly, it still remains at only 13 thirteen to this day — and none of the ratifying States could be called a major space power.\(^\text{14}\)

As a consequence of the lack of further probabilities, presumed apparent from the failure of the Moon Agreement, that the international community would ever be able to arrive at another treaty on outer space enjoying widespread acceptance, a third era was seen to come about, where resort was once more taken to such non-binding legal instruments as United Nations resolutions — major examples thereof being Resolutions 37/92,\(^\text{15}\) 41/65,\(^\text{16}\) 47/68\(^\text{17}\) and 51/122.\(^\text{18}\)

This development has been lamented in particular by a number of authors,\(^\text{19}\) and criticised for its non-binding character which threatened to create more confusion as to what the legal rights and obligations of relevant players were and/or should be, instead of hoped-for clarity regarding the direction the legal regime


\(^{17}\) Principles Relevant to the Use of Nuclear Power Sources in Outer Space, GA Res. 47/68 of 14 December 1992; United Nations Doc. A/AC.105/572/Rev.1, at 47.


of outer space was developing. Though perhaps understandable, even unavoidable in view of the growing number and diversity of actors and stakeholders in outer space and space activities, it was considered a major step backwards. After a 'golden era' of achieving near-global agreement on clear and binding legal regimes by means of the space treaties, apparently the best the international community could now come up with were non-binding sets of guidelines — some of them of a rather limited purport, too. A main example of the latter of course was Resolution 47/68, providing as it did rather technical guidelines for the safe handling of nuclear power sources in space adventures.

It is in this context in particular, that concepts such as 'customary international law' (as a means for interpreting *per se* non-binding documents in such a manner that they would after all contain some legally binding rules) and 'soft law' (as a status perceived to be in between legal rules which need to be obeyed and non-legal rules which legally speaking can be disregarded) became heavily discussed, almost as an effort to fill the gaps left by the inability to agree on a world-wide scale on further treaty regimes.

Also the present book contains several contributions undertaking analyses of these phenomena, which is why the present contribution has chosen another angle of approach. This chapter namely takes a step back, almost outside of the realm of law itself, in order to take a fresh look at those debates on whether 'soft law' exists and, if so what it is — and then of course come back to the main question posed here as to whether it would be a useful or on the contrary counterproductive notion from the perspective of furthering the cause of space law.

II. The characteristics of 'law' and '(international) space law'

Whenever the role of 'soft law' is discussed in the context of space activities, it is usually the *public international* body of space law which is addressed, at heart still part of the larger body of public international law. True, with the extending

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role of intergovernmental cooperation in outer space and the increasing privatisation of space activities, 'internal' institutional arrangements respectively domestic private law may continuously gain in importance.

Yet, those more novel legal 'systems' are still fundamentally contingent upon the public corpus juris spatialis internationalis, most notably through such concepts as State responsibility,\(^21\) State liability for damage caused by space objects,\(^22\) and jurisdiction over space objects specifically through their registration by one State or another.\(^23\) In other words: States are still, certainly in legal terms, the key factors in space law. This also continues to justify addressing the issue of soft law in such a public international law-context in particular.

Public international law in its turn is of course part of the comprehensive body of all law, and here it should be noted that 'law' usually is considered a social construct, one social tool among others for helping to hold a society of humans together in a meaningful manner. It distinguishes itself from other such social constructs — ranging from religion to currency, from social and political norms to a common (sense of) history — by its formality and consequent relative precision and objectivity, incorporating its own system for adaptation and change of itself, and working through concepts that in principle everyone within such a society is subjected to, that normally most within that society subscribe to for the major part and that can, in one way or another, be enforced against those that may not wish to be subjected or subscribe to it at a certain point in time — in short: 'hard' law.

This is probably also why lawyers, including space lawyers, with a view to confident argumentation in first instance tend to attach greatest value to clearly phrased and written rules of law, and might often not be very sympathetic to the possibility of the existence of 'grey' areas where it would be rather uncertain whether such rules are binding or not, where the legal value would not simply be '0' or '1' but might well be vacillating somewhere in between.

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\(^21\) Cf. Art. VI Outer Space Treaty, providing for international responsibility inter alia for space activities 'carried on [...] by non-governmental entities' and consequently requiring the appropriate State to exercise 'authorization and continuing supervision'.

\(^22\) Cf. Art. VII Outer Space Treaty, jointly with Arts. 1(c), II–V Liability Convention, providing for liability for damage caused by space objects exclusively through the concept of 'the launching State'.

\(^23\) See Art. VIII Outer Space Treaty, jointly with Art. II, Registration Convention. By means of those provisions, a fundamental right for a State to exercise jurisdiction over registered spacecraft and their personnel is added to the 'traditional' accepted bases for exercising State jurisdiction, notably of territoriality of events at issue and of nationality of those entities or persons responsible for them.
Within this general conception of ‘law’ as a social construct public international law, including space law, concerns a body of law which distinguishes itself from other bodies of law through a number of features elsewhere discussed in much more precision and legal detail, but essentially amounting to the following.

Firstly, in line with the public character already noted briefly, public international law is a body of law dealing with issues involving various States. Traditionally, States even were the only subjects of public international law, but especially since World War II in many cases international intergovernmental organisations, companies and individual persons also acquired a measure of legal personality in the international field. Still, and in spite of the fact that this may not always be representative of political or economic reality, this concerns generally limited manifestations of international legal personality; States remain the only international law subjects across the whole spectrum of public international law. As a result, in many respects, the rights (and duties) of other actors in the international arena are still taken care of in legal terms through one State or another.

In space law specifically this is even more true due to the military and strategic considerations almost always prominently present in the context of space activities, the benefits from outer space ventures which were for a long time considered to be either in that realm or in the scientific one, as well as the size of costs and risks involved in going into outer space. Those factors, at least for the first few decades, caused space activities essentially to be beyond the reach of private enterprise — and even beyond the reach of many individual nations, causing them in some cases to cooperate together through international, more or less institutional (but certainly still public) constructs such as the international satellite operators INTELSAT and INMARSAT, and the European

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24 Following the realisation of an interim-organisation, INTELSAT properly was established as an international public consortium in 1971 by means of the Agreement Relating to the International Telecommunications Satellite Organisation (INTELSAT), Washington, done 20 August 1971, entered into force 12 February 1973; 1220 UNTS 21; TIAS 7532; 23 UST 3813; UKTS 1973 No. 80; Cmd. 4799; ATS 1973 No. 6; 10 ILM 909 (1971); and the Operating Agreement Relating to the International Telecommunications Satellite Organisation (INTELSAT), Washington, done 20 August 1971, entered into force 12 February 1973; 1220 UNTS 149; TIAS 7532; 23 UST 4091; UKTS 1973 No. 80; Cmd. 4799; ATS 1973 No. 6; 10 ILM 946 (1971). Of course, more recently INTELSAT was privatised, causing a rump-IGO INTELSAT to co-exist side by side with a private operator Intelsat.

25 INMARSAT was established as another international public satellite operating consortium in 1976 by means of the Convention on the International Maritime Satellite Organisation (IN-
The resulting and — in spite of the developments mentioned — still persisting key role of States in space activities was of course also reflected fundamentally in the *corpus juris spatialis*. The Outer Space Treaty refers to 'non-governmental entities' just once, and to intergovernmental organisations only as vehicles for international cooperation of sovereign States. None of the space treaties following the Outer Space Treaty refers in any more detail to 'non-governmental entities', and though intergovernmental organisations have been granted a certain legal possibility to become 'quasi-parties' to those treaties, these possibilities (a) are limited to the material clauses of the treaty at issue and do not encompass for example the right to propose amendments; (b) are subject to the requirement that the individual member States of such an organisation can always be held responsible in conformity with Art. VI of the Outer Space Treaty if the organisation itself fails to appropriately answer to such responsibility; and in the case of the Liability Convention (c) exclude the possibility for direct claims by an intergovernmental organisation whilst allowing claimants against such an organisation to address the individual member States in case the organisation itself fails to rapidly solve the claim.

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26 ESA was created by the Convention for the Establishment of a European Space Agency (hereafter ESA Convention), Paris, done 30 May 1975, entered into force 30 October 1980; 14 ILM 864 (1975); *Space Law — Basic Legal Documents*, C.I.1.

27 In Art. VI Outer Space Treaty; see also supra, fn 21.

28 Cf. Art. VI Outer Space Treaty, making member States of an intergovernmental organisation active in outer space responsible for those activities rather than the organisation itself, and Art. XIII, Outer Space Treaty, which refers to such organisations as a 'framework' within which the States concerned carry out space activities.

29 Cf. Art. 6 Rescue Agreement; Art. XXII Liability Convention; Art. VII Registration Convention; and Art. 16 Moon Agreement.

30 See Art. XXII (3) Liability Convention, which provides: 'If an international intergovernmental organization is liable for damage by virtue of the provisions of this Convention, that organization and those of its members which are States Parties to this Convention shall be jointly and severally liable; provided, however, that: (a) Any claim for compensation in respect of such damage shall be first presented to the organization; (b) Only where the organization has not paid, within a period of six months, any sum agreed or determined to be due as compensation
Secondly, in many respects, general public international law has often been considered a rather rudimentary and 'immature' or embryonic legal system, causing some even to question it is truly law in the first place. The arguments supporting such statements usually focus on the general absence of a global adjudicative system (even the World Court essentially depending upon individual parties to a dispute for being entitled to exercise jurisdiction\(^{31}\)) and, even more, an effective enforcement regime (the United Nations Security Council, the closest thing to an international policeman, being entitled to act with force against unwilling member States only in rather restricted circumstances, as further compromised by the political reality of superpower vetoes\(^{32}\)). Since the general rules of public international law, including the United Nations Charter, are considered to be applicable also to outer space (unless under the *lex specialis derogat lex generalis* principle specific and different space law provisions would be pertinent) these considerations would also automatically apply to the *corpus juris spatialis internationalis*\(^{33}\).

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31 Cf. the famous jurisdictional clause of Art. 36 Statute of the International Court of Justice (hereafter ICJ Statute), San Francisco, done 26 June 1945, entered into force 24 October 1945; 156 UNTS 77; USTS 993; 59 Stat. 1031; UKTS 1946 No. 67; ATS 1945 No. 1: '1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force. 2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation. 3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.' In addition, the so-called *forum prorogatum* concept allows the ICJ to entertain jurisdiction once parties are seen to have silently accepted such jurisdiction through asserting arguments on the merits of a dispute before the court.


33 See of course especially Art. III Outer Space Treaty, which transfers this assumption into an explicit and official part of space law. Thus, whenever specific space law provides for insufficiently clear or disputed legal rules, or whenever it does not provide for any legal guidance at all, reference should be had to general public international law to solve a particular issue or dispute.
More to the point, the embryonic nature of public international law means that its main subjects — the States — can still largely determine individually which part of that legal order to accept and live by. In their sovereignty, they can choose to sign and ratify a particular treaty — or refuse to do so; treaty law of course being one of the two major recognised and accepted sources of international law.\footnote{See Art. 38 (1) Ite a ICJ Statute; with Art. 38 as such, as Freeland, supra, at 13–15, correctly observed, widely being understood as reflecting the sources of public international law in general terms (as opposed to just for the purpose of solving a case before the ICJ).}

In terms of space law specifically, the discussions regarding the terms of the Moon Agreement are quite illuminating in this regard. The major novelty of the Moon Agreement as compared to the previous space treaties developed in UNCOPUOS was its insistence on the Moon and its natural resources being ‘the common heritage of mankind’,\footnote{Art. 11 (1) Moon Agreement.} as presumably different from the concept of the ‘province of all mankind’ which the Outer Space Treaty’s Article I makes reference to.

Whilst the precise terms of what the ‘common heritage of mankind’ in the context of lunar exploration and exploitation was to mean had yet to be worked out, with an eye to roughly parallel developments in the context of the law of the sea and the ocean floor States and legal experts alike commonly understood the concept to refer to some form of obligatory revenue-sharing and technology transfers,\footnote{The United Nations Convention on the Law of the Sea, Montego Bay, done 10 December 1982, entered into force 16 November 1994; 1833 UNTS 3 & 1835 UNTS 261; UKTS 1999 No. 81; Cmnd. 8941; ATS 1994 No. 31; 21 ILM 1261 (1982); S. Treaty Doc. No. 103-39; in its Part XI contained a rather elaborate scheme for revenue-sharing and technology transfers in the context of exploiting the ocean floor, involving international entities to be created such as The Authority and The Enterprise.} which caused most States, including all major space powers, to abstain from ratifying.\footnote{For a more extended analysis of these issues, cf. especially Tronchetti, supra fn 14, 38–61; also Henry Hertzfeld and Frans von der Dunk, Bringing Space Law into the Commercial World: Property Rights without Sovereignty, 6 Chicago Journal of International Law (2005) 81; the author’s The Moon Agreement and the Prospect of Commercial Exploitation of Lunar Resources, XXXII Annals of Air and Space Law (2007) 91.}

In the light of the widespread failure to ratify the Moon Agreement, staunch supporters of the ‘common heritage of mankind’ idea would then come up with arguments that, independently from the treaty text, the concept would be bind-
As far as the treaty itself was concerned, however, legal analysis clearly could and did come to only one conclusion. As much as in the context of the preceding UN COPUOS discussions the States refusing adherence had not indicated any strong antagonism (otherwise UN COPUOS would never have been able to arrive at an agreed draft text in the first place!), the primordial sovereign right of States to change their minds prevailed. This sovereignty, entitling them to determine for themselves which treaties to adhere to and which not, could only mean that refusing States could not in any measure consider to be bound by whatever the Moon Agreement provided above and beyond what was already in the other space treaties, general international law and had obtained the status of 'customary international law' as applicable to those States.

That brings discussion to the other major source of international law, where things are somewhat more complicated. From an outside perspective 'customary international law' is not so much a source or body of law arising through a clear and formal process as characterises treaty law, but a label stuck by relevant States and at least a majority of international law experts on developments happening in political, economic, social and other non-legal terms. Such labels are accorded on the basis of an analysis of these developments as recast in terms of 'State practice' and 'opinio juris', and thus almost inevitably involve a far greater measure of insecurity — read subjectivity — than treaty law as to whether a certain legal rule exists or not. Still, similarly to treaty law, States can through their own 'practice' and 'opinio juris' essentially determine which purported rules of customary international law they choose to abide by, respectively refuse to abide by, for example by becoming 'persistent objectors'.

With regard to the discussion on customary law specifically in the context of space law the developments concerning United Nations Resolution 41/65, containing the principles on remote sensing, are particularly illustrative. The

38 Cf. Art. 38(1.b) ICJ Statute; see also supra, fn 34.
Resolution, as a United Nations General Assembly resolution *per se* being non-binding, had been accepted by ‘consensus’ — a concept meaning no United Nations member State felt sufficiently ‘threatened’ by its principles to express serious doubts about or objections to its text.41

Moreover, at least in the eyes of many beholders, the *de facto* adherence of most relevant States to the key concepts of the resolution — ‘access [by the sensed State] to (...) [primary data and processed data concerning the territory under its jurisdiction] on a non-discriminatory basis and on reasonable cost terms’ and ‘access to the available analysed information concerning the territory under its jurisdiction in the possession of any State participating in remote sensing activities on the same basis and terms’42 — transformed the relevant, as such non-binding, principles into customary international law.43 The present analysis will address this particular example further below.

Reverting to general public international law for the moment, only by way of the interrelated concepts of *jus cogens*44 and obligations *erga omnes*45 has international law been able to nibble away at the fundamental self-regulatory character of public international law as viewed from a narrowly legalistic perspective. The essential element of these concepts for the present purpose is that States which have persistently refused to ratify relevant treaties and whose State practice and *opinio juris* clearly go against relevant perceived rules of customary international law are also still bound to a rule once it has achieved the elevated status of a rule of *jus cogens* and an obligation *erga omnes*. The classroom example is of course the

41 See on the concept of ‘consensus’ e.g. Erik Suy, Consensus, in: Bernhardt, ibid., 759–60.
43 Interestingly, by way of a side note, this then also lead to a discussion as to whether to trans­form the Principles into a proper treaty — as its main contents had already become binding by now anyway, and the original resistance against a treaty should consequently have disappeared — or simply leave them as is — since they were already binding anyway.
apartheid-era South Africa\textsuperscript{46} — but the threshold for a rule to reach the necessary status is very high.\textsuperscript{47}

In terms of space law, though efforts have from time to time surfaced to establish such an elevated normative status for example with respect to the 'common heritage of mankind' concept or the right of remotely sensed States to control the generation and distribution of data regarding their respective territories, the absence of a large consenting majority across various groups of nations — usually seen as necessary for fulfilling the requirement of acceptance and recognition by 'the international community of States as a whole'\textsuperscript{48} — has caused such efforts to fail throughout.

Other than generally acknowledged prohibitions of such international crimes as aggression against sovereign States, genocide and racism, which also apply to outer space and space activities, space law does not know of any specific instances of \textit{jus cogens} respectively obligations \textit{erga omnes} — meaning, essentially, that unless a specific State's ratification of a relevant treaty can be shown or its relevant State practice and accompanying \textit{opinio juris} can be discerned, that State maintains its fundamental sovereign discretion in choosing whether to adhere or not to a specific presumed rule of space law.

Of course, the above has so far steered clear of the discussion on the specific concept of 'soft law'; it is submitted, however, that it serves as a necessary or at least helpful preliminary analysis to that particular discussion as it highlights the general tendency of space lawyers to prefer clear legal guidance by way of 'hard' law over the various legal complexities and uncertainties inherent in applying a concept such as 'soft law'. This brings us back to the general character and perceived role of law in general in the first place, before finally addressing the issue of soft law in the context of space law and space activities.

\textsuperscript{46} See e.g. Jost Delbrück, Apartheid, in: Bernhardt, \textit{supra} fn 40, 193–194, and literature quoted there.

\textsuperscript{47} Cf. Art. 53 Vienna Convention on the Law of Treaties, which requires such a norm to be 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'; also Art. 19 ILC Draft Articles on State Responsibility, Yearbook of the ILC (1980 II, 2), 32, on 'international crimes'.

\textsuperscript{48} Art. 53 Vienna Convention on the Law of Treaties; \textit{supra}, fn 47.
III. The role of 'law' per se in the context of space activities

Law has been referred to above as a social construct for helping a society of humans to hold together. This, it is submitted, in very general terms also constitutes the cause of space law to be furthered inter alia by the present analysis. Of course, in the context of public international law, the 'society' at issue is the international community, and as this has historically developed, the legal construct of the (sovereign) 'State' essentially worked by grouping the humans concerned together in a manner considered necessary for a feasible international legal order. Also in this context, however, the general aim and role of 'the law' is generally given shape along two alternative, sometimes even conflicting lines.

The first line is what one might call 'legal morality'. Whether such a goal is actually achieved at any given point in time may be largely a matter of perception, but the law is usually expected to mirror (at least essentially and largely) some form of 'justice' in the moral and ethical sense of the word, and perceptions of what is right respectively wrong in the society at hand. A piece of law that is considered fundamentally unjust by a majority of members of the relevant society is not destined for longevity.

This holds true even more for international space law as a branch of public international law in view of its self-regulatory character. In the absence of legitimacy in the eyes of most States, in particular space-faring ones, any effort to establish a new rule of space law will of necessity be stillborn, as these States will simply refuse to adhere to any treaties giving expression to such a rule and/or to behave in any manner allowing for the label of 'customary international legal obligation' to be stuck on it. The Moon Agreement's fate is the obvious space law-example thereof.

From the same perspective therefore, the whole discussion on the 'common heritage of mankind', referenced above, abounds with moral and ethical claims that the developing nations should not be deprived of any possibility to enjoy the benefits of outer space activities — notably, in this case, mineral and other resources of the Moon and other celestial bodies — merely because their technological and financial development is lagging behind that of 'more fortunate' States. Application of the 'common heritage of mankind' principle was aimed

49 The same 'morality' and ethical considerations were behind the broad concept of the 'New International Economic Order' which gained prominence in the years immediately before the Moon Agreement started to be drafted and was most explicitly given expression by means of
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at redressing those inequalities by mandatory revenue-sharing and technology transfers.

Also the ultimate denial of world-wide acceptability of the concept was often dressed in moral terms. Apart from stifling any interest in trying to harvest those celestial resources (a more practical argument), it was simply considered immoral by many to force those willing to take the risks and pay the price to try and harvest celestial resources to share any possible — but certainly not guaranteed — revenues or other benefits with those who had not undertaken any effort in that direction whatsoever.

International law, including space law, has always tried to properly incorporate such considerations in more formally-legal discussions through concepts like 'equity' and 'ex aequo et bono'.

Similarly, in the debate on the applicability of Resolution 41/65's principles on remote sensing as legal obligations, essentially moral claims regarding the inherent right of a State to receive any information regarding its own territory acquired by other States or entities had to be balanced with the essentially moral claims that States which spent huge efforts and took large risks in developing, launching and operating remote sensing satellites could not be forced to simply share any resulting data with others who did not employ such efforts or take such risks.

The above also brings us to the second line along which to achieve law's aims in terms of organising society, of what one might call 'legal practicality'. Whatever law results from the law-generating processes at issue, it should be practical at least to a certain level — meaning that it should be understandable to the subjects at issue and be not overly complicated. Even more importantly and fundamentally, however, practicality requires that the law provides for a maximum of predictability of the behaviour of the other subjects of the law — in the case of international (space) law: States, as the predominant legal actors and personali-

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50 Cf. e.g. Art. XII Liability Convention, on how to determine the appropriate compensation for damage caused by a space object.

51 As already referenced in Art. 38 (2) ICJ Statute.

52 Cf. the phrasing of Principles II–VI, XII, XIII Principles Relating to Remote Sensing of the Earth from Outer Space.
ties grouping together actual humans — in the society at issue. Law thus has an
innate tendency towards stability — in positive terms — alternatively immobility
and inflexibility — in more negative terms.

Part of such predictability furthermore lies in the simple fact that 'law' em­
braces its own relative immobility by including specific, by nature somewhat
laborious, even occasionally bureaucratic processes which ensure that law cannot
be changed at a whim or otherwise instantly — otherwise, we call it 'revolution'.
Thus, most treaties, including the space law treaties, explicitly provide for their
own mechanisms for changing the substance of their legal regimes.\(^53\)

The practical element in the discussions regarding the 'common heritage of
mankind' and 'non-discriminatory access' to remote sensing data has already
been referred to, but in those cases the practical element is at least very much
intertwined with the moral one (certainly on one side of the argument). Many
more legal rules, of course, are practical without further ado — there is no inher­
ent 'justice' in driving on the right side of the road as opposed to driving on the
left side (as British, Indians and some others are no doubt keen to assert), but
one way or another a choice has to be made in order for traffic not to result in
immediate chaos and destruction.

Also in space law a number of rules are predominantly or exclusively driven
by such practicality concerns, especially as 'outer space' is becoming ever less a
realm where only States can really be active. From the details of the registration
parameters to be provided for purposes of the international register of space ob­
jects launched into outer space key to the involvement of the United Nations
therein,\(^54\) the applicable provisions of the Registration Convention do not have
much to do with 'justice' or an inherent moral superiority of the United Nations
but everything with practical considerations.

To quote another example, also the current regime for handling international
liability resulting from space activities, focused on the concept of the 'launching
State' of a space object as the State(s) fundamentally involved in the launch of a
space object causing damage, was to a large extent driven by practical considera­
tions. Notably the State whose territory and/or facility was used for the launch of
the space object at issue\(^55\) would always be easy to identify, and hence allowed for

\(^{53}\) See e.g. on amendments Art. XV Outer Space Treaty; Art. 8 Rescue Agreement; Art. XXV
Liability Convention; Art. IX Registration Convention; and Art. 17 Moon Agreement.
\(^{54}\) Cf. Arts. III, IV Registration Convention.
\(^{55}\) Cf. Art. I (c) sub (i) Liability Convention; also Art. VII Liability Convention.
Contradictio in terminis or Realpolitik

It is now that these considerations, in particular with a view to private operators actually in control of satellite operations, seem to lose much of their practicality, many experts start expressing doubts about the continuing viability and workability of this system for allocating liability.

These two rationales which are basically behind all law result already in inherent tensions and, certainly in space law, the self-regulatory character allows States by and large to strive for their own individual balance in terms of the legal regime they would feel comfortable adhering to. Whereas changed perceptions of justice, morality and ethics regularly call for adaptation of law, the law itself has in-built resistances to change as part of its practical usability: the more it takes to change existing law, the more predictable the behaviour of its subjects continues to be. At the same time, this may, in turbulent times in particular, cause the law to considerably lag behind moral and ethical developments (not to mention political, economic and social developments), sometimes even fundamentally calling into question the *raison d'être* of law. Those times often are also those when efforts to bring ‘soft law’ to the fore are most prominent, trying to circumvent ‘hard’ law’s innate immobility in presenting essentially non-legal constructs as ‘soft law’ and thus endowing them with some legal meaning one way or another.

This brings the meta-legal analysis to a final important aspect, which in the context of space law is even more dominant than it is in general public international law in view of the omnipresent military and dual-use aspects of space activities. This relates to the character of the international community as often turning into an international arena, where States are always dedicated most to their very own survival or at least general well-being in that area.

In terms of adhering to international law, whether by ratifying treaties or by being seen to accept customary international law — more often perhaps for the sake of predictability than that of justice — this leads to another major inherent tension. States are often — certainly on the key issues playing in the international community — somehow looking to limit the freedom of action of those other States considered particularly threatening to their own survival and well-being, whilst keeping maximum freedom for themselves and States considered friends or allies. Finding the optimum balance here is the basic driver for foreign ministries and departments, when entering any relevant treaty negotiations, in pushing for specific treaty obligations to be drafted. 56

56 An interesting example concerns Art. IV Outer Space Treaty, which precludes the stationing of
This may also cause States in general to be rather careful in adhering to specific treaties, as these are more precise and leave less room for *bona fide* discretion in undertaking certain activities. In particular in such a rapidly developing area as space activities — in political, economic, but certainly also technological terms — States would prefer not to bind themselves at the outset to such precise systems of legal rules, being weary of the chance that unexpected consequences of such adherence might arise.

The consequently larger role of customary international law in this context — or, perhaps more accurately, the larger tendency for States confronted with a legal issue and legal experts to look for customary law in the absence of applicable treaty law — certainly contributes to the aforementioned perception of immaturity of international (space) law, but also causes the discussion on the role of 'soft law' (past, present and future) to be more prominent and less theoretical in this context.

### IV. 'Soft law' and space activities: a qualified plea

Against the backdrop of the foregoing, finally, it is indeed possible to address the issue of 'soft law' in the context of space activities from a rather different angle. It may now be asserted, for example, that much of this discussion on 'soft law' concentrates on the seeming internal contradiction between *law*, which presupposes binding ('hard') rules of behaviour not subject to the own discretion of the law's subject, and *soft*, which seems to refer to political, social or moral requirements *not* expressed in legal terms and hence allowing for precisely such discretion in applying relevant 'rules'.

Those who do not accept the concept of 'soft law' usually argue along the lines of *one cannot be just a little pregnant; either one is pregnant, or one is not pregnant* — meaning that either something is 'law', in which case it is binding ('hard'), or it is 'soft', in which case it may be a number of different things but certainly not 'law'.

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Weapons of mass destruction in outer space — but *a contrario* allows for using outer space as a trajectory for weapons of mass destruction as well as stationing weapons not of mass destruction, simply because neither the United States nor the USSR at the time (a) wanted to limit their own options with respect to the latter two military uses of outer space; (b) were themselves planning using outer space as a 'station' for weapons of mass destruction; or (c) would like to provide the other party with the legal freedom to start doing so.
Firstly, here, the distinction between a formal and a substantive analysis of the issue of ‘soft law’ needs to be taken into account — and sometimes seems lost in the argumentation. Under the former analysis, ‘law’ is everything encompassed in documents considered to bind a certain group of subjects (read: treaties), whereas ‘non-law’ is by contrast everything contained in documents considered not to be formally — legally — binding (read, for example, United Nations General Assembly resolutions).

Under the latter analysis, the measure of legally binding force of a provision is determined by the substance of that provision. In expert discussions, this is often summarised with reference to the dichotomy between ‘shall’ — which clearly points to a legally binding obligation — and ‘should’ or ‘may’ — where the issue becomes considerably more complicated. And unfortunately, the use of ‘shall’ is not exclusive to formally legally binding documents, or the use of ‘should’ and ‘may’ to formally non-binding documents.

If a treaty, clearly per se a binding legal document under a formal analysis, uses the wording ‘should’ or ‘may’ instead of ‘shall’,57 the result is still a legal obligation, yet in substance it contains more of an exhortation than a legal obligation — it seems rather convoluted to ‘oblige’ someone ‘to be allowed’ to undertake certain activities.

This is, however, what repeatedly is at issue in the case of the space law treaties. Consider, for example Article 1 (b) of the Rescue Agreement providing that ‘the Secretary-General of the United Nations [...] should disseminate [...] [relevant] information concerning spacecraft accidents’,58 or Article 4 of the Moon Agreement providing ‘[i]nternational cooperation in pursuance of this Agreement should be as wide as possible and may take place on a multilateral basis, on a bilateral basis or through international intergovernmental organizations’.59 In legal discussions such (apparent?) inherent contradictions are usually referred to as ‘obligations of effort’ (as opposed to ‘obligations of result’), at least if they appear in documents legally binding per se (following the formal analysis).

However, ultimately there is no escaping from the question: is this, then, law or not? Under the formal approach it is, but since it is rather difficult to determine objectively for example the real level and sincerity of any ‘effort’ in this

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57 Cf. e.g. Art. IV (2) Registration Convention: ‘Each State of registry may, from time to time, provide the Secretary-General of the United Nations with additional information concerning a space object carried on its registry.’ (emphasis added.)
58 Art. 1 (b) Rescue Agreement (emphasis added).
59 Art. 4 Moon Agreement (emphasis added).
context, is it in substance not a rather 'soft' rule? Should it, then, be labelled 'soft law' or 'hard law'? Is it possible after all that there is something in between 'law' and 'non-law', where 'hard' treaty law sometimes contains elements of what at least feels like 'soft law', as it allows States a lot of discretion in actually interpreting substance and extent of the 'obligation' at issue?

Similar arguments could be advanced when the terms of a treaty are, on purpose or not, so vague as not to provide much guidance as to what the 'hard' obligation actually means. Treaties properly ratified and having entered into force are of course binding upon the States concerned as 'hard law', but what if they provide for obligations too general or too vague to be useful in any particular dispute? Consider for example the Outer Space Treaty's provision that '[i]n the exploration and use of outer space, including the Moon and other celestial bodies, States Parties to the Treaty shall be guided by the principle of cooperation and mutual assistance'.

Or, following a very fundamental tenet of space law, '[t]he Moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes' — yet it is common knowledge that this provision has for a long time been interpreted rather differently by the two major space powers. And what does 'to the greatest extent feasible and practicable' mean, when juxtaposed to a formal and formally phrased obligation in the context of the provision of information on potentially hazardous space activities?

Another key clause of the 1967 Outer Space Treaty formally requires that States 'shall carry on activities in the exploration and use of outer space [...] in

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60 Art. IX Outer Space Treaty (emphasis added).
61 Art. IV, 2nd sentence Outer Space Treaty (emphasis added).
63 E.g. Art. XI, Outer Space Treaty. Cf. also e.g. Art. IV(3) Registration Convention, which provides for almost identical language in respect of a certain obligation to provide information on space objects launched into outer space.
the interest of maintaining international peace and security and promoting international cooperation and understanding," 64 and this has been claimed ever since its inception by many States and experts to actually provide for a clear-cut obligation to cooperate internationally. 65 Yet, the nature of international cooperation, whether one looks at the non-legal realities of the international community or at the realities of how general international law has dealt with international cooperation would not allow any State to force another State to 'cooperate' by pointing at such a presumed legal obligation. In the end, it took the 1996 Resolution 51/122 to provide some clarity and guidance regarding the actual contents, scope and extent of this 'obligation of effort'.

Also examples the other way around can be found in space law. Resolution 41/65 on remote sensing for example provides that '[r]emote sensing activities shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic, social or scientific and technological development, and taking into particular consideration the needs of the developing countries', 'shall be conducted in accordance with international law' and 'shall be conducted in accordance with the principles contained in article I' of the Outer Space Treaty. 66 The phrase 'shall' normally being considered to refer to a 'hard', legal obligation, of course the United Nations General Assembly does not have any such competence per se to have a resolution provide for such binding, 'hard' law.

In many such circumstances, then, reference needs to be made to State practice and opinio juris to try and discern a more or less coherent customary rule of international law, 'filling in' as it were the lack of precision of the treaty terms or, alternatively, the lack of innate binding force of guidelines and principles such as contained in United Nations General Assembly resolutions.

Not that this always results in clarity regarding the extent of the legal obligation at issue: certainly with regard to the aforementioned obligations regarding

64 Art. III Outer Space Treaty (emphasis added).
66 Principles II, III, IV Principles Relating to Remote Sensing of the Earth from Outer Space, respectively (emphasis added).
the provision of information under the Registration Convention.67 State practice shows a wide disparity in the extent States have considered it ‘feasible and practicable’ to register satellites in accordance with these provisions — or even apparently considered it not to be ‘feasible and practicable’ at all to register them.68

Another notorious example concerns Resolution 41/65, where the key provision on ‘non-discriminatory access’ of a sensed State concerning data regarding its territory69 has been argued rather widely to have evolved into a rule of customary law — the reference in many leading national space laws and policies concerning the handling of remote sensing data being used as decisive evidence of State practice and opinio juris.70 However, upon closer view it appears that, whilst indeed referencing in most cases Principle XII of the resolution which is at issue here, the individual legislators and policy makers proceeded with giving that Principle their own, peculiar interpretation. In many cases, such interpretations still allow for ‘discrimination’ (a) between those who contributed to the satellite system generating the remote sensing data and those who did not, and (b) between non-commercial and commercial users (however defined); and/or (c) between those using the data for specific purposes (again, however defined).71

What, then, is the meaning or even value of customary legal status of the phrase ‘non-discriminatory access’ if one level down it turns out to be interpreted in widely different fashion?

Moreover, it should be reiterated that customary international law itself is not a clear-cut phenomenon either. Whereas a treaty becomes binding from one moment to the other — by its entry into force in general, or for a particular State upon its ratification or adherence — a customary rule of international law usually arises gradually, moving on a ‘gliding’ scale from ‘no State practice and/or opinio juris’ to ‘sufficient State practice and opinio juris’ to be accepted as customary law by (a majority of) relevant States and legal experts. As a conse-

67 As per Art. IV Registration Convention, in particular.
68 See e.g. Yoon Lee, Registration of space objects; ESA member states’ practice, 22 Space Policy (2006) 42, 44.
69 As per Principle XII Principles Relating to Remote Sensing of the Earth from Outer Space.
Contradictio in terminis or Realpolitik?

Consequent, contrary to treaty law, it is almost never possible to pinpoint an exact moment when the rubric between 'no customary law' and 'customary law' is crossed — rather, there is a 'soft' marsh of some width in between two 'hard' shores.

Therefore, in the discussion on 'soft law', too often it seems to be overlooked that 'law' not only represents a given status, a snapshot at a given moment of what is allowed and what is not, but also (certainly at the international level, which is also where space law largely originates) refers to a process of arriving at such a snapshot at any given time. In other words, there are different gradations of 'pregnancy', which after all starts from an infinitesimally small element to wind up with a full-blown living being — which then continues to grow old and transform itself throughout its life.

It is in the context of such processes that any concept of 'soft law' should best be analysed and discussed as to its value, in particular also in the area of space law where international treaties — the instruments most clearly transforming 'non-law' into 'hard law' from one moment to the other — are relatively rare. Customary international law, by contrast and by definition, is very much a gradual process, where 'non-law' only over time, subject to analysis, interpretation and in particular the accumulation of State practice and opinio juris, evolves into 'hard law'.

If that means that somewhere along the road, read when the resolution as a non-legally binding document starts to give rise to some consistent and relevant State practice and opinio juris but has not yet been labelled customary international law so as to be accepted as binding law in substance, States start to feel comfortable and trusting, there would indeed be considerable benefit from 'soft law', whether in the context of customary international law or (interpretation of) treaty law — and indeed, thereby it plays an indispensable function in the development of a proper international space law framework.

This is where Realpolitik should come into play with a view to furthering as best as possible the cause of space law in the context of the international community of space-faring and non-space-faring States. Here, 'the best' — aiming straight for a treaty, the most clear and coherent source of international space law — would often turn out to be the enemy of 'the good' — realising a process rather than an immediate result. That process would allow States, hesitant at the outset to commit to such clear-cut treaty obligations, to start out accepting merely political 'obligations' which are not yet fully elaborated and/or not legally binding, such as by way of an United Nations General Assembly resolution, to
gradually lose their cold feet in getting acquainted with the way such obligations turn out to affect their interests (especially in the context of rapid new technical or political developments), to adjust as necessary domestic institutions, procedures and practices, to guide further international developments concerning those obligations following increased insight, and to start trusting that other States are doing the same. Ultimately, then, this should (hopefully) reach a level of maturity of understanding of the issues and of other States’ interests which would allow for a really binding legal regime, coherent and feasible — probably more so than if a treaty had been forthwith concluded.

As a matter of fact, present-day space law has provided us with a very interesting example of this process — in the field of space debris and efforts to mitigate its generation and deleterious consequences. The process started on a completely non-legal level, with major space agencies in the context of the Inter-Agency Space Debris Coordination Committee (IADC) agreeing in 2002 on a political/practical level to essentially start conducting their respective space operations in a manner less conducive to the generation of harmful space debris. As a next step, the United Nations, almost as the official representative of the international community of States but of course still without binding legal effect, by officially recognising the validity and value of the IADC document in a United Nations General Assembly resolution of 2007 elevated these practical guidelines to what should probably be called — certainly at that time — a ‘soft law’ status.

Currently, however, by way of a third phase, a number of States involved have in addition chosen to start applying relevant aspects of those guidelines as license requirements for private space operators — in other words, albeit on a domestic level so far, without question as legally binding obligations. This, if nothing

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72 This ultimately resulted in the IADC Space Debris Mitigation Guidelines, IADC-02-01, Revision 1, September 2007.
74 Notably, in France, Italy, Japan, the United Kingdom and the United States; Lotta Viikari, *The Environmental Element in Space Law* (Martinus Nijhoff Publishers, Leiden et al. 2008) 96; Toshio Kosuge and Yu Takeuchi, From Guideline to International Treaty for Rule of Law Concerning Mitigation of Space Debris?, Proceedings of the International Institute of Space Law 2010 (2011) 291–298, discuss from this perspective also Russia, China and India, as well as the European Space Agency as far as their own (inter)governmental launches are concerned; further e.g. Kelly Gable, Rules Regarding Space Debris: Preventing a Tragedy of the Commons, Proceedings of the 50th Colloquium on the Law of Outer Space (2008) 262.
else, reflects a willingness on the side of those States to impose extra burdens and costs on their own entities competing in the international arena, without any international law guaranteeing a level playing field — by requiring that all other States in the same position are doing the same.

If, some years along the road, not only the space debris problem will have gained enough urgency in the perception of the key space-faring States but also the appropriate legal and other regulatory techniques will have been discovered or developed for States to feel certain about the sustainability and appropriateness of the balance between the various concerns at stake, it may well be that an international treaty on the issue ceases to be beyond reach.

A next candidate for a similar development might be the use of remote sensing data for disaster mitigation and management. Since 1999, a number of major space agencies agreed on a Charter on Space and Major Disasters which essentially developed a loose institutional arrangement for States threatened or victimised by natural or man-made disasters to gain rapid access to free satellite data which might help them in averting or mitigating such disasters. Whilst the Charter does not provide any ‘normal’ legal obligations, and for example clearly disclaims any liability of the data provider in case of damage caused in the context of use of such data, it is clear that several issues, such as intellectual property rights regarding the data and national security issues, will repeatedly turn up and ultimately require legal solutions.

Since at the same time the Charter has turned out to be hugely successful (with more than 300 invocations till the present day, from all over the world) a considerable interest might be developing within the international community to gradually transform this ‘soft law’ regime into a more clear-cut and legally binding regime — once the providers in particular have gained enough experience with the Charter’s realities to feel confident regarding the obligations they would be willing to accept. In order to allow them to do that, however, the current Charter operations should not now be disregarded or put aside as merely constituting ‘soft law’ — whilst, of course, acting as if they were already providing for ‘hard’ law obligations would be counterproductive as well.

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76 See http://www.esa.int/esapDF/SEML7PYOBFG_index_0.html (23/08/2011).
Thus, it is finally submitted that, while never losing sight of the benefits of a clear and coherent legal framework probably still best reflected through a treaty regime, in the arena of space activities there is considerable benefit from such mechanisms usually labelled 'soft law', whether in the context of customary international law or of treaty law. Indeed, they may in a number of occasions have an indispensable function in the development of a proper international space law framework for such activities. Whether one should continue to call them 'soft law', ultimately is of less relevance.