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"SOFT LAW" AS AN IMPEDIMENT TO THE REGULATION OF SPACE ACTIVITIES WITH MILITARY IMPLICATIONS

Abstract

The early era of space exploration was accompanied by the conclusion of legally binding multilateral agreements (sometimes referred to as "hard law") to govern key space activities, such as the Outer Space Treaty, the Rescue Agreement, and Liability Convention. Since then, new legally binding agreements have been difficult for the international community to achieve. However, many commentators and state officials have suggested that non-legally binding arrangements, or "soft law," serve as a suitable if not preferable alternative to legally binding regimes in regulating many aspects of space. While soft law has performed important functions and made valuable contributions to collaborative activities in space in the past, it may now represent a significant impediment to meaningful progress in regulating space activities with military implications. This may be true even with respect to significant soft law initiatives which are now underway, including the draft EU Code of Conduct for Outer Space Activities.

Serious challenges to peaceful cooperation in space are presented by the potential deployment of space weapons and by the increasing importance of military-related activities in space. This paper argues that, for many reasons, soft law is not up to meeting this challenge. Soft law may instead present an illusion of progress in this area while incentives for potential conflict in space continue to grow. Of particular importance, soft law may be taking on unhelpful political overtones, particularly in the United States, where it may become viewed by some as an illegitimate "backdoor" mechanism for the creation of unsanctioned, legally-binding and controversial arms control regimes. While obstacles to the conclusion of hard law solutions remain, they appear to now offer more opportunities for meaningful, incremental progress in regulating the most dangerous risks posed by military-related activities in space.