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NORMATIVE REFERENCES TO NON-LEGALLY BINDING INSTRUMENTS IN NATIONAL SPACE LAWS: A RISK-BENEFIT ANALYSIS IN THE CONTEXT OF DOMESTIC AND PUBLIC INTERNATIONAL LAW

Abstract

The creation of non-legally binding norms is characteristic for space law development in the 'post-treaty' era. While the space treaties established under the auspices of the UN lay down principles of quasi-constitutional character, the exploration and use of outer space continues to raise both questions and expectations that not only call for permissible forms of interpretation of the treaties by the respective State parties, but equally for the contemplation and eventual creation of new norms addressing specific problems of spaceflight; the mitigation of space debris is but one prominent example. However, the heterogeneous group of instruments of non-legally binding character that have emerged in the past decades – notably, but not exclusively, through the work of the UNCOPUOS – raises questions of theoretical and practical character, one of which will be analysed in the present paper, namely the employment of normative reference to such instruments in domestic space legislation. Adherence to "internationally recognised standards and guidelines" is regularly established as a condition for the authorisation of non-governmental space activities. This legislative practice, one the one hand, elevates norms of non-legally binding character to the level of law and therefore underpins their value as much as it may support coherence in the preparation and conduct of space activities. On the other hand, it leads to a key question discussed by the authors: how does the comparatively unspecific reference to such norms comply with domestic legislative requirements of being clear, specific and unequivocal? Focussing on the example of liability – of both space operators at domestic level and the State's at international level –, the article examines an important aspect of the interplay between 'soft law', national laws and public international law. Applicable non-legally binding guidelines and standards would ultimately have to be used in determining whether actions or omissions could be qualified as constituting fault, consequently whether or not an operator is to be held liable for damage and would, in a further instance, be subject to a State's right to recourse for compensation paid at international level. The question of the recoverability of damages by a State from an operator is thus inherently linked to the application and interpretation of non-legally binding instruments which often enough are not clearly specified in national space laws, but encompassed in generic references. The stocktaking of this problem from different legal perspectives shall provide novel insights to the application and development of space law.