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# IAC-10.E7.2.3. THE MOON AGREEMENT: AN ILLUSION OR A REALITY?

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**ABSTRACT**

Article 11.1 of the Moon Agreement states that Moon and its resources are the common heritage of mankind and lays down the foundations upon which a future international régime should be established. Nowadays the doctrine is viewing such régime as a set of mutual expectations, rules and regulations, energies veered towards organization and financial commitments accepted by a group of states.

In this paper the author intends exploring recent doctrine to determine the actual scope of the international régime established by the Moon Agreement. To this end the following questions shall be addressed. Is there in fact an international régime stemming from the 1979 Agreement? Is there any state practice based on the so-called international régime, as mentioned in the Moon Agreement? And what is the role of *opinio juris* in the process of elaboration of this régime?

## I. INTRODUCTION

More than thirty years have passed since John Gerard Ruggie wrote his article "International Responses to Technology: Concepts and Trends".1, in which he pointed out that "the international behavior is institutionalized".2 Traditionally, and in a classical fashion, each study on this field always makes reference to Ruggie. He defined the international regime as "a set of mutual expectations, rules and regulations, plans, organizational energies and financial commitments that have been accepted by a group of States".3 Some years later, scholars such as Krasner, Keohane, Strange, Haas, among others, made contributions to this theory and its development.

Haggard and Simmons argue that "a plethora of contending theories have explained regime creation, maintenance, and transformation, but the relationship among them is unclear and empirical

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research has yet to determine which are the more plausible".4

Krasner says that jurists see regimes everywhere.5 So, Article 11.1 of the Moon Agreement states that Moon and its resources are the common heritage of mankind and lays down the foundations upon which a future international regime should be established. In this paper, the author intends to explore recent doctrine to determine the actual scope of the international regime established by the Moon Agreement. To this end, the following questions shall be addressed. Is there in fact an international regime stemming from the 1979 Agreement? Is there any state practice based on the so-called international regime, as mentioned in the Moon Agreement? And what is the role of *opinio juris* in the process of elaboration of this regime?

## II. ADVOCATING FOR INTERNATIONAL REGIMES

Oran R. Young says that "we live in a world of international regimes. Some of them deal with monetary issues (for example, the Bretton Woods system); others govern international trade commodities (for example, the coffee agreement). Some regimes serve to manage the use of natural resources at the international level (for example, the international arrangements for whaling) or to advance the cause of conservation (for example, the agreement on polar bears). Still other regimes address problems pertaining to the control of armaments at the international level (for example, the partial test-ban system) or to the management of power within the international community (for example, the neutralization agreement for Switzerland)".6. Young further explains that "international regimes vary greatly in terms of functional scope, areal domain, and membership. Functionally, they range from the narrow purview of the polar bear agreement to the broad concerns of the treaties on Antarctica and outer space. The area covered may be as small as the highly restricted domain of the regime for fur seals in the North Pacific or as far-flung as that of the global regimes for international air transport (the ICAO/IATA system) or for the control of nuclear testing. A similar diversity occurs with respect to membership: the range runs from two or three members (as in the regime for high-seas fishing established under the international North Pacific Fisheries Convention) to well over a hundred members (as in a partial nuclear test-ban system).7

Jack Donnelly emphasizes the differences between the French and English perspectives. "The French 'regime' also refers to a system of legal rules or regulations (most commonly, but not exclusively, relating to conjugal property). This usage has become well established in international Law. For example, in the Trail Smelter –Case (3 U.N.R.I.A.A. 1905, 1938, 1949), submitted for arbitration by Canada and the United States half a century ago, a central issue was establishing a 'regime', a system of principles, rules, and procedures, for regulating the discharge of noxious fumes by the offending smelter. In the recently concluded negotiations over the law of the sea, the concept was regularly used. And in the Hostages case (I.C.J. 3, 1980), the International Court of Justice held that 'the rules of diplomatic law, in short, constitute a self – contained regime'. The newly popular idea of international regimes can be seen as an extension of such uses".8 According to

Donnelly, "in contemporary English, however, 'regime' tends to be used pejoratively and to refer to national (especially foreign) governments or social systems. Although the rarity of pejoratively connotations in international relations has led at least one critic to suggest that the term has been misapplied, such usage merely reflects well – known structural differences between national and international politics"9. In that regard, "the national political order usually can be taken for granted, moral or ideological evaluations of particular national system are common and perhaps even salutary. 'Regimen' refers to entire social and political system, which makes its use in such contexts seem natural".10 However, in international policy, "anarchy is the rule" and international regimes are one way to provide elements of 'order'.11

Krasner resorted to the notion of international regime as "principles, norms, rules, and decision – making procedures around which actor expectations converge in given issue – area"12 He explained that "a fundamental distinction must be made between principles and norms on the one hand, and rules and procedures on the other. Principles and norms provide the basic defining characteristics of a regime. There may be many rules and decision-making procedures that are consistent with the some principles and norms. *Changes in rules and decision–making procedures are changes within regimes,* provided that principles and norms are unaltered."13 Krasner gives an example of the above by quoting Benjamin Cohen, who stated that "there has been a substantial increase in private bank financing during the 1970s. This has meant a change in the rules governing balance of payments adjustment, but it does not mean that there has been a fundamental change in the regime. The basic norm of the regime remains the same: access to the balance of payments financing should be controlled, and conditioned on the behavior of borrowing countries".14 He also quotes Ruggie, who argued that "in general the changes in international economic regimes that took place in the 1970s were norm-governed changes. They did not alter the basic principles and norms of the embedded liberal regime that has been in place since the 1940s."15 Finally, he pointed out that "*Changes in principles and norms are changes of regimes itself.* When norms and principles are abandoned, ther is either a change to a new regime or a disappearance of regimes from a given issue – area".16

The weakness of the regime is also analyzed by Krasner: "it is necessary to distinguish the weakening of a regime from changes within or between regimes. *If the principles, norms, rules, and decision-making procedures of a regime become less coherent, or if actual practice is increasingly inconsistent with principles, norms, rules, and procedures, then a regime has weakened*"17. Therefore, "the assassination of diplomats by terrorists, and the failure to provide adequate local police protection are all indications that the classic regime protecting foreign envoys has weakened. However, the furtive nature of these activities indicates that basic principles and norms are not being directly challenged. In contrast, the seizure of American diplomats by groups sanctioned by the Iranian government is a basic challenge to the regime itself. Iran violated principles and norms, not just rules and procedures".18

This author summarizes this notion stating that "change within a regime involves alterations of rules and decision-making procedures, but not of norms or principles; change of a regime involves alteration of norms and

principles; and weakening of a regime involves incoherence among the components of a regime or inconsistency between the regime and related behavior."19

By analyzing Krasner's ideas, Donnelly makes a distinction between three types of possible regimes:20

1. Structuralists (e.g. realists and some neo-Marxists) see power as the only consistently important fundamental cause of international behavior, making regimes perhaps real, but at best epiphenomenal.

2. 'Grotians' see regimes everywhere and 'for every political system there is a corresponding regime. A regime exists in every substantive issue-area where there is discernibly patterned behavior'.

3. Neorealists 'adopt an intermédiate – but not a compromise – position. Regimes are important aspects of contemporary international politics, but not all regularities arise from regimes'.

Susan Strange supports the first category, and has certain reservations about the value of the notion of "international regime".21 She argues that "all those international arrangements dignified by the label regime are only too easily upset when either the balance of bargaining power or the perception of national interest (or both together) change among those states who negotiate them. 22
Raymond Hopkins and Donald Puchala, who endorse the second category, define the regime as "a set of principles, norms, rules and procedures around which actors' expectations converge".23

These authors classify regimes into the following categories: 24

1. Specific vs. diffuse regimes: These regimes can be classified according to the number of actors that endorse or accept their principles or norms. No international regime requires universal adhesion but, at least, something close to that notion. More specific regimes are usually included into wider or diffuse regimes. The principles and norms of more diffuse regimes are taken from granted in more specific regimes. In this regard, reference can be made to superstructures normative, which are reflected in functionally or geographically specific normative substructures or regimes. For example, in the nineteenth century, principles concerning the rectitude of the balance of power among major actors (the normative superstructure) were reflected in norms legitimizing and regulating colonial expansion (a substructure), and in those regulating major – power warfare (another substructure);

2. Formal vs. informal regimes: They are classified in terms of their legislative origin. The former arise from international organizations, councils, congresses or other bodies, and are monitored by international bureaucracy, whereas the latter are created and maintained by convergence or consensus in objectives among participants, enforced by mutual self-interest and 'gentlemen's agreements' and monitored by mutual surveillance.

3. Evolutionary vs. revolutionary change: The former preserve the

norms whereas the latter change principles. This takes place within the procedural regulations of the regime. Revolutionary regimes come to life because most regimes function to the advantage of some participants and to the disadvantage of others. But disadvantaged participants tend to formulate and propagate counterregime norms.

4. Distributive bias: All regimes define hierarchies of value, distribute rewards and institutionalize international patters of control, subordination, accumulation and exploitation. In other words, they favor the powerful actors.

In support of the third category, Keohane understands that the regimes derive from the positive agreement between legally equal actors.25 Krasner summarizes this category by arguing that "a world of sovereign states the basic function of regimes is to coordinate state behavior to achieve desired outcomes in particular issue-areas"26

Likewise, Jack Donnelly defines international regime as "norms and decision-making procedures accepted by international actors to regulate an issue-area."27 Consequently, "States (and other relevant actors) accept certain normative or procedural constraints as legitimate, thereby partially replacing 'original' national sovereignty with international authority Although sovereignty thus remains the central ordering principle of the society of states, regimes require limited renunciations of sovereign authority in an issue – area in order to reduce the costs of international anarchy".28

This author classifies international regimes into four main categories:29

1. Authoritative international norms: Binding international standards, generally accepted as such by States

2. International Standards with self-selected national exemptions: Generally binding rules that nonetheless permit individual states to "opt out", in part. (For example, States may choose not to ratify a traty or to ratify with reservations.)

3. International guidelines: International standards that are not binding but are nonetheless widely commended by States. Guidelines may range from strong, explicit, detailed rules to vague statements of amorphous collective aspirations.

4. National Standards: The absence of substantive international norms.

Tate, as quoted by Michael Brzoska, defines regime as a mandatory agreement between international actors (the States) that facilitate the achievement of specific goals through a process that involves coordinated expectations and modification of certain behavioral patterns. 30

Some of the regulations governing the Moon will be addressed below in order to decide whether they constitute a regime or not.

## III.THE MOON REGIME

Maureen Williams states that according to customary international law and up to the entry into force of the 1967 Outer

Space Treaty, the moon was *res nullius*.31 In that sense, she considers that "in the absence of contradicting regulations arising from conventional law, the well-known customary principle whereby effective occupation (with the relevant *animus*) is an essential requirement to claim sovereignty was totally applicable to the moon."32

Article II of the 1967 Outer Space Treaty provides as follows:

"Outer Space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means"

In view of the foregoing, the legal regime of the moon has shifted from *res nullius* to *res extra commercium"33*

In 1979, a new legal nature arose from the Moon Agreement. The *res extracommercium* principle under the 1967 Outer Space Treaty changed to *res communis humanitatis, i.e.* common heritage of mankind."34

Article 11.1 of the Moon Agreement provides that:

"The Moon and its natural resources are the common heritage of mankind"

The proposal submitted by Argentina in 1970 constitutes one of the backgrounds of this notion.35

The 1979 Moon Agreement entered into force on July 11, 1984 and, up to this date, it has been ratified or adopted by 13 States;36 whereas the Outer Space Treaty has 100 member States as of January 1, 2010.37

Williams considers that "most of the provisions of the Moon Agreement represent the gradual development of International Law instead of a codification of custom. Therefore, although it has already entered into force, the Agreement requires a considerable number of ratifications. Otherwise, the new regulations provided therein will only be enforceable against a limited group of members of the international community, among which the space powers are indeed not included."38 As mentioned above, up to this date, the Moon Agreement has not been ratified by a considerable number of States. However, the Outer Space Treaty has indeed created international custom, as evidenced by the considerable number of member States that ratified it. The Moon Agreement was only ratified by Australia, Austria, Belgium, Chile, the Philippines, France, Guatemala, India, Kazakhstan, Lebanon, Morocco, Mexico, the Netherlands, Pakistan, Peru, Romania and Uruguay. This evidences that there is no unified international custom whatsoever.

The 2006 Report of the Study Group of the International Law Commission "Fragmentation of International Law39 provides that a group of rules and principles concerned with a particular subject matter may form a special regime. Expressions such as "law of the sea", "humanitarian law", "human rights law", "environmental law" and "trade law", etc. give expression to some such regimes. For interpretative purposes, such regimes may often be considered in their entirety.40 In this sense, the significance of a special regime often lies in the way its norms express a unified object and purpose. Thus, their interpretation and application should, to the extent possible, reflect that object and purpose.41 According to this report, special regimes or the institutions set up by them may fail. Failure might be inferred when the special laws have no reasonable prospect of appropriately addressing the objectives for which they were enacted. It could be manifested, for example, by the failure of the regime's institutions to fulfill the purposes allotted to them, persistent non-compliance by one or several of the parties, desuetude, and withdrawal by parties instrumental for the regime,

among other causes. Whether a regime has "failed" in this sense, however, would have to be assessed above all by an interpretation of its constitutional instruments. In the event of failure, the relevant general law becomes applicable42

## IV. GENERAL CONCLUSIONS

The notion of "international regime" provides a sense of order to a specific area of international relations; however, the there are different theoretical approaches to define this concept. Furthermore, this notion is very useful to understand certain spheres of international law.

In this paper, the Moon Agreement was addressed as a possible applicable regime. It may be suitable to different versions of a single regime. For instance, Krasner considers that the principles and norms around which the main actors converge in given area are essential. There is no doubt that the international community converges in the 1967 Outer Space Treaty, as evidenced by the 100 ratifications thereof, as opposed to the Moon Agreement, which has only been ratified by 13 member States. In view of that, according to Krasner's ideas, the Moon Agreement does not constitute a regime in itself but, on the other hand, the 1967 provision considering the moon as *res extra commercium* does so.

Following Hopkins and Puchala, it can be defined as a specific regime within a diffuse one. The normative superstructure would be the regime set forth by the Outer Space Treaty, whereas the Moon Agreement would be the substructure in a specific regime. It is a formal regime because it is created within the scope of international organizations, councils, conferences, etc. and it is monitored by international bureaucracy.

We agree with the International Law Commission in the sense that all rules and principles concerned with a particular subject-matter create a "special regime". In this case, the special regime comprises the Outer Space Treaty and the Moon Agreement. However, the special regime has failed, especially in connection with the Moon Agreement, given that the number of ratifications entails no reasonable prospect of appropriately addressing the relevant objectives. It also failed to create a unified international custom. This practice was not universalized and no *opinio iuris* was rendered by the States.

Therefore, the Moon specific regime would be created by Article 2 of the Outer Space Treaty instead of Article 11.1 of the Moon Agreement. To that effect, the 1967 Treaty has full effect on the legal nature of the moon, by considering it *res extra commercium* and not *res communis humanitatis* as in the Moon Agreement, which has only been an illusion so far.

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3 Ibidem

4 Haggard, Stephan and Simmons, Beth (1987): "Theories of International Regimes" in *International Organization*, Vol. 41, N° 3 (summer). Page 492.

5 Krasner, Stephen (1982): "Structural Causes and Regime Consequences: Regimes as Intervening Variables" in *International Organization*. Vol. 36. N° 2. (Spring). Pages 189 – 194.

6 Young, Oran (1980): "International Regimes: Problems of Concept Formation" in *World Politics*, Vol. 32, N° 3 (April). Page 331

7 Ibidem

8 Donnelly, Jack (1986): "International Human Rights: a regime analysis" in *International*

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9 Ibidem
10 Ibidem, Pages 600 and 601.
11 Ibidem, Page 601.
12 Krasner, Stephen (1982): "Structural Causes and Regime Consequences: Regimes as Intervening Variables" in *International Organization*. Vol. 36. N° 2. (Spring). Page 185
13 Ibidem. Page 187. Italics from original text written by Krasner
14 Ibidem, Pages 187 – 188.
15 Ibidem, Page 188.
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17 Ibidem, Page 189. Italics from original text written by Krasner
18 Ibidem, Page 189
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30 Brzoska, Michael (1992): "Is the Nuclear Non – Proliferation System a Regime? A Comment on Trevor McMorris Tate" in *Journal of Peace Research*, Vol. 29, N° 2. Page 216.
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32 Ibidem.
33 Ibídem, Page 63.
34 Ibídem, Page 64.
35 Cheng, Bin, *Studies in International Space Law*. Oxford University Press. U.K.1997. Page 358
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38 Williams, Silvia Maureen, *Derecho Internacional Contemporáneo*. Abeledo Perrot. Buenos Aires. Page 60
39 A/CN.4/L.702
40 A/CN.4/L.702. Page 12
41 Ibidem, Page 13.
42 Ibidem. Page 14.