"Soft law" as an Impediment to the Regulation of Space Activities with Military Implications: A View from the U.S. Congress

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Abstract

The early era of space exploration was accompanied by the conclusion of legally binding multilateral agreements (often referred to as examples of "hard law") to regulate key space activities, including 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 especially true with respect to the most significant soft law initiative now under consideration, the draft EU Code of Conduct for Outer Space Activities, also referred to as "the International Code of Conduct for Outer Space Activities" (the ICOC).

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 article examines how many members of the U.S. Congress are skeptical that soft law is able to adequately address these challenges. In particular, the draft ICOC appears to taking on unhelpful political overtones in the U.S. Congress where it is viewed by some members as an illegitimate and unconstitutional "backdoor" mechanism for the creation of unsanctioned, legally-binding and controversial arms control regimes. The impact of these still unfolding developments within the U.S. Constitutional system of government casts a shadow on future U.S. support of the ICOC as well as the key role that soft law has played in the development of customary international law governing space activities.

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Introduction

Since the beginning of man's exploration of outer space, international efforts to regulate activities there have focused on promoting its use "for peaceful purposes."[1] Yet the search for peace in space seems to be an increasingly elusive goal. As the military importance of space grows and fears of a space weapons arms race abound, military planners view future conflicts on earth in a larger, geopolitical context that anticipates that those conflicts will inevitably extend to outer space.[2] An important challenge thus confronts the international community in developing a legal framework that can improve the prospects for peace and security in space.

The dawn of the space age was accompanied by the development of legally binding rules - sometimes referred to as "hard law" - which included rules of customary international law and a set of multilateral agreements designed to govern key space activities (the Outer Space Treaty, the Rescue Agreement, the Liability Convention, the Registration Convention and the Moon Agreement).[3] Since then, new legally binding agreements have been difficult for the international community to achieve, resulting in a tendency to produce "soft law" instruments which contain legally non-binding "principles, norms, standards or other statements of expected behavior in the form of recommendations, charters, terms of reference, guidelines, codes of conduct, etc."[4]

In light of deadlocked processes which have been unable to produce new hard law regimes, some commentators have suggested that soft law arrangements serve as a simpler, more flexible and faster alternative to legally

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1 *See, e.g.,* Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies [the Outer Space Treaty],opened for signature on Dec. 18, 1979, entered into force July 11, 1984, 1363 UNTS 3.

2 *See* JEFF KUETER, RULES OF THE ROAD IN SPACE: DOES A CODE OF CONDUCT IMPROVE U.S. SECURITY? 2 (George C. Marshall Institute, 2011), http://marshall.org/wp-content/uploads/2013/09/939.pdf ("War will find its way to space because there are things of military value in space and their denial or destruction would net a military advantage during a conflict.").

3 The Outer Space Treaty, s*upra* note 1; Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, Apr. 22, 1968, 19 U.S.T. 7570, 672 U.N.T.S. 119; Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 24 U.S.T. 2389, T 961 U.N.T.S. 187; Convention on Registration of Objects Launched into Outer Space, Jan. 14, 1975, 28 U.S.T.695, 1023 U.N.T.S. 15; Agreement Governing the Activities of States on the Moon & Other Celestial Bodies, Dec. 18, 1979, 1363 U.N.T.S. 3, 18 I.L.M. 1434.

4 Marco Ferrazzani, *Soft Law in Space Activities – An Updated View*, *in* SOFT LAW IN OUTER SPACE: THE FUNCTION OF NON-BINDING NORMS IN INTERNATIONAL SPACE LAW 99, 100 (Irmgard Marboe, Ed., 2012) [hereinafter SOFT LAW IN SPACE].

binding regimes in regulating many aspects of space.[5] This favorable assessment of soft law is not confined to civilian activities in space but, in the view of some authors, also extends to efforts to ensure international peace and security in outer space and prevent its weaponization."[6]

Another school of thought suggests, however, that "once critical national security interest is concerned, then, only legally-binding rules can govern the activities of individual nation."[7] Such legally binding agreements relating to national security issues have been difficult to achieve for many decades (as evidenced by the failure of the U.N. Committee on the Peaceful Uses of Outer Space to produce any serious proposals for such agreements). This is in part because of the big difference in technological capabilities of states and also because of the "essentially military nature of space technology."[8]

Although soft law regimes may not provide effective mechanisms for regulating peace and security issues in space, a wide variety of soft law initiatives affecting these issues continue to be debated by the international community. The most prominent soft law initiative now under consideration is a draft code of conduct for outer space activities, formally proposed by the European Union on December 17, 2008.[9] Currently referred to as the draft "International Code of Conduct for Activities in Outer Space" (the ICOC), this document has been revised three times since its initial formulation, with new versions proposed and released on October 11, 2010, September 16, 2013, and March 31, 2014.[10]

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5 *Id.,* at 105 (arguing that soft law instruments "foster international cooperation by offering simper, faster and more flexible terms" and describing the practice of soft law as "a virtuous system that is flexible, corresponding to the needs of the space community and corresponding to the needs of the space community and limited to the international relations coordinating and preparing space activities.").

6 *See, e.g.,* Fabio Tronchetti, *A Soft Law Approach to Prevent the Weaponization of Outer Space*, in SOFT LAW IN SPACE, *supra* note 4, at 360, 372 (noting that "[i]n recent years, a growing support for soft law as the most appropriate tool to prevent an arms race in space and for ensuring security of space objects has emerged.").

7 Setsuko Aoki, *The Function of 'Soft Law' in the Development of International Space Law*, SOFT LAW IN SPACE, *supra* note 4, at 57, 60; *see also*, Mohamed Elataway, "ICOC: Recommendations for Further Elaboration," in AWAITING LAUNCH: PERSPECTIVES ON THE DRAFT ICOC FOR OUTER SPACE ACTIVITIES, 45, 50 (Rajeswari Rajagopalan & Daniel Porras, Eds., 2014) [hereinafter AWAITING LAUNCH] ("There is a necessity for further measures to govern outer space activities through the negotiation and conclusion of further legally binding instrument(s), whether for peaceful utilization of outer space or to prevent an arms race in outer space.")

8 *Id.,* at 60.

9 Council of the European Union, Brussels, Dec. 17, 2008, "Council Conclusions Concerning the draft Code of Conduct for Outer Space Activities, Annex II," at http://register.consilium. europa.eu/doc/srv?l=EN&f=ST%2017175%202008%20INIT.

10 Council of the European Union, *Council Conclusions Concerning the Revised draft Code of Conduct for Outer Space Activities*, Oct. 11 2010, at Annex,https://www.consilium.europa.eu /uedocs/cmsUpload/st14455.en10.pdf;

Proponents of the draft ICOC view its status as a soft law instrument as one of its greatest strengths. They view soft law as a characteristic which can "help define responsible activities and set out agreed norms of behaviour when legally binding agreements cannot be reached."[11] It is further cited as an example of "a recent trend in security policies, to move beyond deadlocked forums and traditional framing of problems, to encouraging creative thinking and alternative methods of moving forward."[12]

A detailed examination of the value and limitations of the proposed ICOC and other soft law instruments as they relate to security issues in outer space is beyond the scope of this short piece. Instead, this paper focuses on how the most important perceived benefits of soft law are ironically becoming its most criticized shortcomings in regulating national security-related issues in the view of many American legislators who are now critically evaluating the proposed ICOC. This evaluation is generating its own set of far-reaching problems which may ultimately impede international efforts to build cooperative frameworks to improve space security and may even diminish the role soft law has previously played in building a framework for peaceful cooperation in space, particularly its role in forming rules of customary international law.

Soft law and U.S. National Security Interests in Space

It is undeniable that soft law instruments are, as a general matter, more easily achieved than hard law options and give subscribing states more flexibility in both the drafting and implementation of international arrangements. Such benefits continue to be invoked by proponents of the draft ICOC.[13] Other advantages of soft law include assisting in the interpretation of existing space law obligations, setting forth procedural standards and guidelines, and establishing "light norms of a substantive nature."[14]

Council of the European Union, "Version Sept. 16, 2013, Draft International Code of Conduct for Outer Space Activities," at http://eeas.europa.eu/non-proliferation-and-disarmament/pdf/space_code_ conduct_draft_vers_16_sept_2013_en.pdf; Council of the European Union, *Version March 31, 2014, Draft International Code of Conduct for Outer Space Activities*, http://www.eeas. europa.eu/non-proliferation-and-disarmament/pdf/space_code_conduct_draft_vers_31-march-2014_en.pdf.

11 Ibrahim Öz, *ICOC for Outer Space Activities: An Industry Perspective*, AWAITING LAUNCH, *supra* note 7, 117, 121.

12 *Id.,* at 120 (noting that the ICOC is "an example of a recent trend in security policies, to move beyond deadlocked forums and traditional framing of problems, to encouraging creative thinking and alternative methods of moving forward.").

13 Wolfgang Rathgeber *et al*., *Space security and the European Code of Conduct for Outer Space Activities*, UNIDIR DISARMAMENT FORUM, no. 4, 2009, at 34, *available at* http://www.unidir.org/files/publications/pdfs/a-safer-space-environment-en-325.pdf (noting that "because it constitutes soft law, a code of conduct is easier to agree to and potentially avoids lengthy discussions about definitions, but can still give significant impetus to both national and international political processes.").

14 Ferrazzani, *supra* note 4, at 116-117.

Additional perceived advantages of soft law, which are of particular importance in this article, relate to three important types of legal effects that soft law instruments can have. These legal effects are generated by: (1) framing new norms of cooperation which may later form the basis of legally binding international agreements;[15] (2) harmonizing international standards through its unifying effect on legally binding domestic legislation and rules (including licensing requirements and other administrative procedures)[16], and; (3) assisting in the formation of new legally binding rules of customary international law.[17]
The current legal regime governing activities in space includes many "soft," non-binding components, including "best practices" and various other voluntary technical guidelines and standards. The United States has been an active participant in setting many such voluntary standards for activities in space, as demonstrated by its prominent role in establishing voluntary guidelines for the mitigation of space debris.[18] U.N. Space Debris Mitigation Guidelines endorsed in 2007 by the United Nations in General Assembly Resolution 62/217, are thus "heavily based on the guidelines established by NASA, in 2007."[19]
The United States has long opposed, however, legally binding restrictions on its freedom of action in space. For example, the 2006 U.S. National Space Policy proclaimed that the United States will:

> preserve its rights, capabilities, and freedom of action in space; dissuade or deter others from either impeding those rights or developing capabilities intending to do so; take those actions necessary to protect its space capabilities; respond to interference; and deny, if necessary, adversaries the use of space capabilities hostile to US national interests.[20]

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15 *Id*., at 116-117 (noting how soft law may help in "the process of early elaboration of detailed obligations to be subsequently formalized under the law of international agreements.").

16 Aoki, *supra* note 7, at 63 (noting that the "subcategory" of "soft law for the harmonization of national laws" includes "the tacit understanding…that soft law should remain as a standard for the elaboration of national law.").

17 Wolfgang Rathgeber, *supra* note 13, at 34 (citing the ICOC as an example and noting that "proponents argue that provisions contained in a code of conduct are likely to eventually become customary international law").

18 Michael Listner, *U.S. Should Take a Cold, Hard Look at Space Code of Conduct*, SPACE NEWS (April 7, 2014), at http://www. spacenews.com/article/opinion/40128us-should-take-a-cold-hard-look-at-space-code-of-conduct (noting that the United States "led the way in space debris mitigation. NASA was the first space agency in the world to develop orbital debris mitigation guidelines in 1995 and two years later developed Orbital Debris Mitigation Practices. These practices became mandatory under the George W. Bush administration and the 2006 National Space Policy through NASA Procedural Requirement 8715.6A.").

19 *Id*.

20 National Security Presidential Directive 49, *U.S. National Space Policy*, Aug. 31, 2006, at http://www.fas.org/irp/offdocs/nspd/space.html.

Consistent with these objectives, the George W. Bush Administration officially rejected any agreements limiting U.S. actions in outer space and firmly opposed "the development of new legal regimes or other restrictions that seek to prohibit or limit US access to or use of space," and insisted that "proposed arms control agreements or restrictions must not impair the rights of the United States to conduct research, development, testing, and operations or other activities in space for US national interests."[21]

The Obama Administration has attempted to contrast its space policies with those of previous administrations, stressing that the U.S. would no longer be "racing against an adversary," but would instead strive to "promote peaceful cooperation and collaboration in space."[22] In a related divergence from prior policies, the Obama Administration has expressed a willingness to consider proposals for space-related arms control agreements, albeit, with significant caveats.[23] Notwithstanding these pronouncements, Undersecretary of State for Arms Control and International Security Affairs Ellen Tauscher has been quoted in other arms-control contexts as saying "[w]e will never do a legally binding agreement because I can't do one. I can't get anything ratified."[24]

In contrast to its reluctance to pursue treaties or other legally binding international agreements to regulate outer space activities, the Obama Administration has indicated a willingness to consider a variety of soft law mechanisms. For example, the 2011 U.S. National Security Space Strategy stated that: "The United States will support development of data standards, best practices, transparency and confidence-building measures, and norms of behavior for responsible space operations."[25] Similarly, the 2010 U.S. National Space Law Policy embraced soft law initiatives, stating: "The United States will pursue bilateral and multilateral transparency and

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21 *Id.*

22 *Statement by the President on the New National Space Policy*, The White House, Office of the Press Secretary (June 28, 2010), http://www.whitehouse.gov/the-press-office/ statement-president-new-national-space-policy.

23 William Broad & Kenneth Chang, *Obama Reverses Bush's Space Policy*, N.Y. TIMES, June 28, 2010, at A19 (noting that the new National Security Space Strategy "explicitly says that Washington will 'consider proposals and concepts for arms control measures if they are equitable, effectively verifiable and enhance the national security of the United States and its allies.'").

24 Josh Rogin, *Tauscher: We Will Get A Missile Defense Agreement with Russia*, FOREIGN POLICY, Jan. 12, 2012, http://thecable.foreignpolicy.com/posts/2012/01/12/tauscher_we_will_get_a_missile_defense_agreement_with_russia.

25 2011 *National Security Space Strategy, available at http://www.defense.gov/home/features/2011/0111 nsss/docs/NationalSecurity SpaceStrategyUnclassifiedSummary_Jan2011.pdf*

confidence-building measures to encourage responsible actions in, and the peaceful use of, space."[26]

Although the United States did not play a formal role in the initial development of the ICOC, U.S. officials apparently did advise the EU at an early stage (consistent with the policies noted above) that the proposed code should be a non-legally binding document and thus should be devoid of obligatory words like "shall."[27] A senior Department of Defense (DoD) official testified to Congress in 2011 that "[i]n keeping with the new strategy and the President's National Space Policy, we are currently evaluating the EU's proposed international Code of Conduct for Outer Space Activities as a pragmatic first set of guidelines for safe activity in space.[28] He further noted that while the operational impact of the proposed code was still being assessed, "our preliminary assessment finds it a positive approach to promoting responsible behavior in space, enhancing our national security in the process.[29] A fact sheet released by DoD in 2011 further noted that "[t]he United States is working closely with the European Union on a draft international Code of Conduct, which could serve as an important first set of norms of responsible behavior."[30]

The ICOC Controversy in the United States

In contrast to the optimistic views expressed by Obama Administration officials regarding the possible impact of the proposed ICOC, thirty-seven members of the U.S. Senate took a different view in a letter dated February 2, 2011, to Secretary of State Hillary Clinton. In this letter, the senators expressed deep concerns that U.S. participation in the ICOC would "constrain U.S. space capabilities" and restrict military, intelligence, and commercial space activities.[31] The senators were particularly opposed to

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26 National Space Law Policy of the United States, June 28, 2010, at 2, 7, *available at* http://www.whitehouse.gov/sites/default/files/national_space_policy_6-28-10.pdf

27 Bill Gertz, *New space-arms control initiative draws concern*, WASH. TIMES, Jan. 16, 2012 (quoting a Dec. 9, 2009, State Department cable on the draft EU code stating that the United States "continues to have significant concerns about the widespread use of language connoting binding obligations, such as 'shall' and 'will,' in the proposed non-binding Code of Conduct.").

28 *Hearing on Dep't of Def. Space Policy Before the Subcomm. on Strategic Forces of the S. Armed Services Comm*, 112th Cong. 5 (2011) (statement of Ambassador Gregory L. Schulte, Deputy Assistant Sec'y of Def. for Space Policy), *available at* http://www.dod.mil/dodgc/olc/docs/testSchulte05112011.pdf.

29 *Id.*

30 *U.S. Dept. of Defense, Fact Sheet: National Security Space Strategy, DoD Initiatives, available at* http://www.defense.gov/home/features/2011/0111_nsss/docs/DoD%20Initiatives%20Fact%20Sheet.pdf.

31 Scott Pace, *Strengthening Space Security*, 33 HARV. INT'L REV., no. 4, Spring 2012, at 58.

submitting the U.S. to any limitations on the deployment of "space-based missile defense interceptors and anti-satellite weapons."[32]

Although neither the President nor the Secretary of State provided a written public response to the Senators' letter, Undersecretary Tausher surprised reporters in January 2012 when she remarked that the United States had rejected the draft EU Code of Conduct for Outer Space Activities because it was "too restrictive."[33] She did not elaborate on what precisely made the draft code too restrictive or why the Code as drafted was no longer seen to be an important first step in setting norms of responsible behavior in space.

Soon after Undersecretary Tauscher's announcement, Secretary Clinton issued a press release stating that "[w]e believe the European Union's draft Code of Conduct is a solid foundation for future negotiations on reaching a consensus international code," and that "the United States has decided to join with the European Union and other nations to develop an International Code of Conduct for Outer Space Activities."[34] To date, no alternative version of the draft Code has been proposed by the United States, nor has the United States indicated that it will sign subsequent revised versions proposed by the EU. Instead, using language reminiscent of statements made by earlier administrations, Secretary of State Clinton said that "the United States has made clear to our partners that we will not enter into a code of conduct that in any way constrains our national security-related activities in space or our ability to protect the United States and our allies."[35]

Some members of the U.S. Congress applauded this decision. On January 18, 2012, several ranking Republican members of the House and Senate signed a letter to President Obama in which they expressed support for the administration's position not to sign onto the draft code and indicated that they had "significant policy and operational concerns with the EU Code of Conduct."[36] Citing an unclassified excerpt from the executive summary of the Joint Staff Operations Assessment of the draft code, the legislators noted: "if the United States were to make a good faith effort at implementing the requirements of the draft code, there could be operations impacts on U.S. military space operations in several areas."[37]

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[32] *Id.*

[33] Gertz, *supra* note 27.

[34] *International Code of Conduct for Outer Space Activities*, Secretary of State, Press Statement (Jan. 17, 2012) *available at* http://www.state.gov/secretary/20092013clinton/rm/2012/01/180969.htm.

[35] *Id.*

[36] *Letter from Rep. Michael Turner, Chairman, Subcomm. on Strategic Forces, H. Armed Services Comm. et al., to President Barack Obama* (Jan. 18, 2012), *available at* https://defensenewsstand.com/iwpfile.html?file=pdf12%2F03092012_code2.pdf. [hereinafter "Letter from Congress on Proposed ICOC"].

[37] *Id.*

More significantly, at least for purposes of this article, these members of Congress presented their objections to the draft code in such a way that these objections corresponded negatively with two of the three major purported benefits of soft law instruments. In doing so, they raised issues which may ultimately have profound implications for the continuing development of the international legal regime governing space activities and the role of soft law in it. Their letter also marked the beginning of a highly critical examination (and subsequent legislative action) by the U.S. Congress which remains focused on the perceived role that soft law, in the form of the proposed ICOC, can play in undermining both U.S. national security interests in space and U.S. constitutional processes.

As noted above, soft law has been acclaimed by scholars for at least three different roles that it can play in the formation of legally binding obligations: framing new norms of cooperation which may later form the basis of legally binding international agreements; harmonizing international standards through its unifying effect on legally binding domestic rules, including licensing requirements and other administrative procedures, and; assisting in the formation of new legally binding rules of customary international law.[38]

It is thus significant that the members of Congress writing President Obama framed their concerns around the role soft law can play in forming the basis for legally binding agreements. First, they argued that the President was attempting to "negotiate an international arms control agreement…using the Code as a starting point."[39] The Congressmen further noted that this approach could be problematic under U.S. law since any resulting international agreement that emerged from the draft Code "could establish the foundation for a future arms control regime that binds the United States without the approval of Congress, which would bypass the established constitutional processes by which the United States becomes bound by international law."[40]

Another commonly noted benefit of soft law -- its role in harmonizing international standards through its impact on domestic legal requirements -- was the second target of the unhappy members of Congress writing President Obama. They noted:

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[38] Aoki, *supra* note 7, at 63 (noting that the subcategory of "soft law for the harmonization of national laws" includes "the tacit understanding…that soft law should remain as a standard for the elaboration of national law.").

[39] Letter from Congress on Proposed ICOC, Jan. 18, 2012, *supra* note 36.

[40] *Id.* (the letter further reminds the President of the role of Congress in "the normal process for consideration of international agreements."). With respect to arms control agreements, 22 U.S.C. Sec. 2573(b), provides "No action shall be taken pursuant to this chapter or any other Act that would obligate the United States to reduce or limit the Armed Forces or armaments of the United States in a militarily significant manner, except pursuant to the treaty-making power of the President set forth in Article II, Section 2, Clause 2 of the Constitution or unless authorized by the enactment of further affirmative legislation by the Congress of the United States."

> Given the uncertain legal authority by which your administration may seek to apply this arms control regime to the United States, we wish to know whether there may be any other federal agency that issues regulations similar to what we understand the Department of Defense (and possibly the intelligence community) will have to issue, and whether those regulations will impact the U.S. private sector."[41]

Although the Administration provided no formal public response to the January 18 letter, DoD and State Department officials continued to argue that "[a] code of conduct such as the EU's draft proposal would enhance US national security by building international political consensus around precepts such as debris mitigation, collision avoidance, hazard notifications, and general practices of spaceflight safety." [42] In affirming their continuing support for the efforts of the European Union and other spacefaring countries to develop an International Code of Conduct for Outer Space, DoD officials further argued that "A widely-subscribed Code can encourage responsible space behavior and single out those who act otherwise, while reducing risk of misunderstanding and misconduct. We view the European Union's draft code of conduct for space activities as a promising basis for an international code."[43]

Some members of Congress remained unconvinced by these arguments. A draft version of House Resolution 4310 (reported to the U.S. House of Representatives by the Armed Services Committee on May 15, 2012) sought to prevent the implementation of any future draft Code (initially, although inaccurately, describing it as "an international agreement concerning outer space activities").[44] As drafted, the bill prohibited federal agencies from expending any funds to implement or comply with any "international agreement concerning outer space activities unless such agreement is ratified by the Senate or authorized by statute."[45]

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41 Letter from Congress on Proposed ICOC, Jan. 18, 2012, *supra* note 36.

42 Gregory L. Schulte [U.S. Deputy Assistant Secretary of State for Space Policy] & Audrey M. Schaffer, [U.S. Space Policy Advisor in the Office of the Under Secretary of Defense for Space Policy] *Enhancing Security by Promoting Responsible Behavior in Space*, 6 STRATEGIC STUD. Q., no. 1, 2012, at 9–17.

43 *Hearing on Dep't of Def. Space Policy Before the Subcomm. on Strategic Forces of the H. Comm. on Armed Services*, 112th Cong. 5 (2012) (statement of Ambassador Gregory L. Schulte, Deputy Assistant Sec'y of Def. for Space Policy), *available at* http://www.defense.gov/home/features/2011/0111_nsss/docs/Committee%20hearing%20on%20Fiscal%20Year%202013%20National%20Defense%20Authorization%20Budget%20Request%20for%20National%20Security%20Space%20Activities.pdf.

44 H.R. REP. NO. 112-479, at 205 (2012).

45 *Id.* ("The section would prohibit funds authorized to be appropriated by this or any other Act for use by the Secretary of Defense or the Director of National Intelligence to limit the activities of the Department of Defense or the Intelligence Community in outer space to implement or comply with an international agreement concerning

The Administration responded by strongly objecting to Section 913 of the Resolution in particular, and by reiterating that the Code was "non-legally binding" and not "an international agreement concerning outer space activities.[46] The Administration further expressed its concern that Section 913 would "create confusion about the legal status of the Code and lead our international partners to conclude that the U.S. will treat the Code as an international agreement, greatly complicating negotiations" and that it "encroaches on the Executive's exclusive authority to conduct foreign relations and could severely hamper U.S. ability to conduct bilateral space cooperation activities with key allies."[47] Based on the unacceptable way in which Section 913 and other objectionable provisions in the bill were viewed as impeding the President's ability to execute new defense strategies and allocate resources, the Administration also threatened to veto the bill."[48]
The final version of H.R. 4310, which the President signed on January 3, was enacted into law as the National Defense Authorization Act for Fiscal Year 2013.[49] Section 913 of the Act is entitled "Limitation on International Agreements Concerning Outer Space Activities."[50] Not surprisingly, Section 913(b)(1) reaffirms the requirement previously noted in 22 U.S.C. Sec. 2573(b)(1) that:

> No action shall be taken that would obligate the United States to reduce or limit the Armed Forces or armaments of the United States in outer space in a militarily significant manner, except pursuant to the treaty-making power of the President set forth in Article II, Section 2, Clause II of the Constitution or unless authorized by the enactment of further affirmative legislation by the Congress of the United States.[51]

To implement this requirement, Section 913(b)(3) specifically requires, in connection with the signing of any version of the ICOC, that "not less than 60 days prior to any action that will obligate the United States to reduce or limit the Armed Forces or armaments or activities of the United States in outer space, the head of each Department or agency of the Federal

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outer space activities unless such agreement is ratified by the Senate or authorized by statute.")

46 *Statement of Administration Policy*, Executive Office of the President, Office of Mgmt. & Budget, H.R. 4310 National Defense Authorization Act for Fiscal Year 2013.

47 *Id.*

48 *Id.*

49 National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, 126 Stat. 1632 (2013) [hereinafter 2013 NDAA].

50 Now codified as 51 U.S.C. § 30701, Note.

51 2013 NDAA, § 913(b)(1).

Government that is affected by such action shall submit to Congress notice of such action and the effect of such action on such Department or agency."[52]
While Section 913 lacks any provision prohibiting funding, it does contain two onerous certification requirements (made applicable "if the United States becomes a signatory to a non-legally binding international agreement concerning an International Code of Conduct for Outer Space Activities or any similar agreement" [53]) which may have a profound impact on the future of the legal regime governing space.
The first certification provision in Section 913 requires the Secretary of Defense, the Chairman of the Joint Chiefs of Staff, and the Director of National Intelligence to jointly submit to the appropriate congressional committees a certification that such agreement "will be equitable, enhance national security, and have no militarily significant impact on the ability of the United States to conduct military or intelligence activities."[54] The second contains unusual criteria which could prevent soft law instruments like the ICOC from serving as a basis for both future international agreements and customary international law in this area. It requires that the President submit to the appropriate congressional committees a certification that "such agreement has no legally-binding effect *or basis* for limiting the activities of the United States in outer space."[55]
The scope of the certification required in Section 913(a)(1) is unprecedented. It requires the President to not only certify that any draft code will not constitute an agreement with legally binding effect, but also to certify that it will not serve as a basis under any other authority for restricting U.S. activities in space. This potentially reaches to the role that the Code could play in helping to establish rules of customary international law (which would be binding on the United States), thus ironically implicating the third major purported legal benefit that experts argue soft law provides to the international community.
In the United States, any constructive role that soft law may play in regulating space activities in the future is further overshadowed by the U.S. domestic political and legal conflict that now centers around the President's assertion that the restrictions in section 913 unconstitutionally intrude on his conduct of foreign policy. As he reluctantly signed House Resolution 4310 into law, President Obama issued an official statement noting that "certain provisions in this bill, including section…913…could interfere with my constitutional authority to conduct the foreign relations of the United States. In these instances, my Administration will interpret and implement these

[52] 2013 NDAA, § 913(b)(3).
[53] 2013 NDAA, § 913(a).
[54] 2013 NDAA, § 913(a)(2).
[55] 2013 NDAA, § 913(a)(1) (emphasis added).

provisions in a manner that does not interfere with my constitutional authority to conduct diplomacy."[56]

The significance of presidential signing statements such as these is heatedly contested. Academics, members of Congress, and executive officials disagree as to whether these statements represent legitimate acts of presidential authority to interpret statutory provisions, or whether they are politically motivated violations of our constitutional system of checks and balances.[57] However, the concerns related to separation of powers underlying the President's statement on section 913 are real, complex and largely untested in the courts. They are also not new. For example, Congress approved legislation in 2011 which purported to prevent the President's Office of Science and Technology Policy ("OSTP") from using any appropriated funds "to develop, design, plan, promulgate, implement, or execute a bilateral policy, program, order, or contract of any kind to participate, collaborate, or coordinate bilaterally in any way with China or any Chinese-owned company."[58]

A memorandum to the OSTP General Counsel from an Assistant Attorney General in the Office of Legal Counsel argued that the provision enacted by Congress in 2011 banning various types of cooperation with China was "unconstitutional as applied to certain activities undertaken pursuant to the President's constitutional authority to conduct the foreign relations of the United States"[59] Notwithstanding Congress's attempt to use its significant powers over appropriations, the memorandum further noted that "[m]ost, if not all, of the activities of [OSTP] that we have been asked to consider fall within the President's exclusive power to conduct diplomacy, and OSTP's officers and employees therefore may engage in those activities as agents designated by the President for the conduct of diplomacy…"[60]

With respect to the negotiation of the draft ICOC, the Obama Administration has taken a position similar to its previous opposition to

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[56] Statement by the President on H.R. 4310, The White House, Office of the Press Secretary, January 3, 2013, *available at* http://www.whitehouse.gov/the-press-office/2013/01/03/statement-president-hr-4310.

[57] Faith J. Jackson, *The Constitutionality of Presidential Signing Statements: A Note on H.R. 5933—The Presidential Signing Statements Act of 2008*, 35 J.LEGIS. 1, 3–4 (2009); Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1107 (2013); Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT 307 (2006).

[58] Department of Defense and Full-Year Continuing Appropriations Act, Pub. L. No. 112-10, § 1340(a) (2011).

[59] Memorandum Opinion for the General Counsel, Office of Science and Technology Policy, *Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(A) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011*, 1 (Sept. 19, 2011) http://www.justice.gov/olc/opiniondocs/conduct-diplomacy.pdf

[60] *Id.*

Congressional attempts to regulate activities that the White House regards as related to the "conduct of diplomacy." As reflected in the signing statement on H.R. 4310, President Obama argued that attempts by Congress to restrict the purpose and impact of the draft Code could interfere with his constitutional authority to conduct the foreign relations of the United States. Administration officials have promised to keep the Congress "informed" about the continuing revision of the draft code and related negotiations.[61] Yet beyond this promise to keep Congress informed, Administration officials have not offered to consult with Congress about code-related negotiations. Instead, they have assured Congress only that "[t]he Department of Defense and the Intelligence Community have been, and will remain, fully involved in: …consultations and negotiations to develop a Code of Conduct." [62] This approach, which continues to fail to directly address a fundamental and growing Constitutional dispute with the Congress, unfortunately threatens to undermine any attempt to make the draft ICOC a meaningful basis for future space cooperation (at least as it pertains to critical U.S. participation).

Is the United States making the ICOC a "Poison Pill" for Customary International Law in Space?

Frequent assurances by Administration officials that the ICOC will not be a legally binding document are viewed with suspicion by many members of the U.S. Congress because these comments appear to obscure the significance of other frequently-issued and somewhat incongruous statements by those same officials indicating that the Administration intends to use the ICOC to establish new norms for space activities. The Administration in fact hopes that the norms established in the ICOC will play a significant role in discouraging "destabilizing acts that threaten the overall stability of the space domain" and that countries "willfully acting contrary to such norms can expect to be isolated as rogue actors."[63] Lines separating the promotion of new norms (that

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[61] *Hearing on Dep't of Def. Space Policy Before the Subcomm. on Strategic Forces of the S. Comm. on Armed Services*, 113th Cong. 6 (2013) (statement of Mr. Douglas L. Loverro, Deputy Assistant Secretary of Defense for Space Policy), *available at* http://www.defense.gov /home/features/2011/0111_nsss/docs/Loverro%20-%202013%20SASC%20Written_final.pdf.
("We are committed to working with the Department of State to keep you informed on the process of developing an international Code of Conduct.").

[62] *Hearing Nat'l Def. Authorization Act for Fiscal Year 2013 and Oversight of Previously Authorized Programs Before the Subcomm. on Strategic Forces of the H. Comm. on Armed Services*, 112th Cong. 87 (2013) (Letter from David S. Adams, Assistant Secretary of State for Legislative Affairs, To Michael Turner, Chairman), http://www.gpo.gov/fdsys /pkg/CHRG- 112hhrg73437/pdf/CHRG-112hhrg73437.pdf..

[63] *Fact Sheet: DoD Strategy for Deterrence in Space*, *available at* http://www.defense.gov/

the United States expects other countries to follow) and efforts to establish new binding rules of customary international law may thus become blurred, especially if U.S. government officials are determined to give their full support to new norms in an effort to isolate rogue rule-breakers.

Administration officials confront a dilemma in promoting the ICOC. While they argue that the ICOC is not a legally binding agreement, they also strongly endorse and promote the ICOC in order to establish important international norms, setting the stage for the formation of new rules of customary international law or new international agreements. This is especially problematic politically when conservative writers and some members of Congress view such new ICOC-inspired norms as a "back door" for the establishment of a new legally binding arms control regime for space activities and regard any "policy of voluntary compliance" with the code as nothing more than a "subterfuge."[64] A common related argument among conservative writers further posits that the ICOC will serve as a back door for the establishment of legal regimes prohibiting the deployment of missile defense systems.[65]

The significance of this dispute between the U.S. Executive and Legislative branches for international space law may be far-reaching. Although partisan disputes related to cooperative international activities are hardly unusual in the United States, the formal and unprecedented action taken by the United States Congress to restrict the potential impact of the draft ICOC, if signed by the President, sets the stage for a broad attack on the use of soft law instruments as a basis for forming future binding obligations under customary international law.

Customary international law represents an important form of legal obligation arising from the practice of states and is recognized as a "leading, well-respected source of international law, fully on par with treaties."[66] As set forth in the Statute of the International Court of Justice, customary international law is an appropriate set of legal obligations to be applied by the Court to disputes and is established by a conforming "general practice"

/home/features/2011/0111_nsss/docs/DoD%20Strategy%20for%20Deterrence%20in%20Space.pdf.

64 John R. Bolton & John C. Yoo, *Hands Off the Heavens*, N.Y. TIMES, March 8, 2012 (suggesting that the Obama Administration previously attempted to enter into one unratified international convention by the "back door" by "committing our U.S. Navy to follow its terms" and arguing that the Obama Administration's characterization of its "policy of only voluntary compliance" with the Code is a "subterfuge" since several of President Obama's current advisors once "loudly proclaimed that simply signing treaties without the Senate's consent helped form binding 'customary international law.'").

65 Eli Lake, *U.S., EU Eye Anti-Satellite Weapons Pact*, WASH. TIMES, Jan. 27, 2011 (quoting a Congressional staff member as saying about the draft Code that "[t]here is a suspicion that this is a slippery slope to arms control for space-based weapons, anti-satellite weapons and a back door to potentially limiting missile defense.").

66 David A. Koplow, *ASAT-isfaction: Customary International Law and the Regulation of Anti-Satellite Weapons*, 30 MICH. J. INT'L L. 1187, 1194 (2009).

of states which is "accepted as law."[67] In the words of the American Law Institute's Restatement of the Foreign Relations Law of the United States, customary international law emanates "from a general and consistent practice of states, followed by them from a sense of legal obligation."[68]
Customary international law has played a key role in regulating activities in space from the earliest phases of the space era.[69] Many rules and norms have in fact emerged so quickly in the area of space law that this phenomenon has been referred to as "instant" customary international law.[70]
The importance of customary international law in space cannot be overstated. Many of the most important or fundamental principles of space law which are found in the Outer Space Treaty are said to have essentially codified existing customary international law.[71] Even more remarkably, the customary international law version of these rules has achieved even wider or "more comprehensive geographic coverage" than the treaty versions.[72] Furthermore, and of particular importance for this article, treaties and customary international law rules governing space activities have often

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67 Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat. 1055, 1060. As stated by the International Court of Justice: "It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States." *Continental Shelf case (Libyan Arab Jamahiriya v. Malta)*, Judgment, 3 June 1985, *ICJ Reports* 1985, pp. 29–30, § 27.

68 Restatement (Third) of Foreign Relations Law of the United States §102.2 (1987).

69 *See, e.g.,* David Koplow, *supra* note 66, at 1233 (noting that "the failure to object to the superpowers' conspicuous activity, and the tacit acceptance of the proposition that outer space, unlike airspace, was free for transit without permission, tolls, or regulation by the overflown State, quickly crystallized a new CIL set of rules.").

70 Andre da Rocha Ferreira, et al., *Formation and Evidence of Customary International Law* INTERNATIONAL LAW COMMISSION, v. 1, 189 (2013), http://www.ufrgs.br/ufrgsmun/2013/wp-content/uploads/2013/10/Formation-and-Evidence-of-Customary-International-Law.pdf; David Koplow, *International Legal Standards and the Weaponization of Outer Space*, *in* SECURITY IN SPACE: THE NEXT GENERATION (U.N. Institute for Disarmamnet Research Conf. Report, Mar. 31–April 1, 2008) (noting that "within only a decade or so after the first Sputnik orbits, the basic framework of the CIL of outer space was already largely in place as "instant" CIL.").

71 Vladlen S. Vereshchetin & Gennady M. Danilenko, *Custom as a Source of International Law of Outer Space*, 13 J. SPACE L. 22, 25 (1985) (further noting that "the analysis of the practice of states before the conclusion of the 1967 Outer Space Treaty shows that historically custom was the first source of the international law of outer space."); NANDASIRI JASENTULIYANA, SPACE LAW: DEVELOPMENT AND SCOPE 46 (1992) (describing the Outer Space Treaty as the "Magna Carta of international space law" and noting that it was "built on several principles already enunciated in the 1963 Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space.").

72 Koplow, *supra* note 66, at 1234.

emerged from soft law instruments, especially U.N. General Assembly resolutions.[73]

As noted above, a non-binding principle or norm contained in a soft law instrument may ultimately become a binding rule of customary international law if it enjoys sufficient conforming "general practice accepted as law."[74] The fact that a document is explicitly declared by all subscribing states to be a "legally non-binding" instrument does not prejudice its ultimate role in forming a rule of customary international law.

For example, during the consideration of the Universal Declaration of Human Rights at a 1948 session of the U.N. General Assembly, the U.S. Representative stressed this about the historic declaration: "It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or a legal obligation."[75] However, after years of conforming state practice and reaffirmation of the norms in the Declaration by the United States, it was not difficult for a U.S. federal court to later declare that one of those norms, the prohibition of torture, had become a binding rule on all countries under customary international law.[76]

The history of the development of customary international law, particularly in the area of international space law, clearly demonstrates that legally non-binding or "soft law" instruments may generate new legally binding rules of customary international law. This is true even if the soft law instruments explicitly declare themselves to be legally non-binding or use non-binding language. History further demonstrates that, with a high level of state consensus, this process can occur fairly quickly and that U.S. Executive Branch officials can play a critical role – without Congressional involvement – in turning non-binding principles found in these soft instruments into binding obligations under customary international law.

Conclusion

Critics of the draft ICOC in the U.S. Congress appear to have grounds for arguing that non-binding norms and principles found in that soft law

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[73] Vereshchetin & Danilenko, *supra* note 72, at 25 (noting that "the acceleration of the formation of customary principles relating to outer space was brought about not only by the fact that all actions of states in the field of exploration and use of outer space were immediately known all over the world, but also by the adoption of a number of United Nations General Assembly resolutions.").

[74] *Continental Shelf case (Libyan Arab Jamahiriya v. Malta)*, Judgment, 3 June 1985, *ICJ Reports* 1985, pp. 29–30, § 27.

[75] 19 Department of State Bulletin 751 (1948).

[76] *Filártiga v. Peña-Irala*, 630 F.2d 876, (2d Cir. 1980) ("This prohibition [the right to be free from torture] has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights, General Assembly Resolution 217 (III)(A) (Dec. 10, 1948) which states, in the plainest of terms, "no one shall be subjected to torture.")

instrument could later emerge as rules of customary international law, notwithstanding assurances by Administration officials of its non-binding character. To the extent such rules of customary international law may limit or restrict U.S. military capabilities in space, existing U.S. legislation raises questions regarding the need for such restrictions or limitations to be approved by the U.S. Congress in a formal international agreement. The Administration's failure to address these concerns led the U.S. Congress to enact unprecedented legislation prohibiting a proposed soft law instrument, the draft ICOC, from being used as a basis for limiting the activities of the United States in outer space.

The impact of these still unfolding developments within the U.S. Constitutional system of government casts a shadow on future U.S. support of the ICOC as well as the key role that soft law has played in the development of customary international law governing space activities. The actions of the U.S. Congress in opposing the ICOC, notwithstanding partisan battles with the Obama Administration, further highlights an important aspect of the formation of customary law: the role of public participation in this process and whether the lack of public involvement through the legislative process raises a question of "democratic legitimacy."[77]

The United States has played one of the most prominent roles of any country in outer space and in the development of the legal framework governing activities there. Yet the now internally divided U.S. approach to the draft ICOC and the dispute over the purported value of that soft law instrument may call into question the legal significance of any future U.S. efforts to comply with the norms found in that document (even if the United States ultimately does sign it). Although the U.S. executive branch generally speaks for the United States regarding foreign affairs, in democracies the actions of elected representatives in the exercise of their constitutional responsibilities may have special significance in establishing evidence of *opinio juris* in the formation of norms of customary international law.[78] As a general matter, when assessing attempts to establish new international norms to govern activities in space, the views of the citizens of states expressed through their democratic processes should not be disregarded.

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[77] See J. Patrick Kelly, *The Twilight of Customary International Law*, 40 Va. J. Int'l L. 449, 518-519 (2000) (criticizing customary international law for lacking "democratic legitimacy" because the "majority of nations and peoples of the world rarely participate in the creation of customary rules that limit their policy choices and sovereignty.").

[78] BRIAN D. LEPARD, CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS 156 (2010) ("Finally, in the case of all norms…greater weight should be given to the views of states that have some mechanism for taking the views of their citizens and other inhabitants into account, such as democratic elections or consultations.").

Soft law may offer a variety of advantages to the international community in establishing, on a faster and more flexible basis, new components of the international legal framework governing activities in space. However, as demonstrated by the ongoing constitutional and political controversy in the United States over the draft ICOC, a different approach may be necessary for handling important national security issues and other activities in space with military implications. The costs associated with ignoring the problems associated with the current soft law approach may have lasting consequences not only for the success of the proposed ICOC, but also for the development of future rules of customary international law -- rules which may be essential for the continuing peaceful and productive use of space.