

Four Competing Approaches to International Soft Law

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1 Summary

Soft law rests on the idea that the binary nature of law (law is either hard or not law at all) is not suitable to accommodate the growing complexity of contemporary international relations. Expectedly however, there is no commonly shared understanding of international soft law. This contribution looks at the competing views on international soft law by dividing them into four broad groups: treaty soft law; non-binding soft law; rejection of soft law; and non-state soft law. The study then offers its own perception of international soft law and briefly goes into the conceivable implications of soft law on the normative structure of international law.

2 Introduction

An increasing use of soft law in many areas of international law can be observed. Expectedly therefore, this development has attracted the attention of scholars from a wide range of disciplines. The issues related to the functions of international soft law, its relation and interaction with hard law, and the compliance and effectiveness of soft norms have particularly been dealt with in the academic literature. Yet, despite such acquaintance, the term international soft law, even whether such a ‘legal’ category might (or should) exist, is far from being a settled topic. Likewise, to define international soft law poses a similar challenge. As Gold frames: “Almost as many definitions of soft law can be found as there are writers about it”.¹ Of course such a difficulty is to a large extent related to the problem of the nature of soft law as a normative category within international law.

All the same, despite the aforesaid difficulty, this study attempts to categorise the present-day approaches to international soft law into four broad groups. The first category, labelled here for convenience, “treaty soft law”; the second category “non-binding soft law”; the third category ‘non-state soft law’. It is however important to note that an increasing number of scholars understand soft law as a combination of various elements that these three categories display, at least partly due to the coexistence of divergent constituents of soft norms and instruments. The fourth category of approach examined here is labelled ‘rejection of soft law’, which essentially raises questions about the place and role of ‘state-issued’ soft law within international law-making. Thus, this category of criticisms does not include norms and instruments adopted by non-state actors even though some of these norms and instruments intend to create impact on state behaviour. The study nonetheless offers critical perspective of this state-centered understanding of international legal system, which excludes any normative role for non-state actors.

The following section briefly explains the roots of international soft law. Thereafter it sketches out each of the above-named approaches. The study then

1 Gold, Joseph, *Interpretation: The IMF and International Law*, Kluwer Law International: The Hague/London/Boston, 1996, p. 301.

offers its own perception of international soft law and goes into the conceivable implications of soft law on the normative structure of international law.

3 International Soft Law

International soft law emerged in the post-war period as a consequence of the structural shortcomings of public international law, caused mainly by the extension of the scope and actors of international law. These changes are largely attributable to the expanded and intensified international activities following the foundation of the UN and the increased heterogeneity of the international society, as a result of the growing number of sovereign states triggered by the Cold War and the decolonisation process. Likewise, the advances of sciences and technology have eroded traditional distinctions between domestic and international affairs and created new or deepened common interests and multiplied common actions among states, which resulted, among others, in the widening role of international organisations. Also, in parallel to the expansion of market economy, privatisation and deregulation promoted by international economic institutions, the role of “non-state actors” has rapidly been transformed. It is now maintained that a substantial body of international rules is not derived from the formal law-making institutions of international law. Accordingly, as a result of this process, the possibility of states to exercise control over the content of international law has diminished considerably. Apart from states, international organisations, formal and informal technical bodies, Treaty Bodies within the UN system, international conferences on various subject-matters as well as a wide range of non-state actors, including multinational enterprises (MNEs), non-governmental organisations (NGOs) are today involved in shaping international normative order.

On the other hand, the traditional mechanisms of international law making, i.e., the list of sources of international law enumerated in Article 38 of the Statute of the International Court of Justice, have not evolved at the same rate as the expansion of its scope and proliferation of its actors. Hence, it has increasingly been held that in the face of the multiplicity of law-making processes in ‘contemporary’ international law, the understanding, according to which Article 38 sources of law exhaust the methods of international law-making has proven inadequate: Mainly associated with the above-mentioned developments, a new range of international legal commitments that either lack the requisite normative content to create enforceable rights and obligations or do not fall into the “traditional” categories of “treaty” or “custom” or “general principles of law”, has gained unprecedented currency. It is therefore argued that since the norms of ‘contemporary’ international law can be created in many new ways that can no longer be adequately captured solely by reference

to the traditional categories of custom and treaty, there is hence a need to reassess the traditional sources and subjects theory of international law.²

Consequently, soft law developed in response to describe normative activities that do not strictly conform to ‘traditional’ sources of international law.³ Expectedly however the concept of soft law has encountered a fierce opposition by a number of international lawyers. Besides, those scholars, who recognised soft law as a normative category, employ this concept to describe a variety of different types of rules and international instruments.

The following sections aim to sketch out four competing approaches to international soft law. However, before starting to describe these approaches, it is important to bear in mind that the objective of conceptualising and ‘styling’ different approaches to international soft law as ideal-types is to show how each of them captures and relates to central aspects of a particular understanding of international norms, such as the role of the state and to demonstrate in what ways the normative assertions of these approaches converge and compete and possibly counteract each other.

4 ‘Treaty’ Soft Law

The concept of “treaty soft law” refers to treaties and treaty provisions that do not intend to create firm obligations despite their legally binding form and that are imprecise (in language) or flexible (in context), consequently lacking peremptory character. Baxter for instance holds that norms of various degrees of cogency, persuasiveness, and consensus which are incorporated in agreements between states but do not create enforceable rights and duties may be described as soft law.⁴ Scholars holding such view maintain that “the conclusion of an agreement in treaty form does not ensure that a hard obligation has been incurred”.⁵ As follows, though formally binding, some treaties or treaty provisions may be soft in the sense that they do not involve clear and specific legal commitments nor impose real obligations on the parties

2 Van Hoof, G. J. H., *Rethinking the Sources of International Law*, Kluwer Law and Taxation Publishers: Deventer, 1983, p. 66.

3 Dupuy notes that the term soft law was coined by Lord McNair, likely in the beginning of the 1970s. Dupuy, René, Jean, *Declaratory Law and Programmatic Law: From Revolutionary Custom to “Soft Law”*, in Akkerman, Robert, J., Sijthoff: Leyden (eds.), “Declarations on Principles. A Quest for Universal Peace”, 1977, p. 252.

4 Baxter, R. R., *International Law in “Her Infinite Variety”*, 29 *International and Comparative Law Quarterly* 1980, p. 549. Elsewhere, Baxter explains why he prefers to use the term “international agreement” instead of “treaties”. Accordingly, the term “treaty” in its technical meaning as used in the Vienna Convention on the Law of Treaties, is legally ‘binding’ upon the parties. Avoiding this term, Baxter essays to open a possibility to include *all* ‘agreements’ regardless whether they are legally binding or not, such as “political treaties” (*Ibid.* p.550).

5 Chinkin, Christine, *Normative Development*, in Shelton, Dinah (ed.), “Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System”, Oxford University Press: New York, 2003, p. 25.

in the way “hard law” does. In such cases, the vagueness, indeterminacy, or generality of a treaty or treaty provision may deprive these instruments of the character of “hard law”. This is however not one and the same that such “soft” treaties or “soft” treaty provisions are “non-binding”, because as stated in Article 26 of the Vienna Convention on the Law of Treaties, as a legal *form*, treaties are always binding upon the parties.⁶ From this perspective, as exemplified below, treaties and treaty provisions may be either hard or soft, or both. Thus, within this category, it is the *content* of the treaty or treaty provision which is determinant of whether a treaty or treaty provision is hard or soft, not the form of the treaty. Obviously, the distinction between “hard” and “soft” treaties or treaty provisions is not clear cut. Yet, the character of the dispute resolution process may reveal whether a treaty or treaty provisions are hard or soft law: if a treaty is subject to compulsory adjudication in cases of non-compliance it can be inferred that the rules of this treaty lay down precise, thus, *enforceable* legal obligations. Hence, on this account, contrasted with “soft enforcement”⁷ or “dispute avoidance”, the existence of “hard enforcement”, which is characterised by compulsory binding settlement of disputes, appears as a feature that may reveal whether the treaty at issue is hard or soft.

Hence, treaty, as a *legal form*, does not necessarily indicate the existence of a “hard law” if accepted that “hard law” is not only about a *legal form* but also about *enforceability* (i.e. the presence of an enforceable legal obligation).⁸

6 Article 2 (1)(a) of the Vienna Convention on the Law of Treaties defines a treaty as follow: “An international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whether its particular designation”.

7 “Soft enforcement” refers to either non-binding conciliation before an independent third party or non-binding compliance procedure that aims to find an agreed solution rather than to engage in adversarial litigation or claims for reparation. Soft enforcement characteristically evades issues of responsibility for breach, and relies on a combination of inducements or the possibility of termination or suspension of treaty rights to secure compliance (Boyle, Alan, E., *Reflections on Treaties and Soft Law*, 48 *International and Comparative Law Quarterly*, 1999, 4, p. 909).

8 It is interesting to note that the binding quality of treaties is historically a new concept. According to the classical understanding of sovereignty, it was utterly reasonable that a sovereign was supreme and this supremacy could not be surrounded. Spinoza, for instance, objected to the idea that international treaties could bind sovereign states. Accordingly, treaties last so long as the cause, which produced it. When this enticement is no longer there, it is the right of either contracting party to disengage itself from obligation (Spinoza, *Tractatus Theologica-Politicus*, P.III, 11 cited in Lauterpacht, Hersch., *Spinoza and International Law*, 8 *British Year Book of International Law*, 1927, p. 94). It is also interesting to note that the rule of *pacta sunt servanda* that many scholars tend to recognise as the ‘fundamental norm’ of is not highly valued by Spinoza. Lauterpacht distinguishes three main features in Spinoza’s doctrine of international relations: (i) the broad assertion that the mutual condition of states is that of states of nature with all its implications; (ii) the absence of any obligation to observe treaties; (iii) the notion that the state in its dealings with its neighbours is not bound by the canons of morality and good faith (*Ibid.* p.92-93). Lauterpacht also draws our attention to the influence of Spinoza on Hobbes’ political theory and his views on international relations (*Ibid.* p. 95-96).

Indeed, a growing number of treaty and treaty provisions do not include immediate obligations for the parties; instead they merely develop programmes of actions, as it in the examples of European Social Charter (1961) and the UN Covenant on Economic, Social and Cultural Rights (1966), urging or merely advising the parties to “seek to”, “make effort to”, “promote”, or “avoid”.⁹ Such soft law provisions included in treaties are often nothing more than strong recommendations for the contracting parties and the content of such a treaty itself may often be nothing more than a declaration of intention as in the example of the 1979 Convention on Long-Range Transboundary Air Pollution. More and more often, states conclude treaties to consult together, to open negotiations, to settle certain problems by subsequent agreement, or “to develop the best policies and strategies” in a rather ‘conventional’ way (i.e., treaty form), especially in areas such as environment or economic/social development.

Not very different from the aforesaid techniques, some treaty provisions may lay down the undertakings more of a political bargain than legal commitments. The United Nations Framework Convention on Climate Change (UNFCCC) provides some good examples of such techniques. According to Article 4.7 of this Convention, the commitments undertaken under the UNFCCC by developing countries are conditional on performance of solidarity commitments by developed countries to provide funding and transfer of technology.¹⁰ Obviously, such treaty provisions are almost impossible to breach; therefore they are not normative and cannot be described as creating rules in a legal sense.

States may adopt treaty soft law for a number of reasons. The conclusion of a treaty may aim to create a framework for everyday cooperation as well as develop further international rules that are stricter. This is particularly true of the so-called framework or umbrella conventions, which refer to a new international legislative method, according to which a first agreement has to be reached on the principles of common action, while the setting of more precise rules and standards are to be agreed on in subsequent protocol(s) and annexe(s). The UNFCCC once again provides a good example of such a legislative method. The UNFCCC does impose some commitments on the parties,¹¹ but its core articles, dealing with policies and measures to tackle greenhouse gas emissions, are so cautiously and obscurely worded and so weak

9 Weil, Prosper, *Towards Relative Normativity in International Law?*, 77 *The American Journal of International Law*, 1983, p. 414.

10 Article 4.7 of the UNFCCC reads: “The extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties”.

11 For instance, the principles found in Article 3 prescribe how the regime for regulating climate change is to be developed by the parties. It also calls for negotiation of the Kyoto Protocol.

that it is uncertain whether any real obligations are created.¹² In this sense, the UNFCCC, likewise the 1985 Vienna Convention for the Protection of the Ozone Layer (and the subsequent Montreal Protocol), should be seen as a declaration of policy rational for the subsequent (Kyoto) protocol, which sets out greater specificity and more precise obligations.

In a similar way, some treaty provisions may provide guidance to the interpretation, elaboration, or application of hard law, or demands to continue negotiations in order to conclude a new or further/detailed agreement in order to work out a permanent agreement or to give effect to a previous treaty.¹³ For instance, Article 135 of the Treaty of Rome, which established the European Economic Community, required that a subsequent agreement on freedom of movement for workers from Member States had to be concluded.¹⁴

The so-called “political treaties”, which refer to those treaties that are concluded with no expectation of effective enforcement, are traditionally classified as legal soft law. The name of ‘treaty’ in such international agreements may only be a camouflage for a soft instrument.¹⁵ By these ‘treaties’, states enter into alliances, or agree to co-ordinate their military action, or declare the neutrality of an area, or lay out their agreed policies for the future. The 1974 Agreement on the Prevention of Nuclear War between the U.S. and the Soviet Union and the Yalta Agreement are the most quoted two examples for this type of treaty. Baxter also points out that a state party to such an agreement is often not under a legal obligation unless the treaty in question contains territorial or similar dispositive terms.¹⁶

Developing an international treaty is one form, among many, that states use to express their commitments in a given policy area. Then, why do states prefer the treaty form, instead of choosing a “non-binding form”, when they do not intend to be bound by enforceable treaty obligation? The answer likely lies in the fact that by choosing the treaty form, which is legally binding, states reinforce “the credibility of their commitments, expand their available political

12 Boyle (1999) p. 907.

13 Chinkin names such treaty provisions “elaborative” soft law (Chinkin, 2003, p. 30).

14 “Subject to the provisions relating to public health, public security or public policy, freedom of movement within Member States for workers from the countries and territories, and within the countries and territories for workers from Member States, shall be governed by agreements to be concluded subsequently with the unanimous approval of Member States” (http://europa.eu.int/abc/obj/treaties/en/entr6e.htm#Article_135).

15 Baxter (1980) p. 550. Although the Yalta Agreement was published in US Treaties in Force, the State Department declared that “the US regards the so-called Yalta Agreement as simply a statement of common purposes by the heads of the participating states and (...) not as of any legal effect in transferring territories” (35 Dept. State Bull. 484 (1956), cited in Schachter, Oscar, *The Twilight Existence of Nonbinding International Agreements*, 71:2 *The American Journal of International Law*, 1977, p. 298.

16 *Ibid.* A refusal of a state to come to the aid of another under the terms of an alliance or the withdrawal of a State from a political or military pact cannot be subject to a legal dispute but political or perhaps economical. On the other hand, Lauterpacht considered that the Yalta agreement “incorporated definite rules of conduct which may be regarded as legally binding on the state in question” (Oppenheim, 1948, p. 788).

strategies, and resolve problems of incomplete contracting”.¹⁷ As Lipson puts in, “treaties are a conventional way of raising the credibility of promises by staking national reputation on adherence”.¹⁸ In other words, “the more formal and public the agreement, the higher the reputational costs of non-compliance”.¹⁹ However, it should be remembered that by framing the agreement in the formal legal status states do not restrict only their sovereignty but they impose the same restriction on the other state parties in order to gain from the counter-promises of others or/and to manifest their normative commitment.²⁰

To sum up, it should be recognised that the ‘hard’ or ‘soft’ nature of obligation defined in a treaty or treaty provision cannot necessarily be identified on the sole basis of the formally legally binding character of the legal instrument. One must recognise that in many cases, the “softness” of the instrument corresponds to the “softness” of its contents and its form.²¹ Therefore, the criteria used to identify soft law should also take account of the nature and specificity of the obligation that states parties undertake.

5 ‘Non-binding’ Soft Law

Treaties, either bilateral or multilateral, are the most formal commitments that have full international legal status. Nonetheless, treaty is not the only form that states use to govern their relations. States can choose from a wide variety of forms to express their commitments, obligations and expectations. These ‘alternative’ forms include “informal arrangements”, such as tacit agreements, in which obligations and commitments are implied or inferred but not openly declared, and oral agreements, in which bargains are expressly stated but not documented as well as joint declarations, final communiqués, statements and ministerial conferences.²² There is no doubt that many of these instruments do not possess the precise characteristic of law in terms of formality and enforceability. Nor are they drafted in the form of legally enforceable instruments. It is also true that such "soft law" instruments are often no more

17 Abbott, Kenneth W. and Snidal, Duncan, *Hard and Soft Law in International Governance*, 54:3 International Organization, 2000, p. 422.

18 Lipson, Charles, *Why are some international agreements informal?*, 45:4, International Organization, 1991, p. 511.

19 *Ibid.*, p. 508.

20 It is commonplace to examine different approaches to international legal commitments dividing them into two general categories as “rationalist” and “normativist” (constructivist). Accordingly, while the former approach maintains that states enter into contracts to promote their interests, the latter underlines that states choose formal agreements, which embody shared norms and understanding, to manifest their normative commitment.

21 Dupuy, Pierre-Marie, *Soft Law and the International Law of Environment*, 12 Michigan Journal of International Law, 1990-1991, p. 429.

22 Lipson notes that despite the fact that these informal agreements differ in form and political intent, legal scholars rarely distinguish among them (Lipson, 1991, p. 502).

than political pronouncements. Yet, these soft law instruments are either drafted and signed by the representatives of the states or voted for by them, and consequently, may still possess some degree of normative significance. For instance, some of such instruments, especially U.N. General Assembly resolutions, may provide evidence of the legal practice of nation states or they may generate expectations regarding future behaviour.

The second category of soft law provides, an alternative view of soft law, and is here labelled “non-binding soft law”. It focuses on the contrast between “binding” and “non-binding” instruments.²³ According to Thürer, for instance, soft law refers to international norms and instruments that are deliberately non-binding in character but still have legal relevance, located in the “twilight between law and politics”.²⁴ In a similar way, Francioni holds that international norms and instruments that fall outside Article 38 of the Statute of the ICJ are “soft law”.²⁵

When soft law is used in categorical contrast to “binding” law, this implies that treaties by definition are always hard law because treaties are binding upon state parties. In this understanding, the treaty form becomes conclusive of binding obligation. In other words, if the form of an international instrument is that of treaty it can then not be soft law and vice versa. Thus, as opposed to the first category, the decisive factor in this understanding of soft law is the *legal form* and not the content of the international instruments. Soft law in this category (i.e., non-binding soft law) may be adopted either as an alternative to treaty law-making or exist as a part of a multilateral treaty-making process. When used as an alternative to treaty law model, soft law instruments do not constitute part of a legally binding regime nonetheless they aspire to have some normative significance and hold some element of law-making intention. Such non-binding instruments may take a number of different forms, including resolutions of the UN General Assembly; codes of conduct, guidelines and recommendation of international organisations, such as the OECD Guidelines for Multinational Enterprises; and declarations and final acts of international conferences, such as the Rio Declaration on Environment and Development. As said above, non-binding instruments do not always represent an alternative mode of law-making to treaty; they may also constitute an integral part of a multilateral treaty-making process. In the latter case soft law is a part of a multilateral treaty-making process even though such soft law norms, decisions and standards are legally non-binding. It is often so because they emanate from bodies that have not been endowed with the power to adopt mandatory texts, but only recommendations, as in the case of decisions of Conference of the

23 The term ‘international instrument’ mainly refers to treaty, convention, agreement, protocol, declaration, guidelines and codes of conduct.

24 Thürer, Daniel, *Soft Law* in Encyclopaedia of Public International Law, 2002, 4th edition, p. 452.

25 Francioni, Francesco, *International ‘Soft Law*, in Lowe, A. Vaughan and Fitzmaurice, Malgosia (eds.), “Fifty Years of the International Court of Justice, Essays in Honour of Sir Robert Jennings”, Cambridge University Press: NY, 1996, p. 167.

Parties (COP) under various multilateral environmental agreements.²⁶ COPs, nonetheless elaborate and adopt guidelines, rules or procedures that are needed to put flesh on the bones of the several of treaties or protocols'²⁷ key provisions, as in the cases of the Vienna Convention for the Protection of the Ozone Layer/Montreal Protocol²⁸ and the UN Framework Convention on Climate Change/the Kyoto Protocol.²⁹

On the other hand, it is important to bear in mind that non-binding soft law is a multi-faceted concept. It does not only present alternatives to treaties, but also it is sometimes used to complement them. In other words, some non-binding soft law instruments, decisions and standards can constitute a part of a multilateral treaty-making process in various ways. For instance, they may be a first step in a process eventually leading to conclusion of a treaty as it was the case in the United Nations Environment Programme (UNEP) Guidelines on Environmental Impact Assessment,³⁰ which were subsequently incorporated in the 1991 UNECE Convention on Environmental Impact Assessment in a Transboundary Context.³¹ Other non-binding soft law instruments may be used as mechanisms for authoritative interpretation or strengthening of the terms of a treaty, as in the example of the “General Comments of the Committee on

26 On the role of the role of Conferences of the Parties in Multilateral Environment Agreements -based law-making, *see* Brunnée, Jutta, *COPing with Consent: Law-Making Under Multilateral Environmental Agreements*, 15:1 *Leiden Journal of International Law*, 2002.

27 The term ‘protocol’ refers to an agreement governed by international law that amends, supplements, or clarifies a treaty or other broad international agreement.

28 For instance, the terms of the non-compliance procedures were first set out by the Decision II/5 of the 2nd meeting of the Parties in December 1990 and was subsequently revised and then incorporated by amendment as an annex IV in the Protocol in Copenhagen in 1992 (available at “ozone.unep.org/Publications/MP_Handbook/Section_2DecisionsArticle_8/decs-non-compliance_procedure/Decisions_II-5.shtml”).

29 *See* for instance the reporting guidelines for national communication decided by the COP. The basis for reporting and review under the climate change regime is established in Article 4 of the UNFCCC, which requires all parties to prepare national communications according to common reporting guidelines agreed by the COP. These non-binding “FCCC reporting guidelines” have been revised three times, each time specifying in more detail the information that parties must include in their reports and how this should be presented, with the aim of improving the comprehensiveness, accuracy, transparency and comparability of the data provided (Yamin, Farhana and Depledge, Joanna, *The International Climate Change Regime*, Cambridge University Press: UK, 2004, p. 332).

30 “Goals and Principles of Environmental Impact Assessments”, adopted by decision 14/25, of the Governing Council of UNEP of 17 June, 1987.

31 The Convention, which entered into force on 10 September 1997, sets out the obligations of Parties to assess the environmental impact of certain activities at an early stage of planning. It also lays down the general obligation of States to notify and consult each other on all major projects under consideration that are likely to have a significant adverse environmental impact across boundaries “www.unece.org/env/eia/documents/convention_textenglish.pdf”.

Economic, Social and Cultural Rights under the International Convention on Economic, Social and Cultural Rights”.³²

Another important related role of non-binding soft law as part of a multilateral treaty-making process is to provide the detailed rules and technical standards required for the implementation of treaties. Such decisions,³³ operational directives of the multilateral development institutions, and technical and legal standards developed by legal and technical bodies frequently function in giving hard content to the overly-general and open-textured terms of especially framework environmental treaties. Decisions of COPs under various environmental treaties and technical standards adopted by various legal and technical commissions established within a treaty framework, as in the example of Legal and Technical Commissions established by Article 165 of the Convention on the Law and the Sea can exemplify this role. The rationale behind adopting such non-binding rules and standards through various organs and bodies established under various institutions of multilateral regimes is the possibility to easily change or strength as scientific understanding or as political priorities change.

All things considered, it is possible to conclude that the “treaty” and “non-binding” soft law categorisation is neither absolute nor exempt from objections. Nor does this categorisation intend to draw a sharp distinction between those soft law instruments that create legal rights (and/or obligation) and those, which do not create *any* legal rights and/or obligations. Rather it lays its emphasis on the often-present gradual continuum between lesser and higher degree of normative specificity.

6 Rejection of Soft Law

As should be expected, the acceptance of soft law in either above examined definition has faced criticism. In addition to the familiar positivist objection to soft law, which draws on the idea that law is either hard or not law at all,³⁴ soft

32 At the invitation of the UN Economic and Social Council, this Committee, which is a treaty body, has adopted general comments on various issues to assist states in fulfilling their treaty obligations. Although these comments and recommendations adopted by various UN treaty bodies are not legally binding on the parties, it is nonetheless difficult to ignore them due to their often precise and detailed contents.

33 It is nonetheless important to note that certain decisions of international organisations are legally binding upon state members. For instance, Article 25 of the UN Charter states that the Members of the UN “agree to accept and carry out” the decisions of the Security Council in accordance with the UN Charter. Likewise, the decisions of the IMF on the maintenance or alteration of exchange rate or depreciation of currency and the authority of the International Civil Aviation Authority to adopt binding standards for navigation or qualifications of flight personnel also exemplify the binding character of the decisions that international organisations can have.

34 For some more recent and noteworthy ‘neo-positivist’ criticism of soft law, see d’Aspremont, Jean, *Softness in International Law: A Self-Serving Quest for New Legal Materials*, 19:5 *The European Journal of International Law*, 2009.

law has initially been rejected categorically or partially on the basis of lack of legality and has for a long time not been attributed neither the status of a source of law nor considered having a “self-contained regime”³⁵ though some writers have claimed that it has or should have such a status.³⁶ Instead, the “traditional sources” are regarded to be capable to meet the new phenomena, which have occurred at the international arena.

More recent criticisms of soft law seem to be concerned more with the question of effectiveness of international law and with the risk of undermining the authority of established legal norms. It is said for instance that soft law instruments and the hortatory and good-will language of soft law clauses in international treaties are welcomed on the ground of flexibility, widespread participation, speed, adaptability, and effective implementation, not least by using purposive interpretation of soft law instruments and treaty principles. However, soft law instruments and soft law clauses in international treaties can also be understood as proof of the unwillingness of treaty-makers to create effective law or of the inability of the state parties to reach a clear conclusion on a specific and formally binding and, thereby, effective obligation.

Moreover, as Klabbers argued, arguments such as, “states’ wish” and “the advantages of reaching *some form* of agreement” in relation to the ‘facilitatory’ function of soft law should be approached with prudence. The “states’ wish” approach embodies a certain degree of subjectivism, which presumes that “states can conclude whatever they wish to conclude, and if they wish to conclude a soft law instrument, then a soft law instrument it will be.”³⁷ The notion that states “choose” soft law (states’ wish) formulations may be deceptive and should be approached with prudence. As Finnemore holds, soft

35 A “self-contained” regime is generally understood as a subsystem of international law that contains all necessary secondary norms and that significantly limits the application of secondary norms of general international law. A “self-contained” regime provides for remedies in case of breaches of the obligations under the regime. In other words, a self-contained regime does not include only the rules for conduct of states, but also rules on the consequences of non-compliance with such rules. The prime examples of “self-contained” regimes are the WTO legal system and European Community Law (Marschik, Axel, *Too Much Order? The Impact of Special Secondary Norms on the Unity and Efficacy of the International Legal System*, 9:1 *European Journal of International Law*, 1998, p. 220). See also, Simma, Bruno and Pulkowski, Dirk, *Of Planets and the Universe: Self-contained Regimes in International Law*, 17:3 *European Journal of International Law*, 2006, 3.

36 Discussing on “non-treaty agreement”, Hillgenberg, for instance, argues that it is not possible to ascertain from the Vienna Convention of 1969 on the Law of Treaties whether non-treaty agreements are excluded from the application of international law. While the writer acknowledged that if the parties expressly or implicitly do not want a treaty, the provisions of the Vienna Convention will not apply. However, the writer adds, “this does not necessarily mean that all non-treaty agreements only follow political or moral rules. There is no provision of international law which prohibits such agreement as sources of law, unless –obviously– they violate *jus cogens*” (Hillgenberg, Hartmut, *A Fresh Look at Soft Law*, 10 *European Journal of International Law*, 1999, p. 503).

37 Klabbers, Jan, *The Redundancy of Soft Law*, 65:2 *Nordic Journal of International Law*, 1996, p. 169.

law, like customary law, is not always deliberately created by states as a result of their strategic purpose. Soft law “is not simply out there to be chosen”.³⁸

The root of the premise that states are able to “choose” may be found in the understanding that equal, independent and *sovereign* states are empowered to act in ways that have been decided among them. From this assumption it follows that international law is the “universalising will”³⁹ of sovereign states. However, taking states as sole “international reality maker” does not take into consideration several other aspects of the dynamic and complex social process in which international law is formed. As to the latter approach, which suggests that soft law enables states to reach an agreement in those situations where the treaty form might be too hard and therefore out of political reach, might at first sight appear realistic. However, the “some agreement better than no agreement” approach is, as Klabbers contends, rather a simplistic assessment of international relations. The understanding that ‘norms are better than chaos’ also reveals the apologetic tendency of the use of soft law, which gives “the politicians the possibility to be released from their responsibility to take necessary measures to achieve a given effect.”⁴⁰

Likewise, questioning whether soft law has a place in the international legal system, D’Amato contends that soft-law allows a breach to be cost-effective: that is, a violator of a norm of soft law may suffer a reputational loss, but reputational damage may be well worth the benefits that are derived from non-compliance with the norm.⁴¹ Unlike positivist scholars, although D’Amato considers soft law as ‘a naked norm’, that is as law that generates no sanction, his criticism still attaches great importance to the ‘penalty’, not as a constitutive part of a legal act, but as functionality. According to D’Amato, soft law, due to the lack of enforceability, cannot perform the function to guide the nations toward the moral, the just, or the democratic that we should expect from international law, but may instead lead States to take risks in their foreign policy which may lead to their defeat or extinction.⁴²

Yet, such criticism can be seen somewhat surprising as Professor D’Amato elsewhere expressed his criticisms of the positivistic approaches: if law is essentially considered a matter of commanded rules backed by sanction,⁴³ then

38 Finnemore, Martha and Toope, Stephen, J., *Alternatives to “Legalization”*: *Richer Views of Law and Politics*, 55:3 *International Organization*, 2001, p.748.

39 Allott, Philip, *Eunomia*, Oxford University Press: New Y Palgrave MacMillan, 2001, p. 300.

40 Klabbers, Jan, *The Undesirability of Soft Law*, 67 *Nordic Journal of International Law*, 1998, p. 383.

41 D’Amato, Anthony, *Softness in International Law: A Self-Serving Quest for New Legal Materials: A Reply to Jean d’Aspremont*, 20:3 *The European Journal of International Law*, 2009, p. 902.

42 *Ibid.* p. 905.

43 Austin famously argued that “Laws properly so called are a species of commands (...) And hence it inevitably follows, that the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection

the whole international law can be seen as “soft” and “little more than a euphemism for international morality”.⁴⁴

7 ‘Non-state’ Soft Law

Fundamentally different from the previous two categories, the third definition of soft law, labelled in this study “non-state soft law”, involves a structural shift between “law” and “non-law”, which is, it is argued, to be manifested in the increasingly blurred boundary between the public and private domains and in the growing pluralism of sources and subjects of international law.

It is increasingly claimed that our world has now become globalised. According to this perception, a revolutionary shift is taking place from a state-dominated to a market-dominated international economy, which inevitably will lead to a re-definition of international public sphere. The latter is also often conceived as signalling a paradigm shift in international law making from a sovereignty-based international legal system to an ‘informal’, ‘transnational’ and ‘non-state’ legal order. As widely argued, the decline of the state has led to an open and truly global economy characterised by unrestricted trade, financial flows, and international activities of multinational enterprises. It is further argued that the integration of the world economy has unavoidably shifted the balance of power away from states towards markets, and non-state actors have taken on authoritative roles and functions in this emerging new order. According to Reisman, for instance, the rapidly enhanced role of non-state actors in both formal and informal law-making institutions has resulted in the increasing heterogeneity of and pluralism in the modes of law making as well as in the decrease in the control of states over the content of international law.⁴⁵

In a similar vein, it is said that the globalisation of liberalism and privatisation of government activities have increased the reliance on market mechanisms, which has resulted in the relocation of regulatory functions from public to private authority. As a consequence, it is argued, the distinction between international public and private sphere, national and international, and local and global has blurred.⁴⁶

to its author” Austin, John, *The province of jurisprudence determined*, Weidenfeld and Nicolson: London, 1954, p. 133.

44 D’Amato, Anthony, *International Law And World Order*, West Publishers: St.Paul, 1990, p. 11.

45 Reisman, Michael, W., *The Democratization of Contemporary International Law-making Processes and the Differentiation of Their Application*, in Wolfrum, Rüdiger and Röben, Volker (eds.), “Developments of International Law in Treaty Making”, Springer: Berlin, 2005, p. 21.

46 See for instance, Cutler, Claire, A., *Private international regimes and interfirm cooperation*, in Hall, Rodney, Bruce and Biersteker, Thomas, J. (eds.), “The emergence of Private Authority in Global Governance”, Cambridge University Press: Cambridge, 2002, p. 23. See also Strange, Susan, *The Retreat of the State: the diffusion of power in the world economy*, Cambridge University Press: Cambridge, 1966.

It can indeed be observed an increasing tendency among scholars to extend the use of soft law instruments and institutions as something that can and should reside outside the 'traditional' international public sphere. Cutler, for instance, holds that state-based, positivist international law and 'public' notions of authority are being combined with or, in some cases, superseded by non-state law, informal normative structures, and 'private' economic power and authority as a new transnational legal order takes shape.⁴⁷ It is also asserted that MNEs and global business associations have alone assumed the roles that traditionally belonged to the international public authority. These developments have been conceptualised by the term of "global private governance", which basically refers to commercial arbitration, rating agencies, and other types of private regimes.⁴⁸

The recurring reason offered for this modification is the changing international reality, which has created a disjunction between "formalistic and legalistic" structures of international law combined with the new world that has developed in the globalisation process in which state and law has become detached and the public/private distinction has eroded.⁴⁹ Questioning the basic premises of 'traditional' international law, which is a system based on sovereign states, many writers conclude that there is a need to recognise that the basic rules and rule makers of "the game" have changed. In the words of Flood, in this 'new age', which demands fast, flexible and often unaccustomed solutions, soft law has become the law of globalisation.⁵⁰ As may be expected, in this emerging legal order the concept of soft law is also to be redefined. Accordingly, soft law now does not refer to the rules with vague obligation that governs inter-state relations, but to "regimes that rely primarily on the participation and resources of nongovernmental actors in the construction, operation, and implementation of a governance arrangement".⁵¹

Even though there is no uniformity in the definition of 'informal' soft law and soft law regimes, the exclusion of state authority from the norm creating and implementation processes appears to be the common characteristic. These emerging sources of law "do not emanate from public, state authority, but

47 Cutler, Claire, A., *Private Power and Global Authority*, Cambridge University Press: UK, 2003, p. 1.

48 Ruggie, John, Gerard, *Reconstituting the Global Public Domain*, 10:4 *European Journal of International Relations*, 2004, p. 502.

49 In the words of Lipschutz and Fogel, "Today, the state monopoly over regulation is well past its twentieth-century apogee. The "fluidization" of regulatory space is a feature arising from globalization, the declining authority of the state, and the growing tendency of individuals and organizations to act outside traditional rules and frameworks" (Lipschutz, Ronnie, D. and Fogel, Cathleen, "*Regulation for the rest of us?*" *Global civil society and the privatization of transnational regulation* in Hall and Biersteker, 2002, p. 122). See also Cutler, Clair, A., *Public Meets Private* 13:1 *Global Society*, 1999.

50 Flood, J., *Capital markets, globalisation and global elites*, in Likosky, Michael (ed.), "Transnational Legal Process", Butterworths: UK, 2002, p.116.

51 Kirton, John, J. and Trebilcock, Michael, J. (eds.), *Hard Choices, Soft Law*, Ashgate: UK, 2004, p. 4.

rather from privatized, non-state authority”.⁵² It is said that the private international regimes, which are created by enterprises and business associations in the interactions among themselves as well as between their customers, is the most important example of these emerging non-state authorities.

Many scholars, like Reisman, have characterised such “non-state law-making” modes as “privatisation and democratisation” of international law and suggested replacing the traditional division of ‘hard law’ and ‘soft law’ with “state-made law”, which refers to the law that is produced in arenas to which only state representatives have formal access, and “media-made law”, which refers to the ‘law’, which is produced within a much larger and more open ‘law-making’ process that is transmitted through multiple electronic and print channels.⁵³ Or as some others have suggested replacing this ‘old’ division with “formal soft law”, which is primarily defined within the inter-state/governmental realm, and “non-state soft law”, which is confined to those norms and regimes that rely on the participation and recourses of non-state actors in the construction, operation, and implementation.⁵⁴

Hence, according to this thinking, governmental authority is in the non-state soft law either completely absent or does not play a constitutive role.⁵⁵ However, as may be expected, the legal status of the instruments adopted by non-state actors causes much controversy for the reason that if norm-like activities of non-state actors should be classified as soft law or some sort of law, it involves a paradigm shift in the subjects and sources theory of international law. It also implies a decline of the public/private distinction, and therefore requires to be wrapped in a larger context of the tendency of deformalisation of international law.

To sum up, as highlighted in the previous sections, the concept of soft law initially emerged as a result of the structural shortcomings of international law to respond to the increasing complexity of the post-war inter-state life. However, the growing role of non-state actors and decreasing/re-organised regulatory power of the state has had significant impact on the nature and role of international soft law. Most importantly, in the globalisation process the concept of soft law has increasingly been used to develop instruments and regimes that rely primarily on non-state actors in their making, implementation and enforcement. Thus, within this recent interpretation, soft law is no longer a concept of international law and a tool for governments and inter-state

52 Cutler (2003) p. 22.

53 *Ibid.*

54 Kirton, and Trebilcock (2004) p. 8.

55 *Ibid.* p. 9. Shelton, on the other hand, takes a more ‘cautious’ track. According to the writer, the norms adopted by non-state actors can be classified as soft law mainly because of two reasons: First, these norms are predominantly designed to influence states conducts and policies. Second, as is argued, with the increasing globalisation, ‘transnational entities’ that make their own rules (i.e., ‘self-regulation’) enter into normative relations and instruments that “look much the same as state-adopted norms” (Shelton, Dinah (ed.) *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, Oxford University Press: New York, 2003, p. 4).

agencies, but it is the norm-like activities of the private actors within a combined public-private transnational realm.

8 Reconsidering International Soft Law

It has been argued in this contribution that a considerable amount of principles rules or instruments of international law cannot be easily explained within the concept of ‘traditional sources’. These rules and instruments, which are more and more frequently named soft law, can be found both in treaties, which are legally binding, and in legally non-binding instruments such as resolutions of UN General Assembly. It has also been discussed that it would be misleading to classify all treaties and treaty provisions as hard, whereas resolutions, declarations, codes of conduct, etc., would be categorised as soft. For, some treaties may entirely or partly be soft and unenforceable due to being vague, too general, non-self-executing, hortatory or political in nature whereas some non-binding instruments, such as certain UN General Assembly resolutions, can be legally binding.⁵⁶ Likewise, certain provisions of essentially non-binding international instruments may be considered obligatory.⁵⁷ There are indeed cases where the content of a formally binding instrument has been so precisely defined and formulated that some of its provisions could be integrated into a treaty.

It is certain that ‘treaty’ and ‘non-binding’ soft law entail different consequences. Since only violation of formally binding rules bring about responsibility under international law, a ‘treaty’ soft law may serve as the basis of a legal decision delivered by an international court. Although non-legal obligation can also be relevant in a legal dispute for instance as a proof of customary law, it cannot constitute the basis of a legal judgement. However, the practical effects are not as far reaching as they might seem at first sight, considering the fact that comparatively few disputes have been brought before international courts: Between 22 May 1946 and 01 March 2013, the International Court of Justice dealt with 152 contentious cases between states.⁵⁸

According to a common but nevertheless misleading understanding, soft law is argued to create only moral and/or political obligation but no legal obligations. This understanding of soft law fails to consider the obvious fact that soft law may also generate direct as well as indirect *legal* effects alongside with political and moral ones. As it has been pointed out earlier, one of the most important features of soft law is that it can start a rule of customary international law or serve as an evidence of it. Moreover, in certain cases soft law may ‘de-legitimise’ the legal status or binding nature of an existing norm

56 Such as the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.

57 Such as the provisions of Helsinki Final Act of 1975 which regulate military manoeuvres.

58 “www.icj-cij.org/docket/index.php?p1=32”.

through adopting a soft law norm, which is opposite to an existing, say, customary norm. Thus, in these cases, it may be possible to claim that there is no longer *opinio juris* for the rule of custom.⁵⁹ Another important effect soft law may create is the internationalisation of a subject area. Once a matter has become the subject of a soft law, it would hardly be possible for a state party to claim that the matter in question still falls into domestic jurisdiction of the state. This point is especially relevant for the areas of human rights and environment.

Arguably, soft law may also make state behaviour more predictable and thereby inter-state relations more stable. In addition, soft law may promote a more democratic international law, as it more immediately reflects ‘general tendencies of change of beliefs and opinions’ in the “international community”.⁶⁰ However, it should be remembered that, the concept of soft law is a double-edged tool. As pointed out above, soft law may also serve as a strategy to a few powerful states to strengthen their position and undermine the will of the remainder i.e. whenever a few powerful states do not agree with the will of the rest; they may seek ‘non-binding soft law’ as a refuge. Or soft law may give an excuse to states, which are unwilling to comply with their international commitments as in the case of International Covenant on Economic, Social and Cultural Rights.⁶¹

Soft law may also promote more participatory international law permitting the participation of non-state actors in the law-making process. States are seemingly more inclined to accept the participation of non-state actors in norm creating activities when instruments are expressly legally non-binding and when the outcome is either declaratory or programmatic. Non-binding international instruments, such as declarations, agenda, and programs, increased in number during the 1990s and can be exemplified by the results from the global summit conferences.⁶² This interesting though limited development has occurred notably in the domains, which are, as argued by Chinkin, “inherently soft, or perhaps too intrusive into domestic jurisdiction to be subject of binding obligation” such as human rights, environment, population, poverty, economic and social development, human habitation,

59 Gruchalla-Wesierski, Tadeusz, *A Framework for Understanding “Soft Law”*, 30 McGill Law Journal, 1984, p. 56.

60 “Soft law is the bearer of the hopes of the damned of the earth in a society that they wish to turn into a better world. This is also one of the functions of Law” (Pellet, Allen, *Contre la tyrannie de la ligne droite*, Thesaurus Acroasium, Vol. XIX, 1992, p. 354, cited in Casanovas, Oriol, “Unity and Pluralism in Public International Law”, Martinus Nijhoff Publishers: The Hague, 2001, p. 83.

61 The Covenant has a reporting system and no provision for inter-state complaints or individual petitions. However, the Committee established 1987, prepares ‘General Comments’ on particular rights in order to hinder States from evading their responsibilities under the pretext of that rights that the Covenant contains are rather programmatic and their realisation depend much on resources (and the ‘goodwill’) of States parties.

62 To give a few examples: 1992, Rio de Janeiro “The World Conference on the Environment and Development”; 1993, Vienna “The World Conference on Human Rights”; 1995, Beijing “The Fourth World Conference on Women”; and 1996, Istanbul “Habitat II”.

women, and children.⁶³ These global summit conferences have been brought into being with the active participation of individuals, NGOs, and business organisations though having only observer status and not as a part of the formal conference negotiations. It is not surprising that the high level activities of non-state entities in the creation of legally non-binding rules in such global summits is welcomed by many scholars as the democratisation of international law. It is true that these summits have led to new international legal discourses and created expectations, which may function as an authoritative guidance encouraging states to comply with the rules in question. However, it is hardly possible to regard this development as the beginning of a new institutional international law making. It is also highly questionable whether the participation of non-state entities in the creation of non-binding rules should be accepted as the democratisation of international law. The ‘democratisation’ claim based on an increased participation of non-state actors demands great prudence. Because, it may be deceptive to consider international NGOs as the true representatives of “international society” even if it is accepted such a concept exists. First of all, to affirm that all NGOs are democratic (and monolithic) is an ungrounded assertion. Second, this understanding underestimates the risk of over-representation in the meaning that NGOs with greater resources and support would have more chance to be heard in such international institutional activities. Hence, it is hardly surprising that there is an increasing interest in this issue focusing on democratic deficiency or a legitimacy crisis of global governance.⁶⁴

Lastly, soft law may represent opportunities for promotion of international norms and further legalisation of international relations. It is therefore important to understand the relations between hard and soft law as well as formal and informal norms to appreciate their joint contribution to efforts to improve world order instead of insisting upon a rigid dichotomy between what is legal and what is not. As Chinkin suggests, hard and soft law should be seen as part of a continuum of international legal mechanisms. Both may contribute to the development of international law, to the creation of stability and expectation in international relations and both facilitate international co-operation.⁶⁵ Yet, the need for a more complete and larger spectrum of

63 Chinkin (2003) p. 28. Indeed, the criticism of feminist scholars’ regarding soft law is essentially centred around subject-matters that states use soft instruments for matters that are not regarded as essential to their interests (soft issues of international law) or where they are reluctant to incur binding obligations. It is argued that “many of the issues that concern women thus suffer a double marginalisation in terms of traditional international law making: they are seen as the ‘soft issues of human rights and are developed through ‘soft’ modalities of law-making that allows states to appear to accept such principles while minimising their legal commitments” (Charlesworth, Hilary and Chinkin, Christine, *The Boundaries of International Law: A feminist analysis*, Juris Publishing: Manchester University Press, 2000, p. 66).

64 For some insightful discussions, see Rosenau, James, N., *Governance in the Twenty-First Century* in Wilkinson, 2000; and Finkelstein, Lawrence, S., *What is Global Governance?*, 1 Global Governance, 1995.

65 Chinkin (2003) p. 42.

understanding of international norms and the need to answer to the ever-increasing complexity of international affairs should not increase further the structural weakness of international law neglecting the necessary minimum requirement of the normative threshold between what is legal and what is not. Although “the forces that converge to impinge upon and constrain states to behave one way or another are broader than the narrow consideration of legality”,⁶⁶ the aptness of a norm to affect state practice is not conclusive reason for its legal validity. Otherwise, there would hardly be left any meaningful criterion to differ legal norms from moral, political or social norms.

9 Conclusion

Soft law should not necessarily be understood as an alternative to the ‘traditional’ law making, but rather as a complement to it where it is designed as preparatory instrument as to the future adoption, or interpret as a ‘post-law’ instrument, which may provide interpretation for its application, such as the “General Comments of the Human Rights Committee” on various issues, or a steering instrument in establishing and advancing the effect to the law’s objectives, such as many declarations and general recommendation of international organisations. Moreover, the present study recognises the potential of soft law in reforming traditional sources of international law and the modalities for their creation by allowing wider participation and opening up new channels for further legalisation.

It can be said that soft law has ceased to be the “substitute” (or “second-best” solution) for hard law alternative in inter-state relations and it has become the major ‘legalisation form’ of the norm-like activities of private and public-private crossbreed authorities. Closely related to the emergence of private authority and the proliferation of informal or hybrid institutions on the international scene, the new type of informal soft law has come to primarily rely on private (i.e. non-state) and public-private mixed authorities. Therefore, by implying the multiplicity of legal sources and subjects of international law and giving rise to a flexible and context-dependent norm-making process, informal soft law has been a central mechanism in privatising public power.

66 Tiewal, S., *The United Nations Charter of Economic Rights and Duties of States*, 10 *Journal of International Law and Economics*, 1975, p. 687.