Hard Choices and Soft Law in International Law

Smeeksha Pandey

Assistant Professor

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Abstract

The distinction between hard and soft law in international law is an ongoing debate, particularly regarding the role of non-binding instruments in shaping legal norms. Hard law consists of binding treaties and customary law, as outlined in Article 38 of the ICJ Statute, while soft law encompasses non-binding resolutions, declarations, and guidelines that influence state behavior. Despite its non-binding nature, soft law plays a significant role in international legal development by providing flexibility, fostering cooperation, and contributing to the formation of customary international law.

Soft law offers advantages, such as adaptability and cost-effectiveness, particularly in areas where states are reluctant to commit to binding agreements, such as environmental law and human rights. The ICJ and other international tribunals have increasingly relied on soft law principles to interpret legal obligations, as seen in cases like Legality of the Threat or Use of Nuclear Weapons and The Gambia v. Myanmar.

Recognizing soft law as an essential component of international law can enhance its effectiveness. Strengthening institutional mechanisms, encouraging state participation, and facilitating the transition from soft to hard law can contribute to a more responsive legal system. Ultimately, soft law serves as a bridge between political commitments and legally binding obligations, shaping the future of international law.

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1.1 Introduction

The definition of 'law'[i] in an international context is complex; however, for immediate purposes, it can be succinctly defined as a system of precepts that govern the relationships among a specified group of individuals or entities (the 'subjects' of law). Compliance or non-compliance with these precepts results in certain consequences that are independent of the actor's will. This implies that while the actor may choose to comply or refuse, fully aware that specific consequences will ensue, they cannot choose whether those predetermined consequences will occur.[ii] In the international context is not an entirely simple matter; but simple working definition for immediate purposes: it is, shall we say, a system of precepts governing relations between a defined group of persons or entities (the 'subjects' of law)[iii], An act of compliance or non-compliance with those precepts entails specific consequences that are independent of the actor's volition; the actor may opt to comply or refuse, aware and perhaps intending that the corresponding consequence will ensue, yet is not at liberty to determine whether the act will yield those predetermined consequences.[iv]

Article 38 of the ICJ Statute[v] mandates that the Court resolve disputes presented to it largely by using treaties and international customary law.[vi] The ICJ Statute regulates the Court, and it is the only document in which governments have explicitly acknowledged broad international law-making processes. Contrary to the established sources enumerated in the ICJ Statute, recent state practice, both within and beyond international organizations, has progressively incorporated normative assertions into non-binding political instruments, including declarations, resolutions, and action programs, indicating an expectation of adherence to the norms articulated in these documents. [vii]

The inability of many political scientists to engage with the Accord's soft law attributes may stem from the uncertainties intrinsic to the soft vs hard dichotomy. The adjective "soft" is often used to describe certain types of household or interstate legislation, or even standards that are non-binding and lack enforcement via a politically imposed punitive mechanism. Alexander (2000b:3)[viii] observes that soft law often presumes compliance with essential principles and standards of state practice, although it lacks the opinio juris necessary to create binding obligations under customary international law.[ix] Soft law enhances hard law in international law by providing flexibility, guidance, and progressive development of legal norms. While

hard law consists of binding treaties, conventions, and customary international law, soft law includes non-binding resolutions, declarations, guidelines, and codes of conduct adopted by international organizations and states.[x] Soft law helps fill gaps in hard law by addressing emerging global issues where consensus on binding rules is difficult to achieve. It also influences the interpretation and evolution of hard law by shaping state practice and opinio juris, which can eventually contribute to the formation of customary international law. Furthermore, soft law instruments serve as a testing ground for new legal principles, allowing states to experiment with norms before committing to legally binding obligations. In areas such as environmental law, human rights, and trade, soft law facilitates cooperation and adaptation to changing global challenges, reinforcing and complementing the effectiveness of hard law.

1.2 Need for Recognition and discussion of Soft Law

The definition of soft law is contentious, with some scholars rejecting the concept as redundant and illogical. Soft law may be regarded as "a convenient description for a variety of non-binding, normatively articulated instruments employed in contemporary international relations by states and international organizations." Instances of soft law include recommendations, guidelines, and codes of behaviour, non-binding resolutions, and standards. Conversely, hard law denotes legally binding documents, which in international law often manifest as treaties.[xi] Article 38 enumerates a restricted array of modalities for the articulation of international law: treaties, customary law, and principles of law acknowledged by nations as major sources, supplemented by ancillary sources such as court judgments and the doctrines of the most esteemed publicists.[xii]

The intricate framework of international law creates significant challenges in identifying or establishing the existence of law, which elucidates why the ascertainment of law is one of the most contentious questions in international law philosophy and jurisprudence.[xiii] The issue of international law determination is described by Shaw as “the anarchic nature of world affairs and the conflict of competing sovereignties.[xiv] Despite the traditional notion that the examination of the sources of international law is limited to the enumeration in Article 38 of the ICJ Statute,[xv] emerging trends advocate for a reassessment of the existing sources and/or

the inclusion of other contenders. This paper argues the need to re-examine the legal discourse about the roots of international law. It examines the current status of the "soft law" theory to clarify its probable future: to expand the catalogue of sources of international law and facilitate.

On a theoretical level, soft law remains a riddle, while not being novel phenomena; the first instances of soft law are almost as ancient as the first contemporary international treaties.[xvi] Article 38(1) (b)[xvii] of the ICJ stipulates that courts may use international custom as evidence of a 'general practice acknowledged as law,' signifying that broad state practice and acceptance are prerequisites for the establishment of Customary International Law.[xviii] The domain of "soft law" begins when legal arrangements are diminished in one or more aspects of obligation, specificity, and delegation. This softness may manifest in diverse degrees across each dimension and in various combinations.

The term "soft law" is used to differentiate this extensive category of departures from hard law and, conversely, from entirely political arrangements characterized by a significant absence of legalisation. [xix] Soft law provides several benefits akin to those of hard law, circumvents some expenses associated with hard law, and has certain advantages of its own. This is particularly applicable when the entities involved are states that are protective of their autonomy and when the matters in question threaten their sovereignty.[xx]

Soft legalisation offers certain advantages that are not accessible via hard legalisation. It provides more efficient methods for addressing uncertainty, particularly when it launches procedures that enable stakeholders to understand the effects of agreements over time. Moreover, soft law promotes compromise, so enabling mutually advantageous collaboration among actors with divergent interests and values, varying time horizons and discount rates, and differing levels of power.[xxi] Soft law in international law is a multifaceted phenomenon that fulfils many functions and manifests in several ways. At least five distinct functions may be identified, as discussed by Alan Boyle and Christine Chinkin, among others: [xxii]

1) As a substitute for treaty law[xxiii];

2) As an authoritative treaty interpretation;

3) As advice for treaty implementation;

4) As a progression in the evolution of international legal principles;

5) As evidence of opinio juris in the establishment of international customary law.

The current status of the "soft law" concept aims to clarify its probable future: to expand the catalogue of international law sources and facilitates its development pertaining to international law. While soft law has emerged across all domains of international law, International Environmental Law (IEL) has shown to be one of the most prolific contexts. Documents of an "unrecognizable" type have appeared in well-known environmental contexts.

International meetings, specifically the 1972 UN Conference on the Human Environment (Stockholm), the 1992 UN Conference on Environment and Development (Rio de Janeiro - Earth Summit I), the 2002 UN Summit on Sustainable Development (Johannesburg - Earth Summit II), and the 2012 UN Summit on Sustainable Development (Rio + 20), among others.[xxiv] R. Jennings deems it ludicrous to depend only on Article 38.14.[xxv] Consequently, Article 38 should not be commonly regarded as the standard for International Law. [xxvi]

Various writers are attempting to address the issue. For example, **Kiss and Shelton**[xxvii] assert that they are non-binding political instruments capable of addressing a significant global issue notwithstanding the dissent of one or many nations responsible for the problem, so circumventing the doctrinal obstacle of their absence of agreement to adhere to the standard Louka identifies soft law[xxviii] under “other” sources of International Environmental Law, stating that it has the potential to establish expectations that influence the future trajectory of international law. Birnie and Boyle contend that "soft law" constitutes a source of law, albeit not one of the conventional sources delineated in Article 38 of the ICJ Statute. They assert that while these instruments do not qualify as law in the sense articulated by that article, they nonetheless possess a degree of authority.

States may exhibit innovation, and the unique implementation of legal remedies to political issues has resulted in a profusion of new or seldom used forms of international law. States have broadened the use of international organizations established international tribunals with jurisdiction over various state and individual behaviours, and used soft law to formulate regulations across several problem domains.[xxix] Establishing a tribunal to interpret legal duties in a manner that results in soft law through jurisprudence, governments may extend the

tribunal's reach beyond those that accept its jurisdiction. Consequently, all nations governed by the underlying legal obligations may be influenced by the soft-law effects of the tribunal, irrespective of formal submission to the tribunal's jurisdiction.[xxx]

1.3 Procedural Aspect: International Court of Justice and International Tribunals and Opinio Juris Sive Necessitatis

A tribunal's rulings are considered either legally binding or non-binding. However, even when a judgment is obligatory, its influence is somewhat limited. The determinations of the UN Human Rights Committee ("Committee")[xxxi] lack any legal authority, even for the specific dispute at hand. The rulings of the International Court of Justice ("ICJ") are deemed obligatory for the disputing parties. The ICJ verdict is binding only on the parties involved and alone pertains to the specific case at hand.[xxxii] The conventional perspective on the opinio juris criterion was succinctly expressed in the North Sea Continental Shelf instances, whereby it was stated that the actions in question: "*must also be conducted in a manner that demonstrates a conviction that this behaviour is mandated by a legal norm necessitating it. The involved States must thus perceive that they are adhering to what constitutes a legal responsibility*".[xxxiii]

The opinio juris criterion therefore embodies the internalisation described by Koskenniemi as the essential psychological component for differentiating legally pertinent from irrelevant conduct. The issue with this conventional phrase is readily evident, since its literal interpretation seems to exclude the possibility of legal modification.[xxxiv] The Right of Passage case[xxxv] seems to prove that a consistent and uniform practice generates a rule of customary law. Minor inconsistencies are acceptable, since the practice should only be almost consistent, rather than perfectly uniform.[xxxvi] It is important to emphasise that Article 38 refers only to a "general" practice, not a "universal" one. [xxxvii]

In November 2019, The Gambia submitted a request for provisional sanctions against Myanmar, asserting that Myanmar has perpetrated genocide against the Rohingya community in violation of the Genocide Convention. For decades, tensions escalated between the mostly Muslim Rohingya and the majority Bamar Buddhist people, culminating in an armed struggle between the Arakan Rohingya Salvation Army (ARSA) and Myanmar's military.[xxxviii] The ICJ determined that, due to their shared principles, all States parties to the

Genocide Convention had a collective interest in preventing acts of genocide. The Gambia, as a signatory to the Genocide Convention, has a legal interest in adhering to the duties of the convention, which are erga omnes partes, meaning responsibilities due by any State party to all other State parties.[xxxix] Employing soft law in this manner enables governments to circumvent the conventional need of state approval. A tribunal's verdict evidently impacts other states that may appear before it. Each verdict offers insights into the tribunal's probable future decisions, enabling governments to modify their conduct accordingly.[xl] Soft law facilitates the evolution of legal norms without necessitating formal renegotiation. A solitary state may unilaterally and overtly implement a new legal norm, anticipating that other states would conform when faced with an alternative, so recalibrating expectations about compliant behaviour.[xli] International Court of Justice in **Legality of the Threat or Use of Nuclear Weapons (1996 Advisory Opinion)**[xlii] The ICJ was asked to provide an advisory opinion on whether the use or threat of nuclear weapons was lawful under international law. The Court examined soft law instruments, including UNGA resolutions advocating nuclear disarmament. The ICJ found that while there was significant international support for nuclear disarmament, there was no clear opinio juris that using nuclear weapons was categorically prohibited under customary international law. However, it acknowledged that ongoing state practice and legal opinions could eventually lead to a binding prohibition. The case illustrated how repeated references to soft law instruments, such as non-binding UN resolutions, contribute to shaping legal norms through opinio juris.

1.4 Recommendations for Strengthening the Role of Soft Law in International Law

Given the increasing importance of soft law, the following recommendations can help enhance its role in international legal development:

1. **Formal Acknowledgment in International Legal Instruments**: While soft law is widely used, its status remains ambiguous. Recognizing soft law in international legal frameworks can provide greater clarity on its legal weight and function.

2. **Strengthening Customary International Law Formation**: The role of soft law in shaping customary international law should be reinforced through clearer articulation of opinio juris and state practice.
3. **Enhancing Institutional Mechanisms**: International organizations should continue to develop soft law instruments, ensuring that they complement and support legally binding treaties.
4. **Encouraging State Participation**: States should be encouraged to engage with soft law instruments, thereby contributing to their legitimacy and eventual codification in hard law.
5. **Bridging the Gap Between Soft and Hard Law**: Mechanisms should be developed to facilitate the transition of soft law principles into legally binding treaties.

1.5 Conclusion

Soft law plays a crucial role in the evolution of international legal norms. While it lacks binding force, it serves as an essential tool for guiding state behavior, influencing judicial decisions, and shaping customary international law. The ICJ and other international tribunals have increasingly relied on soft law principles to interpret and apply legal norms. Recognizing and strengthening the role of soft law in international law can contribute to a more flexible, responsive, and effective international legal system. soft law plays a crucial role in enhancing the interpretation of hard law in international law by providing clarity, adaptability, and progressive legal development. Courts and tribunals often rely on soft law instruments, such as UN General Assembly resolutions, declarations, and reports of international bodies, to interpret treaty provisions and customary norms. A landmark example is the *Legality of the Threat or Use of Nuclear Weapons* (1996) advisory opinion by the International Court of Justice (ICJ), where the court referred to various UN General Assembly resolutions and humanitarian law principles to interpret the legality of nuclear weapons under international law. Similarly, in the *Barcelona Traction Case* (1970), the ICJ recognized the concept of "obligations erga omnes" by drawing upon soft law sources, including General Assembly resolutions. Another notable case is the *Gabcíkovo-Nagymaros Project Case* (1997), where the ICJ considered principles of sustainable development, reflecting the influence of soft law instruments such as the Rio

Declaration. These cases demonstrate how soft law helps courts interpret and apply hard law, ensuring that international legal norms remain relevant and responsive to contemporary global challenges.

Endnotes

[i] Grotius Theory: He is the father of International law. His principal work, De Jure Belli ac Pacis, was continually relied upon as a work of reference and authority in the decisions of courts, and in the textbooks of later writers of standing.

[ii] Dinah Shelton, Normative Hierarchy in International Law, The American Journal of International Law , Apr., 2006, Vol. 100, No. 2 (Apr., 2006), pp. 291-323

[iii] Guido Acquaviva, Subjects of International Law: A Power-Based Analysis; *Vanderbilt Journal of Transnational Law, Vol. 38, No. 2, 2005*

[iv] It is in this sense that law is said to be 'binding', another slippery concept to define (Hart, Concept of Law, 216). Another way of looking at this aspect is with the idea of 'authority': see B. D. Lepard, Customary International Law: A New Theory with Practical Applications (Cambridge: Cambridge University Press, 2010), 47 ff. See also the idea of 'sanction' in H. Kelsen, Allgemeines Staatslehre, and French trans.: Théorie générale du droit et de l'État (Paris: LGDJ; Brussels: Bruylant, 1997), 11.

[v] https://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf

[vi] https://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf

[vii] Dinah L. Shelton, Soft Law in Handbook of International Law (Routledge Press, 2008).

[viii] Kern Alexander, The Role of Soft Law in the Legalization of International Banking Supervision: A Conceptual Approach; ESRC Centre for Business Research, University of Cambridge, Working Paper No: 168.

[ix] Bryce Ramsey Quillin, The Effects of International Soft Law on State Behaviour: Understanding Degrees of Compliance with the Basel Accord, 1988-2000, Thesis submitted in partial fulfilment of the requirements of the degree Doctor of Philosophy in International Relations London School of Economics and Political Science

[x] Dinah L. Shelton, Soft Law in Handbook of International Law (Routledge Press, 2008).

[xi] Fabián Augusto Cárdenas Castañeda, A Call for Rethinking the Sources of International Law: Soft Law and the Other Side of the Coin.

[xii]Marcel M.T.A. Brus, professor of public international law, University of Groningen. http://www.rug.nl/staff/m.m.t.a.brus/ Soft law in public international law: a pragmatic or a principled choice? Comparing the Sustainable Development Goals and the Paris Agreement, Book chapter under review, based on a paper presented at a conference 'Validity and Public Trust', 17 and 18 December 2015, University of Groningen.

[xiii] Fabián Augusto Cárdenas Castañeda, A Call for Rethinking the Sources of International Law: Soft Law and the Other Side of the Coin.

[xiv] Shaw, Malcolm, International law, 6th. ed., Cambridge, Cambridge University Press, 2008.

[xv]https://prawo.uni.wroc.pl/sites/default/files/students-resources/LLB%20-%20Article%2038%20of%20the%20Statute%20of%20ICJ.pdf

[xvi] The phrase 'soft law' was used to differentiate specific agreements from treaty law. The latter term originates from the latter third of the nineteenth century; see to M. Vec, Recht und Normierung in der Industriellen Revolution (2006), 112. Among the first instances of soft law as so defined are the 'voeux' included in The Final Acts of the 1899 and 1907 Hague Peace Conferences; refer to Conference Internationale de la Paix, La Haye, 18 Mai–29 Juillet 1899, Annexes, p. 5; 2eme Conference Internationale de la Paix, La Haye, 15 Juin–18 Octobre 1907, Actes et papers, Vol. I, p. 700.

[xvii] https://www.icj-cij.org/statute

[xviii] Emma Margareta Claridge, Marrying Lon Fuller to Customary International Law: Is Customary International Law, a form of Law?; An exploration focusing on the status and desirability of Customary International Law with a focus of Lon Fuller's legal principles, 7 th June 2013.

[xix] Kenneth W. Abbott and Duncan Snidal, Hard and Soft Law in International Governance; International Organization , Summer, 2000, Vol. 54, No. 3, Legalization and World Politics (Summer, 2000), pp. 421-456

[xx] Kenneth W. Abbott and Duncan Snidal, Hard and Soft Law in International Governance; International Organization , Summer, 2000, Vol. 54, No. 3, Legalization and World Politics (Summer, 2000), pp. 421-456

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[xxii] Marcel M.T.A. Brus, professor of public international law, University of Groningen. http://www.rug.nl/staff/m.m.t.a.brus/ Soft law in public international law: a pragmatic or a principled choice? Comparing the Sustainable Development Goals and the Paris Agreement, Book chapter under review, based on a paper presented at a conference 'Validity and Public Trust', 17 and 18 December 2015, University of Groningen.

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[xxxi] https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/PracticalGuideNGO_en.pdf
[xxxii] Statute of the International Court of Justice (1945), art 59, 1, 59 Stat 1031 ("The decision of the Court has no binding force except between the parties and in respect of that particular case.").
[xxxiii] North Sea Continental Shelf cases, n 40 above, at 44.
[xxxiv] Stephen Donaghue, Normative Habits, Genuine Beliefs and Evolving Law: Nicaragua and the Theory of Customary International Law.
[xxxv] ICJ Rep 1960, p 6 at 40
[xxxvi] North Sea Continental Shelf cases, ICJ Rep 1969, p 3 at 43; Brownlie, n 28 above, p 6.
[xxxvii] Stephen Donaghue, Normative Habits, Genuine Beliefs and Evolving Law: Nicaragua and the Theory of Customary International Law.
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[xxxix] Stephen Donaghue, Normative Habits, Genuine Beliefs and Evolving Law: Nicaragua and the Theory of Customary International Law.
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