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Soft law

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The conventional understanding of international law sees its "legal" nature as deriving from the consent of states to binding obligations. However, states have engaged in a host of other normative commitments through means such as declarations and General Assembly resolutions that, while not having the binding force of formal treaties, may still have law-like consequences of the kind that the term "soft law" has been coined to describe. In practice, the distinction between "hard" and "soft" law may become increasingly blurred over time.

International law is a largely consensual system, consisting of norms that states in sovereign equality freely accept to govern themselves and other subjects of law. International law is thus created by states, using procedures that they have agreed are "legislative," that is, through procedures identified by them as the appropriate means to create legally binding obligations. These sources of law, at least for the purpose of resolving interstate disputes, are identified in the Statute of the International Court of Justice (ICJ). Article 38 of the ICJ Statute directs the Court to decide cases submitted to it primarily through applying treaties and international custom.[1] The ICJ Statute governs the Court, but it is the only text in which states have expressly recognized general international law-making procedures.

In contrast to the agreed sources listed in the ICJ Statute, state practice in recent years, inside and outside international organizations, increasingly has placed normative statements in non-binding political instruments such as declarations, resolutions, and programs of action, and has signaled that compliance is expected with the norms that these texts contain. Commentators refer to these instruments as "soft law" and debate whether the practice of adopting them constitutes evidence of new modes of international law making. States, however, appear clearly to understand that such "soft law" texts are political commitments that can lead to law, but they are not law, and thus give rise only to political consequences (Raustiala 2005: 587). The distinction may not be as significant as expected, however, because such commitments have proved sometimes to be as effective as law to address international problems. Moreover, soft law norms may harden, being frequently incorporated into subsequent treaties or becoming customary international law as a consequence of state practice. Within states, the norms contained in non-binding instruments may provide a model for domestic legislation and thus

become legally binding internally, while remaining non-binding internationally.

What is "soft law?"

In any community, efforts to resolve social problems do not invariably take the form of law. Societies strive to maintain order, prevent and resolve conflicts, and assure justice in the distribution and use of resources not only through law, but through other means of action. Issues of justice may be addressed through market mechanisms and private charity, while conflict resolution can be promoted through education and information, as well as negotiations outside legal institutions. Maintenance of order and societal values can occur through moral sanctions, exclusions, and granting or withholding of benefits, as well as by use of legal penalties and incentives. In the international arena, just as at other levels of governance, law is one form of social control or normative claim, but basic requirements of behavior also emerge from morality, courtesy, and social custom reflecting the values of society. They form part of the expectations of social discourse and compliance with such norms may be expected and violations sanctioned.

Legal regulation, however, has become perhaps the most prevalent response to social problems during the last century. Laws reflect the current needs and recognize the present values of society. Law is often deemed a necessary, if usually insufficient, basis for ordering behavior. The language of law, especially written language, most precisely communicates expectations and produces reliance, despite inevitable ambiguities and gaps. It exercises a pull toward compliance by its very nature. Its enhanced value and the more serious consequences of non-conformity lead to the generally accepted notion that fundamental fairness requires some identification of what is meant by "law," some degree of transparency and understanding of the authoritative means of creating binding norms and the relative importance among them. A law perceived as legitimate and fair is more likely to be observed.

Soft law is a type of social rather than legal norm. While there is no accepted definition of "soft law," it usually refers to any written international instrument, other than a treaty, containing principles, norms, standards, or other statements of expected behavior. Soft law "expresses a preference and not an obligation that states should act, or should refrain from acting, in a specified manner" (Gold 1996: 301). This "expressed preference" for certain behavior aims to achieve functional cooperation among states to reach international goals (Lichtenstein 2001: 1433).

Some scholars alternatively or also use the term "soft law" to refer to weak or indeterminate provisions in a binding treaty.[2] The practice of states indicates that this use of the term "soft law," referring to the more hortatory or promotional language of certain treaty provisions, is the more appropriate usage. Treaties are binding and contain legal obligations, even if specific commitments are drafted in general or weak terms. It is a misnomer to refer to non-binding instruments as "law," soft or hard, although many scholars commonly do so and, for reasons of convenience and simplicity, the term is used herein as a synonym for normative statements contained in instruments that are not legally binding.

Soft law comes in an almost infinite variety. Many non-binding normative instruments emerge from the work of international organizations, which in most instances lack the power to adopt binding measures. The Security Council, under Article 25, is one of the few international bodies conferred the power to bind states and demand compliance with the measures it adopts.[3] The General Assembly, in contrast, is granted authority in the UN Charter to initiate studies, discuss matters, and make recommendations.[4] Thus, whether the General Assembly denominates a text a declaration, set of guidelines, or charter, the text remains a recommendation.

Nonetheless, the choice of titles is significant. A 1962 memorandum of the UN Office of Legal Affairs called a declaration "a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated."[5] The practice of the General Assembly confirms that states call a text a "declaration" in accordance with this interpretation.

Common forms of soft law include normative resolutions of international organizations, concluding texts of summit meetings or international conferences, recommendations of treaty bodies overseeing compliance with treaty obligations, bilateral or multilateral memoranda of understanding, executive political agreements, and guidelines or codes of conduct adopted in a variety of contexts. In some instances, a given text may be hard law for some states and soft law for others. A decision of the European Court of Human Rights or the Inter-American Court of Human Rights, for instance, is legally binding on the state or states participating in the proceedings but not on other states parties to the relevant human rights treaty. The jurisprudence of both courts is authoritative and may be preclusive or persuasive in domestic courts of all member states, but it is not legally binding on them. It is also a feature of soft law that it may address non-state actors, including business entities, international organizations, non-governmental organizations and individuals, while treaties rarely impose direct obligations on any entities other than states.

As a general matter, soft law may be categorized as primary and secondary. Primary soft law consists of those normative texts not adopted in treaty form that are addressed to the international community as a whole or to the entire membership of the adopting institution or organization. Such an instrument may declare new norms, often as an intended precursor to adoption of a later treaty, or it may reaffirm or further elaborate norms previously set forth in binding or non-binding texts. The UN Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and Treatment of Offenders, 1955, and approved by the UN Economic and Social Council in 1957, is an example of a primary declarative text.

Secondary soft law includes the recommendations and general comments of international supervisory organs, the jurisprudence of courts and commissions, decisions of special rapporteurs and other ad hoc bodies, and the resolutions of political organs of international organizations applying primary norms. Most of this secondary soft law is pronounced by institutions whose existence and jurisdiction is derived from a treaty and who apply norms contained in the same treaty. Secondary soft law has expanded in large part as a consequence of the proliferation of primary treaty standards and monitoring institutions created to supervise state compliance with treaty obligations. Sometimes the underlying treaty is quite general in nature. The Charter of the Organization of American States provided the framework for the OAS General Assembly to constitute the Inter-American Commission on Human Rights and confer on it the authority to supervise compliance with the rights and duties contained in the American Declaration of the Rights and Duties of Man, including the power to make recommendations to specific states. Thus, an institution established by soft law received a mandate to apply primary soft law to create secondary soft law, despite scant mention of human rights in the Charter.

Treaties may be distinguished from non-binding instruments by specific language, especially when the former contain clauses concerning ratification or entry into force. Nonetheless, the characteristics of each type of instrument are increasingly difficult to identify. In some instances, states may express "reservations" to parts of a declaration, as the US did with respect to the right to development in the Rio Declaration on Environment and Development.[6] The UN

Guiding Principles on Internal Displacement[7] has a title that suggests the contents of the instrument are non-binding, but the introduction to the principles says that they "reflect and are consistent with" international human rights and humanitarian law and they "identify rights and guarantees" (Abbott 2007: 166). The quoted introductory language appears to refer to treaty and customary law, but it has also been suggested that the Guiding Principles actually contain three different types of norm:

1. those restating legal rules binding as treaty or customary international law
2. new applications of existing general legal rules, adding substantive content
3. wholly new principles created by analogy to existing norms (Abbott 2007: 169).

Similar differentiation may be made among the norms contained in other non-binding instruments.

In another blurring of the distinction between law and non-binding norms, supervisory organs have been created recently to oversee compliance with some non-binding instruments. The UN Commission on Sustainable Development, for example, supervises implementation of Agenda 21, the plan of action adopted in 1992 at the Rio Conference on Environment and Development. In other instances, states have been asked to submit reports on compliance with declarations and action programs, in a manner that mimics if it does not duplicate the compliance mechanisms utilized in treaties.

Some scholars distinguish hard law and soft law by affirming that a breach of law gives rise to legal consequences while breach of a political norm gives rise to political consequences. Identifying the difference in practice is not always easy, however, because breaches of law may give rise to politically motivated consequences and failure to implement non-binding norms may result in retaliatory sanctions indistinguishable from countermeasures in the law of state responsibility. A government that recalls its ambassador can either be expressing political disapproval of another state's policy on an issue, or sanctioning non-compliance with a legal norm. Terminating foreign assistance also may be characterized either way. Even binding UN Security Council resolutions based on a threat to the peace do not necessarily depend on a violation of international law.

The most heated debate surrounding soft law concerns whether binding instruments and non-binding ones are strictly alternative or whether they are two ends on a continuum from legal obligation to complete freedom of action, making some such instruments more binding than others. If and when the term "soft law" should be used depends in large part on whether one adopts the binary or continuum view of international law. To many, the line between law and not-law may appear blurred, especially as treaties on new topics of regulation are including more "soft" obligations, such as undertakings to endeavor to strive to cooperate. In addition, both types of instrument may have compliance procedures that range from soft to hard.

Some international judicial and arbitral decisions have contributed to the debate. One decision referred to UN resolutions as having "a certain legal value" but one that "differs considerably" from one resolution to another.[8] Various factors, including the language, the vote, the drafting history, and subsequent state practice come into play in deciding on the value of a particular normative instrument.[9]

The relationship between soft law, treaties and custom

Despite their limited juridical effect, non-binding instruments have an essential and growing role in international relations and in the development of international law. In practice, non-binding norms are often the

precursor to treaty negotiations and sometimes stimulate state practice leading to the formation of customary international law. In fact, soft law has many roles to play in relation to hard law. A non-binding normative instrument may do one or more of the following:

1. codify pre-existing customary international law, helping to provide greater precision through the written text
2. crystallize a trend towards a particular norm, overriding the views of dissenters and persuading those who have little or no relevant state practice to acquiesce in the development of the norm
3. precede and help form new customary international law
4. consolidate political opinion around the need for action on a new problem, fostering consensus that may lead to treaty negotiations or further soft law
5. fill in gaps in existing treaties in force
6. form part of the subsequent state practice that can be utilized to interpret treaties
7. provide guidance or a model for domestic laws, without international obligation
8. substitute for legal obligation when ongoing relations make formal treaties too costly and time consuming or otherwise unnecessary or politically unacceptable.

Binding norms have a potentially large impact on the development of international law. Customary law, for example, one of the two main sources of international legal obligation, requires compliance (state practice) not only as a result of the obligation, but as a constitutive, essential part of the process by which the law is formed. In recent years, non-binding instruments sometimes have provided evidence of the emergent custom and have assisted to establish the content of the norm. The process of drafting and voting for non-binding normative instruments also or alternatively may be considered a form of state practice.

The interplay between soft law and custom is identified in the first three enumerations just given. Some soft law texts purport to do no more than set down in written form pre-existing legal rights and duties. The commentary to the UN "Basic principles and guidelines on the right to remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law," approved by the Commission on Human Rights[10] and endorsed by the General Assembly in 2005,[11] claims that the principles and guidelines contain no new norms, but instead reflect existing law scattered among a large number of treaties and widespread state practice. Other instruments may contain a combination of pre-existing law and new developments. It is rare that a non-binding instrument is entirely codification or new norms.

Soft law texts also may be drafted to consolidate a trend towards changes in customary law or stamp with approval one among conflicting positions on a legal issue. Efforts in the economic arena to make such changes, from the Declaration on Permanent Sovereignty over Natural Resources,[12] to the General Assembly Declaration on the Establishment of a New International Economic Order[13] and the Charter of Economic Rights and Duties,[14] demonstrate that these efforts can be highly contentious and not always entirely successful. For the soft law texts to become hard law, conforming state practice is needed among states representing different regions and the major legal, economic and political systems.

Compliance with entirely new non-binding norms also can lead to the formation of customary international law. In recent years, non-binding instruments sometimes have provided the necessary statement of legal obligation (*opinio juris*) to precede or

accompany state practice, assisting in establishing the content of the norm.[15] A declaration may reflect an ideal, moving away from emphasizing state practice to greater reliance on *opinio juris* (Roberts 2001: 765). Whether a declaration provides a statement of what customary law is or should be cannot be determined by reference to mandatory or permissive words alone, although language is important as a reflection of the drafters' intent. Declarations, however, often reflect a deliberate ambiguity between actual and desired practice and are designed to develop the law. Notably, the recent practice that seems to rely on statements of obligation rather than conduct allows more states to participate in the formation of the law than would be the case if conduct alone were relevant. An example of this can be seen in the development of the law of outer space, which occurred when few states engaged in space activities, but many more participated in the drafting and adoption of the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space.[16] This process "democratized" the law-making process and precluded the rules being made solely by the only two powers active in space at the time.

The relationship between soft law and treaties is also complex. In probably the large majority of instances, soft law texts are linked in one way or another to binding instruments. First, as the fourth category enumerated earlier summarizes, soft law can initiate a process of building consensus towards binding obligations needed to resolve a new problem. Examples of this are seen in the preambles to numerous multilateral agreements concluded in recent years, which refer to relevant non-binding normative instruments as precedents. In the field of human rights, for example, regional and global treaties almost without exception invoke the Universal Declaration of Human Rights as a normative precursor. The Declaration itself states by its own terms that it was intended as "a common standard of achievement" that could lead to binding agreement. In fact, in the human rights field, nearly all recent multilateral conventions at the global level have been preceded by adoption of a non-binding declaration.

In environmental law, Principle 21 of the Stockholm Declaration on the Human Environment,[17] which is repeated almost verbatim in the Rio Declaration on Environment and Development, is included not only in the preambles to many multilateral treaties, but also appears in Article 3 of the Convention on Biological Diversity.[18] Thus, the adoption of non-binding norms can and often does lead to similar or virtually identical norms being codified in subsequent binding agreements. Indeed, the process of negotiating and drafting non-binding instruments can greatly facilitate the achievement of the consensus necessary to produce a binding multilateral agreement. This was the case in the last decade with the Rotterdam Convention on Prior Informed Consent (1998).[19]

The next category considers that non-binding instruments act interstitially to complete or supplement binding agreements. Sometimes this is foreseen in the agreement itself, e.g. the Bonn Convention on Migratory Species of Wild Animals (1979),[20] the Antarctic Treaty (1959)[21] regime, and agreements of the IAEA concerning non-proliferation of nuclear weapons.[22] In other instances, the non-binding accords may appear relatively independent and freestanding, but, on examination, make reference to existing treaty obligations, as is the case, for example, with the Helsinki Accords that led to the Organization for Security and Cooperation in Europe (still lacking a treaty basis) and the Zangger Committee for multilateral weapons control.

Using non-binding texts to give authoritative interpretation to treaty terms is particularly useful when the issues are contentious and left unresolved in the treaty itself. Article 8(j) of the Convention on Biological

Diversity, which concerns respect for traditional knowledge as well as access to it and the sharing of benefits from its use, is one example where fundamental disagreements resulted in a provision that is complex, ambiguous and close to contradictory in its terms. Later negotiations during the Conferences of the Parties led to drafting the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization (COP Dec. VI/24, April 2002), a detailed attempt to resolve some of the outstanding issues through the use of soft law.

Other non-binding instruments adopted by state parties similarly "authoritatively interpret" the obligations contained in pre-existing treaty provisions. The World Bank Operational Standards seem intended to give guidance to employees in furthering the mandate of the World Bank as set forth in its constituting treaty. The examples of the Inter-American and Universal Declarations of Human Rights, as they relate to the OAS and UN Charters, and the more recent ILO Declaration on Fundamental Principles and Rights at Work also can be cited as examples. In the case of the UDHR, the final declaration of the UN's International Conference on Human Rights (1968) proclaimed that "[t]he Universal Declaration of Human Rights . . . constitutes an obligation for members of the international community."[23] This proclamation can be seen as simply another resolution unsuccessfully trying to make law out of a prior resolution (non-law plus non-law can never equal law), or as support for the view that the Universal Declaration constitutes an authoritative interpretation of the human rights obligations in the UN Charter, or as a statement of *opinio juris*, which, together with state practice, demonstrates that the UDHR or at least some parts of it, have become customary international law. The consequences flowing from each of the three positions are radically different. If the UDHR is not law, it creates no binding obligations for any state; if it is an authoritative interpretation of the UN Charter's human rights provisions it is binding on all UN member states; if it is customary international law, it binds even those states that are not members of the UN.

Soft law norms also may become "hard" law through adoption by states in their domestic law, or by the incorporation into private binding agreements. The latter occurs most frequently with standards governing contracts or other business activities. UNIDROIT (the Institute for the Harmonization of International Private Law) is an independent intergovernmental organization that prepares draft conventions, model laws, and principles based on comparative legal analysis. Its texts help fill the need for harmonization in transnational business interactions, providing reliable contractual terms and obligations and minimizing legal uncertainties and linguistic misunderstandings. National laws that vary considerably can raise transaction costs to the point where the inconsistencies can actually become considered as a non-tariff barrier to trade (Meyer 2006: 122). The UNIDROIT contract principles provide a catalogue of rules found in national and international contract law. This particular soft law may be used in a number of ways:

1. expressly incorporated in binding contract
2. as a supplement to domestic contract law
3. as model code for the development of further national and international law
4. as the basis for further harmonization
5. part of formation of lex mercatoria (customary international commercial law) (Meyer 2006: 134–5).

The last category just listed is perhaps the most interesting, because the extent to which members of the international community are willing to accept informal commitments and non-binding expressions of expected behavior in their relations with others may reflect a maturing of the legal system and interna-

tional society. In ongoing cooperative relationships not all commitments need to be expressed as legally binding obligations. Clearly, there are instances of freestanding normative instruments that are neither related to nor intended to develop into binding agreements. The proliferating Memoranda of Understanding generally can be included here, along with non-binding export control guidelines developed by international weapons suppliers and the guidelines concerning money laundering adopted by the Financial Action Task Force (FATF). Such agreements often reflect an incremental approach to addressing problems, allowing consensus to be built ultimately to achieve hard law. In other instances, however, a freestanding non-binding instrument can be indicative of ongoing disagreement about the substantive norms. The 1981 General Assembly Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief, for example, took 20 years to negotiate and has never been followed by a treaty, largely due to objections from some states to a few provisions in the Declaration.

Once adopted, then, the soft law can be cited as a reflection of pre-existing customary law, in which case the normative contents, but not the text itself, may be taken as legally binding. The norms also may begin the process of creating new custom, or be relied on in subsequent treaty negotiations. They may also have an impact on the resolution of disputes, without constituting either treaty or custom, especially in new subject areas of international concern:

> Most international environmental issues are resolved through mechanisms such as negotiations, rather than through third-party dispute settlement or unilateral changes of behavior. In this second-party control process, international environmental norms can play a significant role by setting the terms of the debate, providing evaluative standards, serving as a basis to criticize other states' actions, and establishing a framework of principles within which negotiations may take place to develop more specific norms, usually in treaties.
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> (Bodansky 2005: 118–19)

Why are states adopting soft law texts?

The increasing use of non-binding normative instruments in several fields of international law is evident (Shelton 2000). There are several reasons why states may choose to use soft law over a treaty or doing nothing. First, the emergence of global resource crises such as anthropogenic climate change and crashing fisheries, require rapid response, something difficult to achieve by treaty, given the long process required to negotiate and achieve wide acceptance of binding instruments. Non-binding instruments are faster to adopt, easier to change, and more useful for technical matters that may need rapid or repeated revision. This is particularly important when the subject matter may not be ripe for treaty action because of scientific uncertainty or lack of political consensus (Raustiala 2005: 582). In such instances, the choice may not be between a treaty and a soft law text, but between a soft law text and no action at all. Soft law may help mask disagreements over substance, overcome competing visions of organizations' purposes and resolve institutional crises (Schäfer 2006: 194).

Another reason for recourse to soft law is growing concern about the "free rider," the holdout state that benefits from legal regulation accepted by others while enhancing its own state interests, especially economic, through continued utilization of a restricted resource, such as depleted fish stocks, or by ongoing production and sale of banned substances, such as those that deplete stratospheric ozone. The traditional consent-based international legal regime lacks a legislature to override the will of dissenting states,[24] but efforts to affect their behavior can be made through the use of "soft law." International law permits states to use political pressure to induce

others to change their practices, although, in general, states cannot demand that others conform to legal norms the latter have not accepted. Non-binding commitments may be entered into precisely to reflect the will of the international community to resolve a pressing global problem over the objections of one or few states identified as among those responsible for the problem, while avoiding the doctrinal barrier of their lack of consent to be bound by the norm. The actions of the United Nations General Assembly banning driftnet fishing, for example, were directed at members and non-members of the United Nations whose fishing fleets decimated dwindling fish resources through use of the driftnet "walls of death." The international community made clear its resolve to outlaw driftnet fishing and enforce the ban, even though it was not contained in a legally binding instrument. The same approach may be taken with respect to norms that reflect widely and deeply held values, such as human rights or humanitarian law (Olivier 2002).

Non-binding instruments are also useful in addressing new topics of regulation that require innovative means of rule making with respect to non-states actors, which generally are not parties to treaties or involved in the creation of customary international law. The emergence of codes of conduct and other "soft law" reflects this development. The 2003 Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, adopted by the UN Sub-Commission on the Promotion and Protection of Human Rights, exemplifies such texts; the Sub-Commission asserted that the norms are not entirely voluntary, but instead provide corporations with an authoritative code of conduct.

In other instances, soft law texts allow non-state actors to sign the instrument and participate in compliance mechanisms, both of which are far more difficult to do with treaties. The Voluntary Principles for Security and Human Rights in the Extractive Industries, for example, was negotiated between the US and UK governments, major human rights NGOs such as Amnesty and Human Rights Watch, and oil and gas companies, including BP, Chevron/Texaco, and Royal Dutch/Shell (Williams 2004: 477–8).

Moving furthest away from traditional international law, some soft law is negotiated and adopted exclusively by non-state actors, establishing a type of private governance. Private soft law has the same advantages as state-generated norms of cost reduction and speed in reaching agreement, reduced sovereignty costs, opportunities for compromise, but also adds the possibility of muting or delaying states' opposition. The Global Reporting Initiative, for example, is a disclosure initiative of CERES (Coalition for Environmentally Responsive Economics). It uses shareholder activism to get companies to produce environmental reports and implement environmental management systems. The reporting format was developed by companies around the world, NGOs, accounting firms, institutional investors and labor. By March 2004, 416 companies had published reports based in part or totally on the Guidelines, although only 18 reported themselves fully in accordance with the principles (Williams 2004: 461). Some critics charge that such voluntary, non-binding initiatives do not change behavior, but merely put off necessary government regulation. Effective measures and compliance seem to come from integrated systems in which governments, international organizations and non-state actors are involved. An example is the Financial Stability Forum, created in 1999, which is composed of central bank regulators, securities regulators and insurance supervisors, as well as representatives of international financial institutions (the World Bank and the IMF) and OECD, an intergovernmental organization. The information produced by the network includes performance standards, codes of conduct and other models, through which best practices

may be identified, which then become the basis for domestic legislation.

Soft law instruments adopted subsequent to a treaty are useful in allowing treaty parties to resolve authoritatively ambiguities in the binding text or fill in gaps, without the cumbersome and lengthy process of treaty amendment. This is part of an increasingly complex international system with variations in forms of instruments, means, and standards of measurement that interact intensely and frequently, with the common purpose of regulating behavior within a rule of law framework. The development of complex regimes is particularly evident in international management of commons areas, such as the high seas and Antarctica, and in ongoing intergovernmental cooperative arrangements. For the latter, the memorandum of understanding has become a common form of undertaking, perhaps "motivated by the need to circumvent the political constraints, economic costs, and legal rigidities that often are associated with formal and legally binding treaties" (Johnston 1997: xxiv).

The European Union has turned to soft law to introduce some flexibility into its regulatory system in the face of adhesion by new member states with weaker economies and political institutions. The EC has thus moved to deregulate and "simplify," ostensibly to remove "outdated" and "unnecessary" regulation, in the process advocating "soft law" as an alternative to traditional regulatory instruments such as directives (Commission 2002, 2003). The result has been controversial, especially as a means to improve the deteriorating working environment in central and eastern Europe. Critics say the non-legal alternative fails to take into account the significant imbalance in power between employers and employees and "[a]s such the necessary supports for various forms of soft law initiative and self-regulations within an enterprise are absent" (Woofson 2006: 196). If true, this could be an example of moving from hard law to soft law in order to weaken pre-existing standards.

Others note that non-binding rules of conduct have in fact had operational effects in European law (Snyder 1994: 198). In the social field, formally non-binding rules emerged through the open method of coordination. Although EU soft law has no formal sanctions and is not justiciable, it employs non-binding objectives and guidelines to bring about changes in social policy, relying on shaming, diffusion of the norms through discourse, deliberation, learning and networks to induce compliance (Trubek and Trubek 2005: 350, 356). Soft law is used because social policy and welfare standards are particularly critical to governments and traditionally the exclusive domain of national legislatures. States are very reluctant to turn over competence in these matters, especially where there is no pre-existing formula or agreed standards. The EU cannot insist on uniform measures but must ensure easy and rapid revisability of norms and objectives. The first 5 years of the program showed a convergence towards the common EU objectives in the policy guidelines.

Three further reasons may explain the increasing use of soft law. First, soft law is all that states can do in some settings. International organizations in which much of the modern standard setting takes place generally do not have the power to adopt binding texts. Second, non-binding texts serve to avoid domestic political battles because they do not need ratification as treaties do. Third, soft law can give the appearance that states are responding to a problem where public pressure has been exerted, while in fact the form and contents of the instrument adopted are designed to create little in the way of obligation (Graubart 2001–2: 425).

Compliance with soft law

Assertions that states are bound by law require identifying the process by which legal rules and principles are authoritatively created. If states expect compliance and, in

fact, comply with rules and principles contained in soft law instruments as well as they do with norms contained in treaties and custom, then perhaps the concept of international law, or the list of sources of international law, requires expansion. Alternatively, it may have to be conceded that legal obligation is not as significant a factor in state behavior as some would think. A further possibility is that law remains important and states choose a soft law form for specific reasons related to the requirements of the problem being addressed, as noted earlier, and unrelated to the expectation of compliance.

Using data from 107 countries, one study sought to explain why countries comply with soft law standards. The results showed reputational considerations were significant, but also found a consistent positive effect of democratic systems on implementation: "Countries implementing the Basle Accord are wealthier, have higher savings, are more likely to have a current account surplus, are more democratic, less corrupt, and have less divided government" (Ho 2002: 672), with democracy consistently outperforming all other explanatory variables (Ho 2002: 676). Domestic institution building is thus of paramount importance to ensure compliance with political as well as legal agreements. Transnational NGO coalitions can assist to mobilize and empower affected groups, with the possibility of enmeshing governments in a web of norms and pressures from above and below to implement instruments such as the Helsinki Final Act.

In some instances, compliance with non-binding norms and instruments is extremely high and probably would not have been better if the norms were contained in a binding text. In fact, in many cases the choice would not have been between a binding and a non-binding text, but between a non-binding text and no text at all. In instances where the choice is presented, there is some evidence that there may be less compliance with non-binding norms, but that the content of the instrument is likely to be more ambitious and far reaching than would be the product of treaty negotiations, so the overall impact may still be more positive with a non-binding than a binding instrument.

Conclusion

From the perspective of state practice, it seems clear that resolutions, codes of conduct, conference declarations, and similar instruments are not law, soft or hard, even if they are usually related to or lead to law in one manner or another.[25] State and other actors generally draft and agree to legally non-binding instruments advertently, knowingly. They make a conscious decision to have a text that is legally binding or not. In other words, for practitioners, governments, and intergovernmental organizations, there is not a continuum of instruments from soft to hard, but a binary system in which an instrument is entered into as law or as not-law. The not-law can be politically binding, morally binding, and expectations can be extremely strong of compliance with the norms contained in the instrument, but the difference between a legally binding instrument and one that is not appears well understood and acted on by government negotiators. Although a vast amount of resolutions and other non-binding texts includes normative declarations, so-called soft law is not law or a formal source of norms. Such instruments may express trends or a stage in the formulation of treaty or custom, but law does not have a sliding scale of bindingness; neither does desired law become law by stating its desirability, even repeatedly.

The considerable recourse to and compliance with non-binding norms may represent an advance in international relations. The ongoing relationships among states and other actors, deepening and changing with globalization, create a climate that may diminish the felt need to include all expectations between states in formal legal instruments. Not all arrangements in business, neighborhoods,

or in families are formalized, but are often governed by informal social norms and voluntary, non-contractual arrangements. Non-binding norms or informal social norms can be effective and offer a flexible and efficient way to order responses to common problems. They are not law and they do not need to be in order to influence conduct in the desired manner.

The growing complexity of the international legal system is reflected in the increasing variety of forms of commitment adopted to regulate state and non-state behavior in regard to an ever growing number of transnational problems. The various international actors create and implement a range of international commitments, some of which are in legal form, others of which are contained in non-binding instruments. The lack of a binding form may reduce the options for enforcement in the short term (i.e. no litigation), but this does not deny that there can exist sincere and deeply held expectations of compliance with the norms contained in the non-binding form.

There is no "recipe" for success that will ensure the effective resolution of international problems and conflicts. While there may be particular factors that appear to influence state and non-state behavior, determinants of implementation, compliance, and effectiveness vary in a single subject area and for a single legal instrument. Ultimately, the issue centers on how to prevent and resolve conflict and promote international justice. In the end, the international legal system appears to be a complex, dynamic web of interrelationships between hard and soft law, legal norms given greater or lesser priority, national and international regulation, and various institutions that seek to promote the rule of law.

Notes

1 General principles of law are a third, more rarely used, source of international law, with judicial decisions and teachings of highly qualified publicists providing evidence of the existence of a norm. See ICJ Statute, Article 38.

2 See, for example, *International Covenant on Economic, Social and Cultural Rights* (1966), Article 2(1): Each state party "undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized . . . by all appropriate means, including particularly the adoption of legislative measures."

3 Article 25 provides that: "The members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

4 UN Charter, Art. 13.

5 Memorandum of the Office of Legal Affairs, UN Secretariat, 34 UN ESCOR, Supp. (No. 8), 15, UN Doc. E/CN.4/1/610 (1962).

6 Rio Declaration on Environment and Development, adopted by the UN Conference on Environment and Development (UNCED) at Rio de Janeiro, 13 June 1992, UN Doc. A/CONF.151/26 (vol. I) (1992).

7 United Nations (1998), UN Guiding Principles on Internal Displacement, UN Doc. E/CN.4/1998/53/Add.2 (1998).

8 *Texaco/Calasiatic vs. Libya*, Arbitral Award (1978), 17 ILM 28–29.

9 See Principle 35 of Statement of Principles Applicable to the Formation of General Customary International Law, ILA London Conference 2992, Final Report of the Committee on Formation of Customary (general) International Law. In this text, the ILA claimed that resolutions accepted unanimously or almost unanimously and "which evince a clear intention on the part of their supporters to lay down a rule of international law are capable, very exceptionally, of creating general customary law by the mere fact of their adoption."

10 The Principles and Guidelines were first approved by the Commission on Human Rights, Res. 2005/35 of 19 April 2005 (adopted 40–0 with 13 abstentions).

11 UNGA Res. A/Res/60/147 of Dec. 16, 2005.

12 UNGA Res. 1803 (XVII) of 14 Dec. 1962, Permanent Sovereignty over Natural Resources, UN GAOR. Supp. (No. 17) 15, UN Doc. A/5217 (1963).

13 UNGA Res. 3201(S-VI), 6 (Special) of 1 May 1974, UN GAOR, Supp. (No. 1) 3, UN Doc. A/9559 (1974).

14 UNGA Res. 3281 (XXIX) of 12 December 1974, Charter of Economic Rights and Duties of States, UN GAOR, 29th Sess., Supp. No. 31, at 50, UN Doc. A/9631 (1975).
15 E.g. the UN General Assembly ban on Drift-net Fishing in UNGA Res 46/215 (2001).
16 GA Res. 1962 (XVII).
17 Stockholm Declaration of the United Nations Conference on the Human Environment, June 5–16, 1972, UN Doc. A/CONF.48/14 (1972).
18 *Convention on Biological Diversity*, 5 June 1992, 31 ILM 818 (1992).
19 *Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*, 30 ILM 1 (1999).
20 *Convention on the Conservation of Migratory Species of Wild Animals*, 19 ILM 15 (1980).
21 *Antarctic Treaty*, 402 UNTS 71.
22 IAEA, *The Structure and Content of Agreements Between the Agency and State Required in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons*, IAEA Doc INFCIRC/153 (May 1971).
23 UN International Conference on Human Rights (1968) UN Doc. A/CONF/32/41 at 3 (13 May 1968).
24 Thus Teubner argues that: "In principle . . . most rules of international law are only authoritative for those subjects that have accepted them" (Teubner 1997: 584).
25 See, e.g. the Decision adopted by the General Council of the WTO on 1 August 2004 containing frameworks and other agreements designed to focus the Doha round of negotiations, para 2: "The General Council agrees that this Decision and its Annexes shall not be used in any dispute settlement proceeding under the DSU and shall not be used for interpreting the existing WTO Agreements," http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm.