

## A Call for Rethinking the Sources of International Law: *Soft Law* and the Other Side of the Coin

*Un llamado para repensar las fuentes de derecho Internacional: soft law y la otra cara de la moneda*

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SUMMARY: I. *Introduction. The Need to Revisit the Sources of International Law.* II. *Soft International Law: the Other Side of the Coin.*  
III. *Conclusion.* IV. *Bibliography.*

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Artículo recibido el 9 de julio de 2012  
Aprobado para publicación el 4 de septiembre de 2012

**RESUMEN:** El presente artículo cuestiona la concepción tradicional del estudio de las fuentes del derecho internacional haciendo un contraste con una de las nociones que viene presentando claros desafíos a la producción normativa internacional: el soft law o derecho suave. Para tal fin, el artículo hace una exposición general del concepto de soft law así como de sus principales características y efectos legales reales. Finalmente, se hace una formulación de cuestionamientos cuya finalidad principal es hacer un llamado respecto de la necesidad de volver a la investigación de las fuentes de derecho internacional las cuales, se considera, no deben permanecer estáticas pero deben desarrollarse en la medida en la que se dinamizan las relaciones internacionales contemporáneas.

**Palabras clave:** Fuentes, derecho internacional, derecho ambiental internacional, soft law, derecho suave.

**ABSTRACT:** This article revisits the traditional conception on the study of the sources of international law by contrasting it with one of the notions that challenges classical law making: soft law. In doing so, the article presents an overall review of the concept of soft law, exploring its main features and actual legal implications. Finally, the paper formulates a series of questions whose main aim is to make a call for rethinking the sources of international law. It is posited here that such sources should not remain static but rather develop at the speed of contemporary international relations. Special reference is made to international environmental law considered as a particular branch of international law, which dynamics are to be useful and pertinent to such an endeavor.

**Descriptors:** Sources, international law, international environmental law, soft law.

**RÉSUMÉ:** Cet article mit en cause la conception traditionnelle de l'étude des sources du droit international, qui contrastent avec des notions qui posent clairs défis à la production normative internationale : tels que le soft law ou droit souple. Pour cela, le document fait une expose général du concept de soft law, ainsi que ses principales caractéristiques et leurs effets juridiques réels. Finalement, on formule des questions avec l'intention de faire appel au besoin de revenir à la recherche des sources de droit international, lesquelles on considère, qui ne doivent pas rester statiques, par contre, ils doivent se développer dans la mesure où se dynamisent les rapports internationaux actuels.

**Mots clés :** Sources. Droit international, droit de l'environnement, droit souple, soft law.

# I. INTRODUCTION. THE NEED TO REVISIT THE SOURCES OF INTERNATIONAL LAW

One of the most representative characteristics of international law is the lack of a universal legislator,<sup>1</sup> which makes law ascertainment of international law an activity of paramount importance. The concept of sources itself is considered unclear and confusing.<sup>2</sup> At the international level there is no unique legal person in charge of the legislative production.<sup>3</sup> By contrast, international law is produced by none and all international subjects at the same time at multiple levels in a disseminated and unsystematic manner, and this is mostly due to the possibility for international subjects to practically decide the “international circles” in which they want to take part based on the inveterate mainstream principle that international law is construed on the ground of consent (apology).<sup>4</sup> However, it is not denied here that international law is aimed to be construed also by broader concepts like justice, good faith, international well being and so on (utopia).<sup>5</sup>

<sup>1</sup> E.g. Cassese, Antonio, *International Law*, 2nd. ed., Cambridge University Press, Cambridge, Ch. 1.

<sup>2</sup> Álvarez, Luis, *Derecho Internacional Público*, 4a. ed., Bogotá D.C, Pontificia Universidad Javeriana, 2007, Colección Estudios de Derecho Internacional, p. 101.

<sup>3</sup> See Brownlie, Ian, *Principles of public international law*, 3a. ed., Oxford, Oxford University Press, 1979, p. 3. “in the context of international relations the use of the term “formal source” is awkward and misleading since the reader is put in mind of the constitutional machinery of law-making which exists within states. No such machinery exists for the creation of rules of international law... in a sense the termin “formal sources” do not exist in international law.

<sup>4</sup> See an interesting example in Garvay, Jack Israel, “United Nations Peacekeeping and Host State Consent”, *Amsterdam Journal of International Law*, vol. 64, 1970, p. 241. See also Goodman, Ryan, “Human Rights Treaties, Invalid Reservations and State Consent”, *Amsterdam Journal of International Law*, vol. 96, Amsterdam, 2002, p. 531. *Ibidem*, p. 5, “what matters then is the variety of material sources (disregarding the importance of the concept formal sources), the all-important evidences of the existence of consensus among states concerning particular rules or practices”. See also Brotons, Antonio Remiro *et al.*, *Derecho internacional*, Madrid, Tirant lo Blanch, 2007, p. 175. Cassese, Antonio, *International law*, 2nd. ed, Oxford, Oxford University Press, 2005. p. 153

<sup>5</sup> Koskenniemi, Martti, *From apology to Utopia: the structure of international legal argument*, Cambridge, Cambridge University Press, 2005.

The complex construction of international law produces a real difficulty in determining or discovering the existence of law, which explains why law ascertainment is one of the most sensitive issues in international law doctrine<sup>6</sup> and jurisprudence.<sup>7</sup> The situation regarding international law ascertainment is what Shaw calls “*the anarchic nature of world affairs and the clash of competing sovereignties*”.<sup>8</sup>

It is the aim of this paper to present an overview of the classical understanding of the sources of international law *vis à vis* newer trends arguing for the required growth of international law. I will support the latter view positing the need to formalize what today is considered informal based on the primary source of international law: international practice. Special reference will be made to the so-called soft law, suggesting that as soon as its permanent usage continues to increase it may cease to be soft.

### 1. *The Insufficiency of the Source Thesis of Article 38 of the ICJ statute*

Law ascertainment of international law turns out to be “*a survey of the process whereby rules of international law emerge*”<sup>9</sup>. Any discussion on the sources should necessarily begin with Article 38 of the ICJ statute, con-

<sup>6</sup> See for instance Chiarella, Gregory, Sources of Law, Sources of Authority: The Failure of the Philippines’ Code of Muslim Personal Laws, *Pacific Rim Law & Policy Journal Associations*, vol., 21, 2012, p, 223. See also New Voices: Rethinking the Sources of International Law, *American Society of International Law Proceedings*, Vol, 103, 2009, p, 71. Cohen, Harlam Grant, Finding International Law: Rethinking the Doctrine of Sources, *Iowa Law Review*, vol, 93, 2008, p, 65.

<sup>7</sup> See for instance a few cases on the discussion regarding the determination and hierarchy of law a the ICJ: Actividades militares paramilitares en Nicaragua y contra Nicaragua (Nicaragua c. Estados Unidos de América). Fondo del Asunto, Fallo, I.C.J. Reports. 1986, p. 14. Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Rulings, I.C.J. REPORTS, 1996, P, 595. Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain). Sentence, I.C.J. Reports, 1970, p, 3. Corfu Channel Case, United Kingdom of Great Britain and Northern Ireland v. Albania), Sentence, I.C.J. Reports, 1985, p, 20.

<sup>8</sup> Shaw, Malcolm, *International law*, 6th. ed., Cambridge, Cambridge University Press, 2008, p. 66.

<sup>9</sup> *Idem*

sidered by the mainstream as the most authoritative law ascertainment criteria. The norm reads as follows:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
  - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
  - b. international custom, as evidence of a general practice accepted as law;
  - c. the general principles of law recognized by civilized nations;
  - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.<sup>10</sup>

However, the written statement of article 38 only regulates the applicable law regarding specific disputes before the ICJ and restricted to the State parties.<sup>11</sup> From the institutional law point of view the ICJ stands only as the dispute settlement organ of one particular international organization: the UN.<sup>12</sup> The ICJ is not, as the media usually wants us to believe, the world court or the supreme international court of justice.<sup>13</sup> Therefore, its statute constitutes just a secondary rule applicable within the organization. It explains why R. Jennings considers absurd to rely solely on article 38.<sup>14</sup> Therefore, article 38 should definitely not be considered universally as the yardstick to determine international law.

Despite such restrictive nature as a treaty, according to the mainstream international doctrine, article 38 embodies what is believed the

<sup>10</sup> Statute of the International Court of Justice [ICJ]. Art. 38.

<sup>11</sup> Vienna Convention on the Law of Treaties, Part III, Section 3: Interpretation of Treaties.

<sup>12</sup> Schermers, Henricus & Blokker , Nicolaas, *International institutional law: unity within diversity* , 5th rev. ed., Leiden, Martinus Nijhoff, 2011.

<sup>13</sup> See e.g. Nicaragua con ventaja en juicio contra Colombia, El Nuevo Diario, <http://www.elnuevodiario.com.ni/nacionales/250058-nicaragua-ventaja-juicio-contra-colombia> accessed 12 May 2012. See similar misusage with ITLOS. Refer Sea Dispute with Beijin to world court, The Korea Herald, <http://view.koreaherald.com/kh/view.php?ud=20120518000961&cpv=0> accessed 13 April 2012.

<sup>14</sup> D'Aspremont, Jean, "The Configuration of Formal Ascertainment of International Law: The Source Thesis", *Formalism and the sources of International law*, New York, Oxford University Press Inc., 2011.

customary international law governing the sources and consequently law ascertainment of international law.<sup>15</sup> That explains why the article is quoted in public international law manuals<sup>16</sup> as the list of the sources of international law. One of the main reasons for the foregoing statements is the interpretation of the particular phrase “*whose function is to decide in accordance with international law such disputes as are submitted to it*”.<sup>17</sup> The mainstream considers that despite of the nature of the ICJ statute, as it was expressed above, the intent of the drafters was to regulate the whole universe of the sources.<sup>18</sup>

What is interesting on that respect is that the basic reference literature usually does not elaborate on the arguments behind such assumption and apparently all refers to practical and “obvious” facts.<sup>19</sup> On that perspective Shaw states:

in fact since the function of the Court is to decide disputes submitted to it in accordance with international law and since all member states of the UN are ipso facto parties to the Statute by virtue of article 93 of the UN Charter, there is no serious contention that the provision expresses the universal perception as to the enumeration of the sources of international law.<sup>20</sup>

My attention is drawn to the fact that this very popular manual of international law does not even state that article 38 in fact constitutes the rule regulating the sources of international law but in the negative posits that “*there is no serious contention*” of such circumstance. Additionally,

<sup>15</sup> One of the main reasons behind the assumption is that art. 38 of the ICJ actually embodies the very same text contained in the statute of the PCIJ, see. e.g. Sorensen, Max, *Manual de derecho internacional publico*, Fondo de Cultura Económica, 1986, pp. 40- 42

<sup>16</sup> E. g. Juste, José et al., *Lecciones de derecho internacional público*, 2a. ed., Valencia, Tirant lo blanch, 2005, pp. 131-135. Diez De Velasco, Manuel. *Instituciones de derecho internacional público*, 15 ed., Madrid, Tecnos, 2005, p. 113.

<sup>17</sup> Statute of the International Court of Justice, annexed to the United Nations Charter, San Francisco, June 26, 1945.

<sup>18</sup> Diez de velasco, Manuel, *op. cit.*, p. 114.

<sup>19</sup> *Ibidem*.

<sup>20</sup> Shaw, Malcolm, *op. cit.*, p. 67. Niemelä, Pekka, *The politics of responsibility to protect: problems and prospects*, Helsinki, Erik Castrén Institute of International Law and Human Rights, 2008, p. 83.

it supports the whole argument of its customary nature on the massive ratification of the Statute by a large number of states, disregarding, perhaps, the requisites listed by the very same article.<sup>21</sup>

The direct and plane reference to article 38 of the ICJ statute embodies what is called the *Source Thesis* of the configuration of formal ascertainment of international law.<sup>22</sup>

The source thesis is considered the current mainstream law ascertainment yardstick to determine law. It posits that rules are ascertained through their pedigree.<sup>23</sup> Such pedigree, of course, relies on the declarative list of article 38 of the ICJ statute. The source thesis is also based on the abovementioned belief that the whole universe of international law is based on international consent and the intent to be bound by a rule is always present whether explicitly or implicitly.<sup>24</sup>

Such theoretical construction that intent is the quintessence of international law is what Martti Koskenniemi calls apology in international law. It means the defense of sovereignty and absoluteness of state's integrity and autonomy as the starting point of international law.<sup>25</sup> The foregoing was without a doubt the parameter set by the Westphalian society in which international law was seen as a minimum normative standard to regulate relations between equally sovereign states in so far as it does not interfere with the internal sphere of each nation state.<sup>26</sup> It must be commented at this point that nowadays international law possesses a much broader understanding considering that it is no more about minimums but about a transversal appearance of law at all levels. International law has permeated all scenarios of international community. Such assertion can be based on a newer positions developed in the international doctrine positing that the source thesis "fails to offer a

<sup>21</sup> See e.g. the similar explanation made by a popular Spanish manual, Diez de Velasco, *Manuel*, op. cit., note 83, p. 113.

<sup>22</sup> D'Aspremont, Jean, *op. cit.*, p. 149

<sup>23</sup> *Idem*.

<sup>24</sup> Brownlie, Ian, *op. cit.*, p. 66

<sup>25</sup> Koskenniemi, Martti, *op. cit.*

<sup>26</sup> See for instance Korhonen, Outi, *The Role of History in International Law*, American Society of International Law Proceedings, 2000, vol. 94. P. 45. See also Amos, Hershey, *History of International Law since Westphalia*, American Journal of International Law, 1912, vol. 6, p. 30.

*satisfactory blueprint for law-ascertainment in international law.*<sup>27</sup> Different criteria should be taken into account.

For instance, on the field of International Environmental Law (hereinafter IEL) where most of the changes of the formalism of the sources are taking place, the expression of consent has varied. Nowadays, in the adoption of IEL treaties and other legal documents, the different participants —who mainly include states but also encompass other subjects—, tend to reach decisions through consensus. Such way to reach decisions has had different impacts. On the one hand it subtly obliges the parties that were initially against the decision to finally yield to the main interest giving up in one way or another their initial consent. On the other hand, although consensus is usually falsely presented as a unanimous manifestation of the “general will” of the international conference where the decision is discussed, it actually turns out to be a smart recourse of powerful subjects in order to avoid decisions reached by majority where they could be outnumbered. From this perspective, consensus rests as tool of power.<sup>28</sup>

However, and despite rising criticisms,<sup>29</sup> it is enough to say by this point that the source thesis is still the mainstream perspective governing the practice of international law. Its attached reference to article 38 of the ICJ statue still brings an appearance of formalism, understood as an exhaustive, strict, objective, clear and predefined standard of law ascertainment, this is a seemingly simple way to distinguish law from non-law. The main aim of the source thesis is to support the existence and functioning of a formal standard in the identification of interna-

<sup>27</sup> D'Aspremont, Jean, *op. cit.*, note 15, p. 149.

<sup>28</sup> Fitzmaurice, Malgosia, “International Protection of the Environment”, *Recueil des Cours*, The Hague Academy of International Law, The Hague, Boston, London, Martinus Nijhoff, 2001, vol. 293, p. 100.

<sup>29</sup> For instance Brownlie affirms that “yet the article itself does not refer to “sources” and, if looked at closely, cannot be regarded as a straightforward enumeration of the sources”. Brownlie, Ian, *op. cit.*, note 4. says that “. See also Diez De Velasco, Manuel *op. cit.*, note 17. On my view article 38 has mistakenly labelled as the source of sources, its list is not exhaustive or exclusive. What is not discussed is the possibility of finding other recognized sources not comprised into the text.

tional law. This is what the mainstream also called: “formal sources” of international law.<sup>30</sup>

## 2. *Environmental Concerns, Redefining the Pedigree of the Sources*

It should be mentioned that even the mainstream source thesis has its opponents who actually point out its informal contents. It evidences its apparent contradictions and consequential insufficiency to explain the current dynamics of the sources of international law.<sup>31</sup> In that regard it is made very clear by Professor D’aspremont that the source thesis rests on non formal criteria and is mined by different informalistic processes, particularly—but not exclusively—regarding non written sources like customary law, general principles and oral agreements.<sup>32</sup> Likewise, he highlights the importance of clearly distinguishing law ascertainment from law making, law evidence and law determination —among others—, as they are very different processes, though interrelated.<sup>33</sup> It should be reiterated that I share the view that there is a need to formalize law ascertainment processes while acknowledging the informal nature of other phenomena. Formality in processes distinct to law ascertainment, such as that of law making, should not be an appropriate yardstick to distinguish between law and non-law.<sup>34</sup>

I share also the view that if—for some—“formality” means exclusive attachment to the forms of article 38 of the ICJ Statute, international law should be broadened to informality. That would imply the recognition of other possible manners of law ascertainment.<sup>35</sup> This explains why

<sup>30</sup> See Diez De Velasco, Manuel, *op. cit.*, note 17, p. 113.

<sup>31</sup> See e.g. Srivastava, M. N. P., “Sources of international law: retrospect and prospects”, *Sri Lanka Journal of International Law*, 1994, vol. 6, pp. 243.

<sup>32</sup> D’Aspremont, Jean, *op. cit.*, p.161.

<sup>33</sup> *Ibidem*, pp. 162- 174.

<sup>34</sup> Kratochwil, Friedrich, *Rules, norms, and decisions: on the conditions of practical and legal reasoning in international relations and domestic affairs*, Cambridge, Cambridge University Press, 1989.

<sup>35</sup> On this view which I share see Toope, Stephen J, “Formality and Informality”, en Bodansky Daniel, *et al.* (eds.), *The Oxford Handbook of International Environmental Law*, Oxford, Oxford University Press, 2007, p. 108.

I later present an introduction of one of the possible “babies in gestation”: “soft law”. In such cases, soft law would not be called “soft” anymore but it would probably be added to the list of “hard” law sources, using labels like “resolutions of recognized international organizations”, “declarations resulting from world international summits”, *inter alia*.

Furthermore, it should be noted that one of the most notable critiques of formalism is the assumption that the whole international law making process is based in both consent and intent.<sup>36</sup> However, the practice of international law demonstrates that there is also concomitantly a different approach to the construction of international law even in the daily performance of the most orthodox law applying machineries such as the ICJ, where different elements such as *bona fide*, justice, principles of the international community, *inter alia*, are taken into account when deciding a case.<sup>37</sup> In fact, this contention between the later view and the consent principle of the source thesis is what Koskenniemi has presented in his book “from apology to utopia”.<sup>38</sup>

Thereby, inspite of the classic belief that the study of the sources of international law is circumscribed to the list of article 38 of the ICJ Statute, new trends have emerged arguing either that the current sources should be revisited<sup>39</sup> and/or that other candidates should be added to the list.<sup>40</sup> This paper argues the need to revisit the legal discussion on the sources of international law.<sup>41</sup> It reviews the state of art of the “soft law” doctrine in order to elucidate its more likely destiny: to broaden the list of the sources of international law and contribute to the growth of international law.

<sup>36</sup> Interestingly, classic conceptions define consent as the formal source of international law. See Srivastava, M. N. P. *op. cit.*, p. 245.

<sup>37</sup> *Ibidem*, pp. 178-182.

<sup>38</sup> Koskenniemi, Martti, *op. cit.* See also Koskenniemi, Martti. “The politics of international law”, *European Journal of International Law*, 1990, vol. 1, issue 1-2, pp. 4-32. Koskenniemi, Martti. “The politics of international law 20 years later”, *European Journal of International Law*, 2009, vol. 20, issue 1, pp. 7-19,

<sup>39</sup> Fitzmaurice Malgosia, *op. cit.*, p. 100. See for instance how the author presents the different changes made within the law of the treaties as to permit fast changes suitable for the demands of science and circumstances surrounding IEL. See also Srivastava, M.N.P., *op. cit.*

<sup>40</sup> *Ibidem*. p. 96

<sup>41</sup> Brownlie, Ian, *op. cit.*, p. 3. He considers the topic of the sources as the basic particle of any international regime.

The emergence of alternative and new manners of law ascertainment has not been arbitrary but it responds to particular characteristics of growing fields of international law, this is where IEL takes on importance to illustrate what is happening in international law as a whole. As regards the environment Fitzmaurice affirms: “*Environmental law covers events which are characterized by very speedy changes and by the need for prompt response to environmental crises*”.<sup>42</sup> Reading G. Handl she continues:

Environmental issues are of global concern, i.e. they are not confined only to bilateral transboundary conflicts and interests. Thus to accommodate these requirements, the international environmental norm-making process is likely to be more difficult and time-consuming than the one in other fields of international regulation.<sup>43</sup>

In connection with that, more explicitly Singleton-Cambage affirms: “*These three sources (treaties, custom and principles) are unable to create an adequate international response to the rapid devastation of various aspects of the earths' environment*”.<sup>44</sup> Therefore, the appearance of new formal sources of international law turns out to be rather a need than a mere quirk of the scholarship. Such idea must be emphasized, as it constitutes the main reason why alternative and novel formalism should be accepted and incorporated in the current international law making processes. International law, as any other legal field, should obey the dictates of reality and not the other way around, as the obsolete doctrine wants us to believe. IEL meanwhile is just the perfect branch of general international law in which such analysis could be carried out. IEL does not have a particular dynamic regarding the sources but it represents universally the dynamics of general international law.

The foregoing explains why scholars include in the list of the sources of IEL, court decisions (both international and national tribunals),

<sup>42</sup> Fitzmaurice, Malgosia, *op. cit.*, p. 96.

<sup>43</sup> *Ibidem*, p. 97.

<sup>44</sup> Singleton-Cambage, Krista, “International legal sources and global environmental crisis: the inadequacy of principles, treaties, and custom”. *ILSA Journal of International and Comparative Law*, 1995, vol. 2, issue 1, pp. 170.

teachings of scholars, and soft law instruments that stands as the antithesis of “hard law” or the traditional list of article 38 of the ICJ Statute.<sup>45</sup>

Such inclusion is definitely not casual but it represents the specific historical legal developments of the most authoritative IEL principles. The case of Principle 21 of the Stockholm Declaration,<sup>46</sup> the prohibition of transboundary damage,<sup>47</sup> is very illustrative.

Within the framework of the first environmental summit, the UN Conference on the Human Environment carried out in 1972 a political declaration was adopted. The texts contains that

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and *the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction*<sup>48</sup> (bold stands as the specific development).

At that time it appeared evident that the text, worded in a legal fashion, was not binding as it was contained in a non-legal declaration.<sup>49</sup> Besides, the Vienna Convention on the Law of the Treaties was just singed in 1969.

Notwithstanding, along the decades the text was not used as a simple political aspiration, its mere wording and the belief that it should not be devoid of legal effects gave it initially the label of “soft law”. Today, after

<sup>45</sup> Louka, Elli, *International Environmental Law, Fairness, Effectiveness, and World Order*, New York, Cambridge University Press, 2006, p. 25.

<sup>46</sup> UN Conference on the Human Environment, U.N. Doc. A/CONF.48/14 P, 2-65. Declaration of the United Nations Conference on Human Environment, Principle 21.

<sup>47</sup> Uribe, Diego y Cárdenas, Fabián, *Derecho Internacional Ambiental*, Fundación Universidad de Bogotá Jorge Tadeo Lozano, 2010.

<sup>48</sup> Declaration of the United Nations Conference on Human Environment, *cit.*, Principle 21.

<sup>49</sup> The principle was actually initially contained in the UNGA Resolution 1803 (XVII) 1962 declaring that the exploitation of natural resources by states should have been done in accordance to the rules and conditions of the people and nations as they consider necessary or desirable.

its enforcement within the 1992 Rio Declaration and its global support stands as customary international law.<sup>50</sup>

Situations like the abovementioned do not give us immediate answers on the certain existence and characterization of new sources (and new dynamics of the old sources) of law (yet), but definitely show us the existence of a grey area which today is filled with concepts such as “soft law” which is necessary to research.

The foregoing supports the pertinence to present an overview of the current developments of “soft law” in order to identify an accurate meaning, description, characterization as well as a presentation of its legal disadvantages, advantages and legal effects. The following part devoted to “soft law” will help to elucidate the other side of the coin, which has been located for the past decades at the back of article 38 of the ICJ Statute institutions, or what has been also called “hard law”.

The overall presentation of the apparent white and black as well as the grey areas of the sources of international law will formulate a rethink on the obsolete formalism of the sources.

## II. SOFT INTERNATIONAL LAW: THE OTHER SIDE OF THE COIN

In order to identify what is the current value of the emerging written sources of international law which nowadays are mainly contained within the concept of “soft law”, —but still law in any case—,<sup>51</sup> it turns out to be very useful to make a brief presentation of what the doctrine has construed as “soft law” in order to contrast it with the commonly accepted “hard law” of article 38 of the ICJ Statute. Such a distinction will help us to understand the specific characteristics and common features

<sup>50</sup> See a previous research on the topic. Uribe, Diego y Cárdenas, Fabián, *op. cit.*, p. 134.

<sup>51</sup> On the contrary view see Dupuy, Pierre-Marie, “Soft law and the international law of the environment”, *Michigan Journal of International Law*, 1991, vol. 12, issue 2, pp. 420. “Soft law is a paradoxical term for defining an ambiguous phenomenon. Paradoxical, because, from a general and classical point of view, the rule of law is usually considered “hard”, e.g., compulsory, or it simply does not exist. Ambiguous because the reality thus designated, considering its legal effects as well as its manifestation, is often difficult to identify clearly”.

of the collection of documents which regulates a massive quantity of international issues at the present time and has done throughout the XXI Century. There will be attempts to propose a classification of the types of “soft law” and their specificities. Such endeavor will lead us to the conclusion that in fact there are many different ways to make law at the present time despite the finite list of article 38 of the ICJ statute (hard law). The purpose will not consist of an attempt to propose a complete new list, that would be rather idealistic (for now!), but it would just attempt to rethink and accept the likeliness of the existence of new ways of making the old sources as well as new ways of law making. For instance, if the acceptance of such growing phenomenon increases, what today we call “soft” wouldn’t be soft anymore.

Although soft law has appeared in all international law fields, IEL has been one of the most productive scenarios.<sup>52</sup> Such kind of documents of “unrecognizable” nature emerged in very well known environmental international meetings, namely, 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) as well as the 2012 UN Summit on Sustainable Development (Rio + 20), *inter alia*. The resulting soft law documents from the foregoing summits are usually labeled as declaration of principles and plans of action depending on their main goal or function, notwithstanding, their nature, as soft law, is the same.

Are they political or legal instruments? The positions are divergent even within the scholars who defend their increasing usefulness in particular on the field of IEL. Fitzmaurice argues that “*soft law is one of these phenomena of international law which puzzle international lawyers and leave disagreement as to their legal character and their legal effects*”.<sup>53</sup> Dupuy says that soft law “*is a trouble maker because is either not yet or not only law*”.<sup>54</sup>

<sup>52</sup> As it was very well settled by Dupuy “It should be clearly noted that the international law of the environment is explored and used as an example here merely because it provides fertile ground for analysis and not because it is a field in which “soft” law presents any particular theoretical or technical problems”. *Ibidem*, p. 431.

<sup>53</sup> Fitzmaurice, Malgosia, *op. cit.*

<sup>54</sup> Dupuy, Pierre-Marie, *op. cit.*, p. 420.

There are different authors trying to solve the trouble. For instance while Kiss & Shelton affirm that they are non-binding political instruments which may “*resolve a pressing global problem over the objections of one or a few states causing the problem, while avoiding the doctrinal barrier of their lack of consent to be bound by the norm*”,<sup>55</sup> Louka even locates soft law within “other” sources of IEL concluding that it “*has the capability of creating expectations to shape the future direction of international law*”.<sup>56</sup> On the same perspective Birnie & Boyle argue that indeed “soft law” is a source of law, although not one of the traditional sources contained in article 38 of the ICJ Statute, “*these instruments are clearly not law in the sense used by that article but nonetheless they do not lack all authority*”.<sup>57</sup> There are many reasons to believe in their legal nature. Birnie & Boyle add: “*they are carefully negotiated, and often carefully drafted statements, which are in many cases intended to have some normative significance*”.<sup>58</sup> There are even many reasons to believe in the legal authority of soft law instruments, there is “*an element of Good Faith commitment, an expectation that they will be adhered to if possible, and in many cases, the desire to influence the development of state practice and an element of law-making intention and progressive development*”,<sup>59</sup> additionally they are believed to be a mechanism for the settlement of international controversies.

As suggested before, soft law instruments were not artificially created, they just emerged as a response to the legal need faced by the international community.<sup>60</sup> They are the result of reality modelling international law, of international practice modelling the sources!. There are many reasons why IEL has been and continues to be a fertile ground for soft law instruments to grow.

Matters like the environment are tough issues involving sensitive interest for states, communities, peoples, enterprises, *inter alia*, and im-

<sup>55</sup> Kiss Alexandre- Charles & Shelton Dinah, *Guide to international environmental law*, Leiden, Boston, Martinus Nijhoff, 2007, p. 9.

<sup>56</sup> Louka, Elli , *op. cit.* , p 25.

<sup>57</sup> Birnie, Patricia & Boyle Alan, *International law & the environment*, 2nd ed., Oxford, Oxford University Press, 2002, p. 25.

<sup>58</sup> *Idem*.

<sup>59</sup> *Idem*.

<sup>60</sup> Sands, Philippe, *Principles of international environmental law*, 2nd ed., Cambridge, Cambridge University Press, 2003.

portant values are always at stake. For instance: living creatures, health, security, stability, the mere survival of the mankind, on the one hand.<sup>61</sup> On the other hand there are parties alleging their right to develop economies, to grow, to make profit from their work. And the contrast is not always that clear, sometimes the well being of one party can be achieved only if the interest of another party is affected. In the end, that is what all environmental controversies are about.

The foregoing explains why it is absolutely difficult to reach consensus over generally regulating environmental legal texts. As a result we find one of the main reasons why soft law instruments play a crucial role in contemporary international law; those instruments constitute legal texts “*generally complied with but free from pressures of the principle *pacta sunt servanda* as well as from the rules of customary international law*”.<sup>62</sup> As a consequence there is a second reason, soft law is ”*a helpful technique in situations where States want to act collectively but at the same time do not want to fetter their freedom of action*”,<sup>63</sup> is like having the possibility to be part of something without committing to it. It is not an ideal situation but a practical solution that has developed most IEL. Likewise soft law has provided practical tools to unblock conflicts among international actors securing agreements when it seemed impossible particularly in events like the environment where “*scientific evidence is not conclusive or complete, but nonetheless a cautionary attitude is required, or because economic costs are uncertain or over-burdensome*”.<sup>64</sup>

According to Dupuy, softness in IEL has appeared also as a natural consequence of the institutional establishment of international organizations, nongovernmental organizations, and other international actors surrounding the development of the law of the environment.<sup>65</sup> In particular, the UN has offered to the world a structure of cooperation that has led to permanent negotiations and normative developments. Such fast moving phenomena cannot deal with slow motion sources

<sup>61</sup> *Ibidem*, p. 45.

<sup>62</sup> Fitzmaurice, Malgosia, *op.cit.*, p 124.

<sup>63</sup> *Ibidem*, p. 289.

<sup>64</sup> Birnie, Patricia, et al., *International law and the environment*, 3rd ed., Oxford, Oxford University Press, 2009, p. 25.

<sup>65</sup> Dupuy, Pierre-Marie, *op. cit.*, p. 421.

like international treaties or customary law, thus requiring an effective formula capable of responding to the high dynamism of current international relations.<sup>66</sup> Additionally, soft law has in general, and at least as regards the Environment, “made an important contribution in establishing a new legal order in such a fast-growing an unsettled field”.<sup>67</sup>

Interestingly, defenders of soft law have postulated contradictory criticisms on the usages of this normative trend that are worthy of being mentioned.

According to professor Dupuy

these new states (the ones created after the 50’s), having the weight of the majority without the power of the elder countries, have speculated on the utilization of “soft” instruments, such as resolutions and recommendations of international bodies, with a view toward modifying a number of the main rules and principles of the international legal order.<sup>68</sup>

In other words, Dupuy suggests that soft law serves as an invention useful for developing countries to “revolutionize” international law. I should disagree on that statement for different reasons.

Such an affirmation is unfounded simply because its validity would depend on the prior identification of the abovementioned rules and principles of the international legal order; that was not done. Additionally, it has not been established which are the “elder countries” and it seems rather a political opinion rooted in the old and much criticized expression of obsolete international law: “civilized nations”. There are also remaining questions such as: Do “the powerful countries” have more weight in legal terms than the “new and *minor*” majority? Is the majority comprised of non-powerful states incapable of making international law? In this regard, who are all the powerful countries? I think that, as far as international law is concerned, those questions were settled back in 1648 when the Westphalian classic international law concreted the principle of sovereign equality: a *jus cogens* norm currently in force.

<sup>66</sup> *Ibidem*.

<sup>67</sup> Birnie, Patricia, *op. cit.*, p. 28.

<sup>68</sup> Dupuy, Pierre-Marie, *op. cit.*, p. 421.

In any case, I believe that the study of the new trends of the sources of international law and the definition, application and effects of soft law should be done in accordance with objective legal arguments.

Instead of using the emergence of soft law as an argument to solve international perspectives of a different nature, which I dislike in this kind of legal studies but which should not always be ignored, I think that as the very same Dupuy suggests later in his article, “soft law should not be considered a “normative sickness” but rather a symbol of contemporary times and a product of necessity”.<sup>69</sup> Soft law is just a natural consequence of the normal evolution of the international community. The international community as a social construct is dynamic, so it is the formalism of the sources of international law.

After setting up a context where “soft law” has appeared and also presenting the most mentioned reasons why it has emerged as an alternative within the scenario of the sources of international law as well as presenting a challenge to the traditional formalism of the sources listed by article 38 of the ICJ Statute, there will be an effort to present —though not exhaustively— the concept, characteristics, classification, advantages, disadvantages and legal effects of “soft law”, in order to finally conclude that in fact the whole study of the sources of international law should be expanded and revisited. We may well call later “hard” what had labeled as “soft”.

### 1. Standardizing the Concept and Origins of Soft Law

To begin with it should be mentioned that —paradoxically— there is not “hard” instrument recognizing the existence of such a thing as “soft law”, rather it has been a doctrinal development created to explain a new phenomenon related to the lawmaking of international law. Consequentially, there is neither a unique accepted definition of the term, nor even the possibility of identifying the most authoritative one. Neither is there agreement on the reasons why the very concept is being developed. In such circumstances it would be helpful, after presenting some

<sup>69</sup> *Ibidem*.

reasoning regarding its origin, to compare a few definitions among the legal literature in order to abstract the most common features. Undoubtedly it will address the discussion and give a more accurate explanation.

Lord Arnold McNair, British legal scholar and first president of the European Court of Human Rights coined the term “soft law”. McNair used it in order to encompass normative statements defined as abstract operative principles through judicial interpretation.<sup>70</sup> What he considered then “soft” was the broad abstractness characterizing some legal principles whose direct application as to settlement of a given situation were rather difficult.<sup>71</sup> Since then, the concept has been increasingly used to gain the current shape and understanding in light of the theory of the sources of international law.

Notwithstanding the general consideration of “soft law” as a new issue in Public International Law and the label made up by McNair — though with a different meaning —, it should be said that its content, sense and meaning is not new at all. “Soft law” as such —and probably with different names— was used popularly among the scholars to describe normative events subsequent to the adoption of the Universal Declaration of Human Rights in 1948.<sup>72</sup>

Although the Declaration is not a treaty, it was adopted in the General Assembly of the United Nations on 10 December 1948 almost by acclamation. The voting was forty-eight for and none against. Byelorussian SSR, Czechoslovakia, Poland, Saudi Arabia, Ukrainian SSR, USSR,

<sup>70</sup> Dupuy, René-Jean. “Droit déclaratoire et droit programmatoire: de la coutume sauvage a la “soft law”, en *L’élaboration du droit international public. Société française pour le Droit International public*, Colloque de Toulouse, Leiden, Sijthof, 1975, p. 132-148. See also Abi-Saab, Georges, “Éloge du droit assourdi: quelques réflexions sur le rôle de la soft law en droit international contemporain”, en *Nouveaux itinéraires en droit. hommage à François Rigaux*, Bruxelles, Vruylant, 1993, pp. 59, 60 y 68.

<sup>71</sup> According to Professor D’aspremont “it is not entirely certain that Lord McNair contemplated anything like a soft *negotium* or a soft *instrumentum*. It may be that he simply alluded to the dichotomy between *lex lata* and *lex ferenda*”. D’aspremont, Jean, *op. cit.*, p. 1081.

<sup>72</sup> See Olivier, Michèle, “The Relevance of “Soft Law” as a source of international human rights”, *The Comparative and International Law Journal of Southern Africa*, 2002, vol. 35, issue 3, p. 298.

Yugoslavia and the Union of South Africa abstained.<sup>73</sup> Although the Declaration did not impose legal obligations on states at the time of its adoption, it was clear that it became legally binding due to the rapidly generalized acceptance and inclusion in national constitutions.<sup>74</sup> In order to explain that untypical situation scholars began to require a new category, “soft law” just perfectly fit.<sup>75</sup>

Nevertheless, *di Robilant*,<sup>76</sup> deems that the genealogies of the “soft law” are deeper. According to the author there are two identifiable family trees. 1. The medieval legal pluralism and the *lex mercatoria*, which were the principal causes of the vulgarization of law as recognition of multiple styles, mentalities and solutions. Then, soft law appeared in order to solve the needs and demands of business communities, creating a recognizable tensional between unity and plurality; and 2. The rise of social law and legal pluralism developed by European antiformalist jurists at the end of the 19th century. Soft law emerged as the most effective mean to implement a new social policy, emphasizing characteristics such as flexibility, social responsiveness, pluralism and participation.<sup>77</sup>

Meanwhile *Schermers & Blokker*<sup>78</sup> consider that the rise of instruments with undefined legal force (what we call soft law) is due to the nature of the international law, which does not have the centralized coherence of national law. “*This lack of unity is to some extent compensated by international organizations*” which express themselves by different instruments without the same binding force of treaties and accepted customary law, but undoubtedly with legal relevance.<sup>79</sup>

<sup>73</sup> *Ibidem*, p. 299.

<sup>74</sup> *Ibidem*, p. 301.

<sup>75</sup> Shelton, Dinah, “Compliance with international human rights soft law”, in *International Compliance with nonbinding accords*, Washington DC, The American Society of International Law, 1997, num. 29, pp. 120 – 122.

<sup>76</sup> See Robilant, Anna, “Genealogies of soft law”, *The American Journal of Comparative Law*, 2006, vol. 54, issue 3.

<sup>77</sup> It was essential the development of concepts like law as language and living law by authors like Savigny.

<sup>78</sup> See Schermers, Henricus & Blokker, *op. cit.*

<sup>79</sup> *Ibidem*, p. 720, “*Within the limits of their competence, international organizations are used by the member states as frameworks for law-making*”.

In any case and regardless of when exactly soft law as a phenomenon appeared what is undeniable —in my view— is that the origin of soft law rests on the natural development —or better said changing— of the international community. Soft law is the necessary consequence of the evolution of the manner in which nowadays international relations are carried out. As pointed out earlier, international law should follow reality and not the other way around. Soft law is indeed an expression of the sources of international law following reality. That reality in its turn includes fast changes, the need for prompt reaction *vis à vis* issues of global concern, proliferation and diversification of international subjects, globalization, interdependence and the fragmentation of international law where IEL has emanated.

The foregoing circumstances shows why it is hard to believe that soft law is just an attempt by international scholars to expand their object beyond the actual realm of law in order to gain a bigger sphere for international scholarship, and, in the end, to preserve their jobs.<sup>80</sup> Although such practical consequence may have come across, I think that, after all, the main subjects of international law such as States, international organizations, worldwide NGO's and multinationals, *inter alia*, are the ones who from their practice are constantly changing realities and thus making fertile ground for the spontaneous surfacing of soft law.

Following the previous presentation of a general panorama of the emergence of soft law, there will be presented a set of definitions which may lead this present study to an accurate characterization.

One of the most quoted definitions in accordance with the current meaning is the proposed by Christine Chinkin in 1989.<sup>81</sup> Although it was not the first attempt to give shape to the term, as it has been mentioned, it is very likely one of the most comprehensives.

According to *Chinkin* soft law regards:

<sup>80</sup> On this view see this debate: D'Aspremont Jean, Softness in International Law: A Self-Serving Quest for New Legal Materials, 19 *European Journal of International Law*. 2008. D'Amato, Anthony, Softness in International Law: A Self-Serving Quest for New Legal Materials: A Reply to Jean d'Aspremont. 20 *European Journal of International Law*, 2009; D'Aspremont Jean, "Soft Law Softness in International Law: A Self-Serving Quest for New Legal Materials: A Rejoinder to Tony D'Amato", 20 *European Journal of International Law*, 2009.

<sup>81</sup> Chinkin, C. M., "The Challenge of Soft Law: Development and Change in International Law", *The International and Comparative Law Quarterly*, 1989, vol. 38, p. 850.

Instruments ranging from treaties, but which include only soft obligations (legal soft law), to non —binding or voluntary resolutions and codes of conduct formulated and accepted by international and regional organizations (non-legal soft law), to statements prepared by individuals in a non— governmental capacity, but which purport to lay down international principles.<sup>82</sup>

The definitions that can be found in the doctrine are diverse as they are written from different perspectives. As can be read in the coming presentation of definitions, the most common benchmark is the concept of “legal bindingness” which explains why the majority of the definitions aim at unfolding whether “soft law” has or has not some sort of obligatory force.<sup>83</sup> The easiest alternative is just to say that if “soft law” is “soft” then is not law at all because the quintessence of law is its hardness, yet I consider that absolutely superficial and efforts like this present paper would be useless.

Other scholars attempt to go deeper and conclude that “soft law” is just a stage where law can be found before it achieves its “hardness” *strictu sensu*. That is where we see readings according to which “soft law” is aspirational law (inspirational may work too), preparatory law or “unripe” law. We also found scholars who do not contemplate the “bindingness” yardstick considering that the response seems very obvious. Yet —according to their view— “soft law” is still a normative phenomenon despite its lack of bindingness or in spite of the inapplicability of the principle of *pacta sunt servanda*; soft law may then be still normative considering its wording as to establish rules of conduct or purporting to determine principles applicable to the international community.

After the foregoing clarifications it would be very illustrative to gather some of the most interesting definitions proposed by different sectors of the doctrine in order to point out what was previously said. Soft law has been defined as follows:

Instruments which are to be considered as giving rise to legal effects, but do not amount to real law (*Klabbers*<sup>84</sup>); rules of conduct that are

<sup>82</sup> *Ibidem*, p. 851.

<sup>83</sup> This is what has been called the binary nature of law. D’aspremont, Jean, *op. cit.*, p. 1076.

<sup>84</sup> Klabbers, Jan, “The redundancy of soft law”, *Nordic Journal of International Law*, 1996, vol. 65, issue 2, p. 167. See also, Klabbers, Jan, “The undesirability of soft law”, *Nordic Journal*

laid down in instruments without binding force as such, but which may have practical effects (*Senden*<sup>85</sup>); vague unenforceable legal norms which create expectations in the international behavior (*Gruchalla-Wesierski*<sup>86</sup>); sources that show how states should act in a specific manner (*Crawford*<sup>87</sup>); the lowest level of international compliance after the non-law stage (*Riphagen*<sup>88</sup>); vague obligations imposing weak commands (*Gold*<sup>89</sup>); standards of behavior which indicates how law should be (*Douglas*<sup>90</sup>); instruments of normative nature with no legally binding force which are applied through voluntary acceptance (*Joachim*<sup>91</sup>); instruments for addressing policy issues at diplomatic level (*Kennett*<sup>92</sup>); aspirational norms

of *International Law*, 1998, vol. 67, issue 4, p. 389. Klabbers, Jan, “Institutional ambivalence by design: soft organizations in international law”, *Nordic Journal of International Law*, 2001, vol. 70, issue 3, pp. 403-421. Klabbers, Jan, “Reflections on soft law in a privatized world”, *Lakimies*, 2006, vol. 104, issue 7-8, p. 387-398.

From the reading of papers referenced *Idem*, it should be taken into consideration that Professor Klabbers has been adjusting his previous positions in the matter, according to new circumstances. Although in his first writings he considered that the creation of a new category of law in degree was not necessary, indeed it was undesirable, he more recently recognized its inevitable existence due to the fast changing relations of the International System. He finally accepted that nowadays, soft law is the most plausible form that law can take. According to him, the “soft law” is taking its legal positioning despite of considering that is one of the uncertainties of the globalization.

<sup>85</sup> See Senden, Linda, *Soft Law in European Community Law*, Oxford, Hart, 2004, vol. 1, p. 89.

<sup>86</sup> See Gruchalla-Wesierski, Tadeusz, “A framework for understanding “soft law”, *McGill Law Journal*, 1985, vol. 30, pp. 37-88.

<sup>87</sup> Crawford, Cynthia, “Hard” Law v. “Soft” Law: Unnecessary Dichotomy?”, in *International Monetary and Financial Law Upon Entering The New Millennium : A Tribute To Sir Joseph And Ruth Gold*, London, British Institute of International and Comparative Law, 2001, pp. 1433 – 1441.

<sup>88</sup> Riphagen, W, “From Soft Law to Ius Cogens and Back”, *Overdruk van:Victoria University of Wellington Law Review*, 1987, vol. 17, p. 85.

<sup>89</sup> Gold, Joseph, “Strengthening the Soft International Law for Exchange Agreements”, *American Journal of International Law*, 1983, vol. 77, p. 457.

<sup>90</sup> Branson, Douglas, “Teaching Comparative Corporate Governance: the Significance of “Soft Law” and International Institutions”, *Georgia Law Review*, 2000, vol. 34, p. 670.

<sup>91</sup> Joachim, Michael, “Brendan Brown Lecture Series: UNIDROIT Symposium: Soft Law and Party Autonomy: the Case of the UNIDROIT principles”, *Loyola Law Review*, 2005, vol. 51, p. 234.

<sup>92</sup> Kennett, S.A, “Hard Law, Soft Law and Diplomacy: the Emerging Paradigm for Inter-governmental Cooperation in Environmental Assessment”, *Alberta Law Review*, 1993, vol. 31, p. 653.

of international behaviour (*Williamson*<sup>93</sup>); kind of instruments where the rule *pacta sunt servanta* is inapplicable (*Shelton*<sup>94</sup>); variety of non-legally binding instruments used in contemporary international relations by States and international organizations (*Boyle*<sup>95</sup>); a normative element between the gliding scale of bindingness of law and non-law, a synonym for *pré-droit* or *droit vert* (*Ingelse*<sup>96</sup>); transitional stage in the development of norms where their content is vague and their scope imprecise (*Olivier*<sup>97</sup>); rules of conduct which the scholars can not readily fit into the orthodox catalogue of rules of international law (*Zemanek*<sup>98</sup>); international agreements not concluded as treaties under the rules of the Vienna Convention of the Law of the Treaties (*Hilgenberg*<sup>99</sup>); the inevitable consequence of the multiplication of powers of international bodies and the privatization of legal regimes (*di Robilant*<sup>100</sup>); non binding agreements on principles that customarily address social, political or economic concerns (*Weiner*<sup>101</sup>); characterizing texts which are one the one hand not legally binding in a ordinary sense, but are one the other hand not completely devoid of legal effects either (*Peters & Pagotto*<sup>102</sup>); important statements of public policies of political preferences (*Sossin & Smith*<sup>103</sup>), *inter alia*.

<sup>93</sup> Williamson, Richard, “Hard Law, Soft Law and Non-Law in Multilateral Arms Control: Some Compliance Hypothesis (is International Law Relevant to Arms Control?)”, *Chicago Journal of International Law*, Spring, 2003, vol. 4(1), p. 61.

<sup>94</sup> Shelton, Dinah, *op. cit.*, p.125.

<sup>95</sup> Boyle, Alan, “Soft Law in International Law- Making”, in Malcolm D. Evans (ed.), *International Law*, 2nd ed., 2005, pp. 141-157.

<sup>96</sup> Ingelse, Chris, “Soft law?”, *Polish Yearbook of International Law*, 1993, vol. 20, pp. 74.

<sup>97</sup> Olivier, Michèle, *op. cit.*, pp. 289- 307.

<sup>98</sup> Zemanek, Karl, “Is the Term “Soft Law” Convenient?”, in *Liber amicorum professor Ignaz Seidl – Hohenveldern, in honor of his 80<sup>th</sup> birthday*, The Hague, Kluwer Law International, 1998, p. 843.

<sup>99</sup> Hillgenberg, Hartmut, “A Fresh Look at Soft Law”, *European Journal of International Law*, 1999, vol. 10, issue 3, p. 501.

<sup>100</sup> Robilant, Anna, *op. cit.*, pp. 499-554.

<sup>101</sup> Weiner, Justus, “Hard Facts Meet Soft Law, the Israel-plo Declaration of Principles and the Prospects for Peace: a Response to Katherine w. Meighan”, *Virginia Journal of International Law*, 1995, vol. 35, Issue 4, p. 940.

<sup>102</sup> Peters, Anne & Pagotto, Isabella, “Soft Law as a New Mode of Governance: A Legal Perspective”, in *New Modes of Governance*, 2006.

<sup>103</sup> Sossin, Lorne & Smith, Charles, “Hard Choice and Soft Law: Ethical Codes, Policy

It is possible to identify that the legal scholars are aware of the existence of one phenomenon with legal implications in the international arena, although it does not correspond to any of the traditional conceptions of international law. They tried to define “soft law” by using different criteria, such as: causes, effects, implications, common examples, problematic, status, targets, subjects, participants, contents, etc.

In any case it is possible to identify different sorts of norms—with different natures or origins—that are considered “soft law”. After the previous gathering of definitions I will allow myself to attempt a characterization.

Apparently the first clarification and a characteristic worth mentioning is that “soft law” necessarily implies the existence of a written document: an *instrumentum*.<sup>104</sup> Thus, it seems that “soft law” does not encompass verbal or norms which are not written, making impossible to talk rigorously about “soft customary law”,<sup>105</sup> and this affirmation has nothing to do with the assertion according to which soft law—always in writing—may have an effect on proving the existence of required *opinio juris* to determine new customary law<sup>106</sup>.

Strictly speaking, a hypothetically “soft customary law” would not even exist considering that for a rule to achieve the status of customary law it would be absolutely necessary to have the material and mental el-

Guidelines and the Role of the Courts in Regulating Government”, *Alberta Law Review*, 2003, vol. 40, p. 868.

<sup>104</sup> See a coherent description and distinction of *instrumentum* and *negotium* in D’aspremont, Jean, *op. cit.*, pp. 1081- 1087.

<sup>105</sup> Despite of the fact that there are authors describing some IHL rules as “soft” I still believe that if such alleged normative uncertainty exists then the rule has not actually emerged. See Smith, Thomas. “Old Laws, New Wars: International Humanitarian Law and the Domestic Atrocities Regime”. *Paper presented at the annual meeting of the International Studies Association*, Montreal, Quebec, Le Centre Sheraton Hotel, 2004. Additionally It seems that Danilanko suggests that soft customary law exists when discussing the legal nature of the UNGA resolutions, however, after reading careful reading it is feasible to find out that conceptually such “soft customary law” would not have any nature and it would be simply emerging customary law. See. Danilenko, Gennadij, *Law-making in the international community*, Dordrecht, Nijhof, 1993, vol. 15, p. 122. In general it is shown that when the concept “soft customary law” has been used it is to denote actually “emerging customary law. See Laursen, Finn, “Denmark and the exclusive economic zone-past and future considerations”. *Nordic Journal of International Law*, 1987, vol. 56, p. 96.

<sup>106</sup> See for instance Boyle, Alan, *op. cit.*, p. 153.

ements namely, international practice and *opinio juris*.<sup>107</sup> Such elements have either emerged or are emerging. It would be completely inaccurate to say that a customary law has “softly” emerged.

If those requirements were fulfilled, then the “soft customary law” would not be “soft” anymore and it would be just “customary law” (hard law). Additionally, in all cases there would be reference to written documents where *opinio juris* of the international actors is posited. Thus, the existing “soft law” would be referred rather to the material instruments (written soft law or soft *instrumentum*<sup>108</sup>) than to the hypothetically alleged “soft customary law”.

Instead of speaking of “soft customary law” we see cases where the doctrine refers to “emerging customary law”<sup>109</sup> as to describe rules of international conduct that have not yet achieved the full acceptance of the international community as customary law, yet they are increasingly becoming more accepted and already address the subjects’ behavior.

That is the case of the precautionary principle in international environmental law<sup>110</sup>, this is an international rule according to which international subjects shall avoid activities whose possible harmful effects against the environment have not been discarded with scientific certainty. This rule can be summarized as follows: in case of scientific uncertainty of eventual damages on the environment caused by an activity, such activity should be suspended or initially avoided.

As it can be verified, the precautionary principle —applicable to the whole universe of international environmental law— is not laid down in a proper international treaty or any other “hard law” source of international law. The precautionary principle is contained in prin-

<sup>107</sup> Statute of the International Court of Justice [ICJ]. Art. 38.

<sup>108</sup> D'aspremont, Jean, *op. cit.*, p. 1082.

<sup>109</sup> See for instance McDougal, Myres, *The Emerging Customary Law of Space*, Nw. U.L.Rev, 1963, p. 618; Wolfrum, R., “The Emerging Customary Law of Marine Zones: State Practice and the Convention of the Law of the Sea”, in *Netherlands Yearbook of International Law*, 1987, vol. 18, pp. 121-144; Laylin, J. G., “Emerging Customary Law of the Sea”, in *International Lawyer*. 1976, vol. 10, p. 669; Nadasdy, Kristin, “Discriminating Among Rights?: a Nation’s Legislating a Hierarchy of Human Rights in the Context of International Human Rights Customary Law”, *Valparaiso University Law Review*, 1998, vol. 33, p. 369.

<sup>110</sup> Atapattu, Sumudu A., *Emerging Principles of International Environmental law*, Ardsley, NY, Transnational Publishers, 2006, p. 203.

ciple 15 of the 1992 Rio Declaration,<sup>111</sup> a written soft law document. However, Atapattu confirms<sup>112</sup> that the evolution of the principle within the international context began in the early 1980s —it has been applied in Germany and Sweden since the 1970s—, and it was referenced for specific topics in international agreements such as the Convention of the High Seas Fisheries of the North Pacific<sup>113</sup> and the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES).<sup>114</sup> It was also discussed at the 1984 North Sea Conference and incorporated in the Cartagena Protocol on Biosafety and the Stockholm Convention on Persistent Organic Pollutants.<sup>115</sup>

Despite the mention of specific situations and particular conventions, the lack of a universal instrument setting up the precautionary principle is what makes it still written “soft law”. Yet, the massive reference<sup>116</sup> both at the international and national<sup>117</sup> levels, in treaties of a particular nature, non-binding instruments and writings of scholars is what makes the doctrine consider that the precautionary principle is emerging cus-

<sup>111</sup> Rio Declaration on Environment and Development adopted at the UN Conference on Environment and Development, 1992. Available at <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163>, “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”.

<sup>112</sup> Atapattu, Sumudu A., *op. cit.*

<sup>113</sup> International Convention for the High Seas Fisheries of the North Pacific Ocean, Tokyo, April 25, 1978.

<sup>114</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington, May 3, 1973.

<sup>115</sup> Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Montreal, January 29, 2000. Stockholm Convention on Persistent Organic Pollutants, Stockholm, May 23 2001.

<sup>116</sup> Apart from the abovementioned conventions —and an extensive legal literature—, see for instance the claims of New Zealand and the dissenting opinions of Judges Weeramantry and Palmer in the Nuclear Test Case, the discussions within the Case concerning the Gabčíkovo Nagymaros Project, the Dissenting opinion of Judge Cancado Trindade in the Pulp Mills Case and article 174 (2) of the EU Policy on Environment, *inter alia*. For a complete reference see Uribe, Diego y Cárdenas, Fabián, *op. cit.*, note 48, pp. 195-200.

<sup>117</sup> See for instance regarding Colombia Wilches, Rafael, Principio ambiental de precaución y contratación mercantil en Colombia planteamiento del Problema, en Revista Javeriana, Bogotá, 2011, num 782, pp. 283-314.

tomary law.<sup>118</sup> Who has the final word on whether a customary law has already emerged or not? International law does not clearly regulate the matter because such duty is bestowed on all international subjects.<sup>119</sup> In practice and considering previous experiences, I think that, unfortunately, we will have to wait until a recognized international tribunal declares its existence, preferably the ICJ. Still, as we have said in another opportunity,<sup>120</sup> although it has not been absolutely confirmed, the precautionary principle may already be customary international law. In any case, considering that most of the scholars consider it is emergent is a good practical example to illustrate how it would be inappropriate to talk about “soft customary law” because such thing would not even exist. In its place we should speak of emerging customary law. That makes clear why one of the main features of “soft law” is its necessary embodiment in a written document.

The foregoing characteristic can be also explained in theory of the law of the treaties, in particular in what has been called the *negotium* and the *instrumentum*. The former being the specific substantive content of the rule and the later the tangible material object where such *negotium* is incorporated.<sup>121</sup> “Soft law” necessarily requires an *instrumentum* to exist. Additionally, regarding the search for soft law, even when reference is made to a *soft negotium* that concept relates always to the confusing way a hard *instrumentum* was worded.<sup>122</sup>

## 2. *The Spontaneous Emergence of Soft Law*

From the abovementioned definitions we can also identify the scenarios where “soft law” could appear. “Soft law” can be found both in hard law

<sup>118</sup> The most authoritative is probably Sands, Philippe, *op. cit.*, p. 266. See on the same vein Uribe, Diego y Cárdenas, Fabián, *op. cit.*

<sup>119</sup> Shaw, Malcolm, *op. cit.*, p. 68.

<sup>120</sup> For a comprehensive presentation of the precautionary principle see Uribe, Diego y Cárdenas, Fabián, *op. cit.*, pp. 195-200.

<sup>121</sup> See a very clear presentation of the distinction between the “negotium” and the “instrumentum” in D’aspremont, Jean. *op. cit.*, pp. 1081-1087.

<sup>122</sup> *Ibidem*, p. 1084. Regarding soft negotium the author says: “... More precisely, they can adopt a legal *instrumentum* which is non-normative, that is, an act which fails to provide any precise directive as to which behavior its authors are committed to”.

*instrumentum*s and in political documents or other non-legal documents. The former is called “legal soft law” while the later is called “non-legal soft law”<sup>123</sup> as posited in the initial definition proposed by Chinkin.<sup>124</sup>

The legal “soft law” consists of rules of conduct laid down in treaties, and subscribed under the rules of the Vienna Conventions on the Law of the Treaties or in unilateral declarations,<sup>125</sup> but without formulating a direct obligation of “do” “let do” or “do not do”. According to *Gruchalla-Wesierski*<sup>126</sup> it regards vague or ambiguous legal norms that do not have direct applicability. That type of norms, is usually the establishment of principles or aspirational constitutions, written in the maximum expression of abstraction. They create broad goals and general purposes, describing situations, facts or other norms but without stating a specific provision.

Nevertheless, *strictu sensu* those norms remain binding *per se* despite of the fact that they themselves do not have direct implications. Attention should be paid to the different places where legal soft law can be located within a treaty or a unilateral declaration because if the rule appears as an isolated norm disconnected from the other rules comprising the instrument, it is clear that the rule indeed does not have any legal implication. That is then the first kind of non-legal soft law.

On the contrary, if the rule is located in a specific part of the instrument giving light to the whole or part of the normative body, and worded as paradigms or guidelines for interpreting the other norms of the instrument, a different situation is faced. This would be a second kind of the so-called non-legal soft law. The latter rules do not give the impression of being “soft” any more. They actually fulfill an identifiable and concrete legal function. They fulfill the function of being the point of reference against which teleological interpretation is carried

<sup>123</sup> See *Gruchalla-Wesierski, Tadeusz, op. cit.*, p. 42.

<sup>124</sup> This is the difference made by Professor D’aspremont between soft *instrumentum* and soft *negotium*. *D’aspremont, Jean. op. cit.*, p. 181.

<sup>125</sup> Regarding the current impact of unilateral declarations see for instance Orakhelashvili, Alexander, Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo, *Max Planck Yearbook of United Nations Law*, vol. 12, 2008, p. 1-44.

<sup>126</sup> *D’aspremont, Jean. op. cit.*, p. 48.

out.<sup>127</sup> This kind of legal “soft law”, is just law although it has a different role in the normative system: this second type of legal soft law may be the principal reference for understanding the regular hard law norms which describe clear obligations. From that perspective, it is difficult to think that such particular type of so-called “legal soft law” is soft law considering that in the end it is bestowed of full obligatory force although it does not alone generate concrete legal effects rather it does it through other specific rules. Those rules usually fulfill their legal purpose when interpreted in relation to other rules belonging to the same legal institution.

On the other hand, non-legal soft law refers to the main meaning of “soft law” commonly used within the legal debate, as was explained above regarding the definition and characteristics. The non-legal soft law refers to non-binding instruments like political declarations, guidelines or reports of international organizations or NGO’s where there are rules worded in a legal fashion. This is, I agree, strictly speaking “soft law” and therefore, together with the purposeless kind of legal soft law which is included in the accurate definition of soft law as a whole.

I will allow myself to present two simple examples to illustrate the previous differentiation. Although there may be many cases of “legal soft law” where weak, imprecise or inconsistent norms are included in hard law instruments purporting an specific end —such as a proper treaty or unilateral declaration—, I will mention just one. The 1963 Treaty Banning Nuclear Weapons Test in the Atmosphere, in Outer Space and Under Water was signed in the aftermath of WWII and aimed precisely at conserving the mere existence and security of humankind and the environment.<sup>128</sup> The initial and apparently most obvious idea of this sort of treaty —considering the historical context— was to ban nuclear weapons at all. The preamble<sup>129</sup> itself says: “Proclaiming as their princi-

<sup>127</sup> See for instance the Vienna Convention on the Law of the Treaties, Vienna, May 23 1969, Section 3.

<sup>128</sup> Treaty Banning Nuclear Weapons Test in the Atmosphere, in Outer Space and Under Water, Moscow, August 4 1963.

<sup>129</sup> Vienna Convention on the Law of the Treaties, Vienna, May 23 1969. Art. 32. “The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes”.

pal aim the *speediest possible achievement of an agreement on general and complete disarmament under strict international control...*”.<sup>130</sup> However, the very text of the first article of the treaty refers exclusively to “nuclear weapon test explosion”.<sup>131</sup> As it can be seen, this first treaty on nuclear weapons seems to attempt somehow to prohibit the existence of nuclear weapons, notwithstanding considering the political position of the “original parties”,<sup>132</sup> they finally decided to leave a weak “soft” intention in the preamble of the treaty as to finally set up clear “hard” rules just with regard to test explosion.<sup>133</sup> Still this vague or “legal soft law” reference of the complete and general disarmament of nuclear weapons established at that time the real goal of international law on the topic: the absolute prohibition of nuclear weapons; the prohibition of test explosions was just a starting point in order to begin leading the consensus. Thanks to that initial mention, nowadays there are attempts to argue the need —and legal support— for full disarmament.<sup>134</sup>

While the abovementioned treaty is a perfect example of legal soft law as it consists of a proper international treaty adopted under the VCLT yet with imprecise obligations regarding the prohibition of nuclear weapons, the 1992 UN Rio Declaration on Environment and Development is a perfect example of non-legal soft law.<sup>135</sup> It is non-legal

<sup>130</sup> Treaty Banning Nuclear Weapons Test in the Atmosphere, in Outer Space and Under Water, *op. cit.*

<sup>131</sup> *Ibidem*, art. 1.

<sup>132</sup> *Ibidem*. The original parties are the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

<sup>133</sup> That explains why the ICJ “found that international law neither specifically authorized nor specifically prohibited the threat or use of nuclear weapons. Likewise, the Court found that a threat or use of nuclear weapons must comply with Articles 2(4) and 51 of the United Nations Charter concerning the use of force, the general requirements of international law applicable in armed conflict, and treaty obligations expressly dealing with nuclear weapons”. See Matheson, Michael, “The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons”, *American Journal of International Law*, 1997, vol. 91, num. 3, p. 417.

<sup>134</sup> Although it has been rather difficult to argue the existence of a general prohibition of nuclear weapons in all circumstances on basis of the particular normativity, scholars have attempted to argue that such prohibition indeed exists but its foundation is based on the main principles of international humanitarian law and human rights. See *Ibidem*, p. 430.

<sup>135</sup> Rio Declaration on Environment and Development, Rio de Janeiro, June 14 1992. Available at <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&article>

because it is built only on a political declaration resulting from an international conference (also called the mother of all summits<sup>136</sup>) but purporting to have relevant legal effects as it is believed to establish the main principles of international environmental law, some of them with customary law status.<sup>137</sup> So, although it is not a treaty *per se*, it is considered “soft law” as it generates actual legal effects, like containing environmental customary law and providing for an international yardstick on sustainable development.<sup>138</sup> Additionally, the so called Earth Charter is written in a legal wording as if it were an actual treaty, for instance, principle 3 says: “the right to development *must be fulfilled* so as to equitably meet developmental and environmental needs of present and future generations”.<sup>139</sup> The imperative sentence, the fact of calling itself a declaration of principles, its background —considering that initially a treaty was supposed to be sign but the required consensus was not available—, together with the international support as being more than a simple declaration is what has made it non legal soft law.<sup>140</sup>

Despite the scenario where soft law can appear either in a legally binding *instrumentum* or a non binding *instrumentum*, legal soft law and non-legal soft law respectively, still remains our general and broad de-

*id=1163*. It must be said that the Rio+20 Declaration is expected to have greater implications, notwithstanding that cannot be verified until the declaration is finally adopted and its effects are fully assessed.

<sup>136</sup> Hunter, David *et al.*, *International Environmental Law and Policy*, 3rd ed., New York, Foundation Press, 2007, p. 181.

<sup>137</sup> Sands, Philippe, *op. cit.*, p. 54.

<sup>138</sup> In any case there are skeptics who argue that “Rio undoubtedly offered a great platform for environmental protection, but its contribution to IEL was more apparent than real”. Guruswamy, Lakshman & Hendricks, Brent, *International Environmental Law in a Nutshell*, St. Paul, West Publishing, 1997, p. 12.

<sup>139</sup> Rio Declaration on Environment and Development, *op. cit.*, principle 3.

<sup>140</sup> Hunter, David *et al.*, *op. cit.*, p. 189. “The Rio Declaration can thus be read in several ways. First, it is a political document reflecting the “grand bargain” between the North and South. The document spells out the broad parameters of this North-South partnership. Secondly, the Rio Declaration represents the global consensus on environment and development decisions at a specific moment in time, sets a benchmark for measuring progress in the future... the Rio Declaration significantly furthered the development of international environmental law, including the future incorporation of specific principles in subsequent treaties and the possibility of formal codification of an international binding covenant on environment and development in the future”.

scription of soft law as rules of conduct with a normative profile which does not fit in the scheme of the statute of the International Court of Justice.<sup>141</sup> In the end, such a description was actually what brought us to the debate in the very first place.

### 3. *The actual implications of Soft Law*

Within the framework of the latter description and from the reading of the foregoing gathering of definitions presented by a variety of authors it is possible to go deeper in the description of soft law even as to propose some advantages, disadvantages and identifiable legal effects on the current accepted sources of international law.

Soft law rules have legal implications in international law; however they do not seem to be direct on the formation of law (yet!<sup>142</sup>), although usually they appear through the traditional sources, namely treaties, customary law or general principles.<sup>143</sup> Thus, they do not seem to affect *per se* international law, even though, they may affect somehow the sources of article 38 of the ICJ Statute.<sup>144</sup>

Usually those soft law rules are public policies or political preferences<sup>145</sup> which impact the traditional sources by creating expectations, giving advice, generating practices, consolidating positions, interpreting, or mobilizing the public opinion.

The rules may be created by states, international organizations or even private subjects<sup>146</sup> with certain international importance like well

<sup>141</sup> See Hillgenberg, Hartmut, *op. cit.*, p. 374.

<sup>142</sup> Despite of that general perception within the international doctrine it is posited here and along my thesis project (so far as an hypothesis) that such previous reality is changing and that –in particular on the field of IEL where the idea is more demonstrable- soft law is generating more far reaching legal implications than it was imagined, actually as to constitute under strict circumstances real sources of law capable of shaping behavior and constituting original arguments to generate international responsibility and start international disputes.

<sup>143</sup> See Peters, Anne & Pagotto, Isabella, *op. cit.*, p. 377.

<sup>144</sup> *Ibidem*, p. 360.

<sup>145</sup> See Sossin, Lorne & Smith, Charles, *op. cit.*, p. 378.

<sup>146</sup> See Abbott, Kenneth, “Privately Generated Soft Law in International Governance: Commentary”, In *International Law and International Relations: Bridging Theory and Practice*,

recognized NGO's, or multinationals with dominance in particular sectors.<sup>147</sup>

Its current advantages appear due to the identification and improvement of certain difficulties which have arisen with the use of traditional sources. *Wolfrum*<sup>148</sup> has identified four common weaknesses of treaties for the implementation of an effective legal regime: 1. Speed: treaties are not able to respond to new challenges at normative level; 2. Clarity and uniformity: when a particular subject is too specialized is often difficult to reach an agreement between the parties, because they do not want to assume obligations which are not clearly defined; 3. Universality of participation: sometimes there is necessary the acquiescence of parties which lack of capacity to sign a treaty under the rules of the Vienna Convention on the Law of the Treaties; and 4. flexibility and adaptability: to adopt or amend one treaty could take decades.<sup>149</sup>

Therefore and as regards the foregoing, *Boyle*<sup>150</sup> argues that there are several reasons why soft law instruments may represent an attractive alternative to traditional law-making. It is relevant to mention, *inter alia*: a. It may be easier to reach agreement when the form is non binding or does not seem to comply with the principle *pacta sunt servanda*; b. soft law instruments enables states to agree to more detailed and precise

Thomas J. Biersteker, et al, eds., London, Routledge, 2007. “*The International Commission on Intervention and State Sovereignty (ICISS), which elaborated the state's “responsibility to protect”, a norm that earlier informed the GPID, represents a more complex hybrid process. The ICISS had no formal public status. The Canadian government and a group of foundations created and funded it... What is notable, though, is the surprisingly limited role played by states*”.

<sup>147</sup> See Branson, Douglas, *op. cit.*, p. 673.

<sup>148</sup> Wolfrum, Rüdiger, Commented by H. Neuhold, “The Inadequacy of Law-Making by International Treaties: “Soft Law” as an Alternative?”, in *Developments of International Law in Treaty Making*, Springer Berlin, 2005, p. 40.

<sup>149</sup> Ibidem, “*The VCLT which was adopted in 1969 entered into force in 1980 after 35 states had agreed to be bound by it in accordance with its art. 84. Negotiations on the UN Convention on the Law of the Sea started in 1973, the text of the treaty was adopted in 1982, another twelve years passed before the entry into force of the Convention for which 60 ratifications or accessions were needed under its art. 308*”. See also the arts. 108 and 109 of the UN Charter. An amendment or a revision of the Charter not only needs ratification by a two-thirds majority of the member states, this majority has also to include the five permanent members of the Security Council.

<sup>150</sup> See Boyle, Alan, *op. cit.*, p. 144.

provisions because their legal commitment;<sup>151</sup> c. the consequences of non compliance are more limited; d. the states can avoid the domestic treaty ratification process (legal and constitutional control), and perhaps (if convenient) escape from democratic accountability for the policy to which they have agreed; e. soft law instruments are flexible and easy to amend or replace, specially in the high dynamic of International organizations.<sup>152</sup>

As regards cost and benefits, *Abbott*<sup>153</sup> finds four additional advantages of “soft law”: a. it reduces the costs and delay of reaching agreement; b. reduces the perceived “sovereignty costs” of norms; and c. provides new opportunities for compromise.

The main reason why parties that want to reach agreement prefer to use a soft law instrument rather than a hard one, is the impossibility of the “treaty making-process” to carry out with the rapid dynamics of politics, diplomacy and international relations. Hard law processes are not able to satisfy the big demand of alternatives in the international arena.

However, in my view the main reason for resorting to soft law should not be the avoidance of the direct effects of legality such as obligatory force, executability, and the final possibility of claiming international responsibility before an international dispute settlement body, that would bring indeed instability to the international legal system. It is posited here that in fact soft law has spontaneously appeared as a natural consequence of contemporary needs of law making like speedy regulation of important matters and requirement of prompt reaction before dynamic subjects like the environment. Notwithstanding, the acceptance of specific soft law rules as a novel manner of making law in the 21st century should not lead to legal anarchy, on the contrary it should lead to the formalization of new sources of international law. Current developments, which have been visible in the field of IEL, are paving the way

<sup>151</sup> That is why there are many examples of soft law in more specialized areas such as the environmental law, the general rules for private international law, international banking, atomic energy, radioactive waste management and other sensible political world concerns problems.

<sup>152</sup> See Schermers, Henricus & Blokker, Nicolaas, *op. cit.*

<sup>153</sup> See Abbott, Kenneth, *op. cit.*, p. 383.

for such recognition of the already transformed theory of the sources of international law.

On this line it is necessary then also to identify which are the current main disadvantages of soft law in order propose future possibilities to avoid them or overcome them.

Due to the lack of connection with the national parliaments and democratic bodies for the legitimacy of agreements, it would be comparably harder to implement such soft law policies if funding, legislation, or public support are needed<sup>154</sup>. Hence, it is not possible to supply the required economic and political support when there is no legal certainty. As Eckersley<sup>155</sup> has stated, there are important issues in the international stage that require strong and enforceable structures. If the implications of “soft law” are still under debate, it is therefore not the appropriate tool to implement it.

In my view, the current principal weakness of “soft law” is the hesitation itself as regards its actual implication on international law, because despite the general acceptance of its legal interest and effects, if the competent law applying bodies such as courts, states, international organizations, and so forth, do not recognize it, then there is no pragmatic legal significance.

To illustrate, there are traditional positivist scholars like Ingelse<sup>156</sup> who consider that if soft law is soft, then is not law at all. “*There should either be law or non-law; law is not soft. It would be a contradiction in terminis*”<sup>157</sup>

If the competent officials or authoritative interpreters of international law assume sucha position it will not be more than mere political or diplomatic implications of “soft law”. Assuming one of the earliest positions of professor Klabbers,<sup>158</sup> soft law would be law just when it turns into hard law.

<sup>154</sup> See Boyle, Alan, *op. cit.*, p. 144.

<sup>155</sup> See Eckersley, Robin, “Soft law, hard Politics, and the climate change treaty”, in *The Politics of International Law*, Reus-Smit, Christian, ed., Cambridge, Cambridge University Press, 2004, pp. 80-105.

<sup>156</sup> See Ingelse, Chris, *op. cit.*, p. 79.

<sup>157</sup> *Ibidem*.

<sup>158</sup> See Klabbers, Jan, *op. cit.*, p. 358.

However, generally it seems that probably the most important disadvantage is connected with what was said above regarding the advantages: as long as soft law is mistakenly considered as rules which do not comply with the principle *pacta sunt servanda* at all, its mere existence would evidently bring legal instability. It explains also why it is of paramount importance to accelerate the debate on the changing and the enlargement of the sources of international law.

Although it is posited here that the legal effects of soft law should go further as to promote the increasing recognition of the new forms of making law at the international level, it would be very illustrative to present a few of the current effects of soft law upon, at least, the traditional sources of international law such as: treaties, customary law and general principles.

Abbott<sup>159</sup> regarding the process of conversion of soft law into rules with legal effects has described the “life cycle” of soft law, composed by three distinct stages. 1. At the beginning the interested parties frame an issue and place it on the political agenda, composed by the appropriated norm and formula; 2. The, advocates further disseminate the norm and “early adopter” states persuade others to sign on; finally 3. the norm is invoked and brought to bear against the “recalcitrant” states, until social pressure and domestic adjustments lead them to internalize it, rendering compliance routine. It is mainly accepted (so far!) that the so-called “soft law” is not *per se* a new source of international law, however, it seems that its legal effects are still related with the sources of law.<sup>160</sup>

It is inevitable to refer to article 38 of the Statute of the International Court of Justice<sup>161</sup> where the formal sources of international law are listed. Thus, at first sight only rules generated in one of the procedures mentioned therein are considered as binding legal rules; “*rules of conduct*

<sup>159</sup> See Abbott, Kenneth, *op. cit.*, p. 383.

<sup>160</sup> See Senden, Linda, *op. cit.*, p. 360.

<sup>161</sup> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

*generated in a different way are, consequently, not hard law*”.<sup>162</sup> So what is the real current legal value of what we called non-legal soft law?

It is clear that “soft law”, as a generalized category of rules of conduct, is not a treaty because it does not fulfill the established formal requirements, and it is neither customary law or principles of international law *per se*. Nevertheless, the “soft law” exercises some legal pressure upon the principal sources of international law, as it will be explained.

**a. Effect on treaties.** Soft Law has also been considered “*pre-droit*” or “*droit vert*”. In this perspective the terms points to the future, and operates as “*portée juridique*” for the consolidation of new treaty making. “*It expresses that the potential character of law depends on a certain lapse of time*”.<sup>163</sup> Hence, the instrument may call upon the parties to develop its content into law. Especially when the parties are reluctant to subscribe or adopt a treaty in determined matter, soft law carries out the duty of preparing or drafting the text. However, it still depends on the future interpretation and actions taken by the interested parties.

Soft Law instruments are also important auxiliary mechanisms for treaties interpretation, application or development.<sup>164</sup> In that sense *Olivier*<sup>165</sup> highlighted the relevance of some resolutions of the UN General Assembly, affirming that in some cases when the resolutions are approved by acclamation and they refer existing treaties and reiterate common accepted principles of international law, such developments of understanding Human Rights, they are legally binding.<sup>166</sup>

*Boyle*<sup>167</sup> stated “*although of themselves (soft law rules) these instruments may not be legally binding, their interaction with related treaties may transform their legal status into something more*”. They *per se* do not have legal force, notwithstanding they may become attachments to treaties, acquiring legal value just by virtue of the binding nature held by the international

<sup>162</sup> See Zemanek, Karl, *op. cit.*, p. 844.

<sup>163</sup> See Ingelse, Chris, *op. cit.*, p. 77.

<sup>164</sup> To illustrate how this criterion is being used in domestic jurisdictions, see for example Supreme Court of Canada, 114957 Canada Ltee (*Spraytech, Société d’arrosage*) v *Hudson (Town)*, 20001 SCC 40; [2001] 2 S.C.R. 241.

<sup>165</sup> See Olivier, Michèle, *op. cit.*, p. 297.

<sup>166</sup> See also Schermers, Henricus & Blokker, Nicolaas, *op. cit.*

<sup>167</sup> Boyle, Alan, *op. cit.*, p. 147.

instrument to which they accede. Soft law may modify the meaning, interpretation, or contents of existing treaty law.

b. Effect on Customary Law. Deeming that the preamble of the Vienna Convention of the Law of the Treaties stipulates that “*the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention*”; is it the soft law called upon to fulfill the gap by configuring international practice?

Considering that customary international law is comprised of two elements: (1) consistent and general international practice by states, and (2) a subjective acceptance of the practice as law by the international community (*opinio juris*),<sup>168</sup> most of the scholars claim that the principal legal functions of soft law are to legitimize the practice by the international community, and corroborate the existence of the *opinio juris*, when achieving the requirement for the assumption of customary law as a source of international law. According to Zemanek,<sup>169</sup> “*They (soft law instruments) record the consensus of opinion on how the law should progress which exists at a given moment. The future shows whether states acted in fact in a way that confirmed the expressed opinio juris*”. Soft law instruments, thus, represent one element in the respective law-creating process. This demonstrates that “soft-law” does not have a separated legal standing, it is just one step in the legal making process, in the present analysis, customary law.

c. Effect on general principles. In some ways, the “soft-law” instruments may be recognized as the basis for the applicability of existing principles of international law such as good faith, estoppel and equity, amongst other things.<sup>170</sup> Despite the fact that the rules of conduct are not principles of international law, they can provide or inform the existence of any degree of accomplishment with such principles.

In a particular case, it could be pleaded that it is against good faith if a soft agreement has been concluded and consequently one of the parties would (deliberately) act in a way contrary to it.

<sup>168</sup> See Villiger, Mark, *Customary International Law and Treaties: a Manual on the Theory and Practice of the Interrelation of Sources*, The Hague, Kluwer Law International, 1997.

<sup>169</sup> See Zemanek, Karl, *op. cit.*, p. 859.

<sup>170</sup> Ingelse, Chris, *op. cit.*, p. 84.

Complying constantly with a non-legal or vague rules can result in a legal obligation through estoppels.<sup>171</sup> Nevertheless, “*there must be conduct inducing another state to take a certain position and prejudice to another state must have arisen, because it has reasonably changed its position*”.<sup>172</sup>

As this principle is a direct emanation of justice, it may be evidenced by the existence and development of mere political and normative, not legal, instruments. The law is changing and thus, its contents.<sup>173</sup> The soft law may be called upon to fill the sense of meaning of equity among the different international stages.

All things considered, although there is not certainty as regards the position of “soft law” in international law, it seems that as it stands today it acquires legal value when it is attached somehow to the traditional sources of law. Even though, albeit its legal value may not have been totally specified there is a very strong argument to deem that soft law should also be governed and studied by international law rather than mere politics or international relations as the instruments adopted through “soft law” mechanisms.

After the abovementioned considerations as regards soft law it is feasible to acknowledge that the topic itself is a complex and unsolved phenomenon although it definitely has an important relevance within the context of the international law sources research. Despite the fact that soft law is not regulated by identifiable sources of law there are a few common characteristics arising from the constructions of the scholars —who basically read the international reality—:

Soft law is always contained in physical documents consequently making impossible the appearance of “soft customary law” (or any other non written source); such *instrumentums* can spontaneously appear in both *proper* legal sources like treaties and unilateral declarations as well as political documents, although special attention is deserved to the latter as it is at the center of the debate on the probable new ways of international law making (legal- non legal); although there may be disadvantages of using soft law to regulate particular issues like its mere

<sup>171</sup> See Aust, Anthony, “The Theory and Practice of Informal International Instruments”, In *The international and comparative law quarterly*, 1986, vol. 35, p. 787.

<sup>172</sup> Ingelse, Chris, *op. cit.*, p. 85.

<sup>173</sup> *Ibidem*, p. 86.

nature of being “soft” and apparently devoid of the application of the principle *pacta sunt servanda*, its advantages appear to be more striking: soft law instruments can react more rapidly to the current challenges of the international community which can not be faced by the obsolete understanding of the sources; the current existence and practical action of soft law in the daily functioning of the international community is undeniable, its usefulness self-evident, notwithstanding attention should be paid to its uncontrolled employment because unregulated usage could bring to a “lawless world”<sup>174</sup> which consequentially reveals the need to formalize (law-ascertainment) the raising informal sources; last but not least it appears that soft law does not seem to be an artificial invention of the scholarship rather it is a natural effect of the normal dynamics of the international community. Additionally, although we describe it as “soft” today its conceptual content may lead to the further appearance of a new kind of “hard” law that recognizes the new dynamics of the international community.

### III. CONCLUSION

All things considered it is undeniable to settle that international law is already changing. The traditional foundations of the sources are being modelled by the supreme source of international law: international practice. Therefore, article 38 of the ICJ Statute should not be mistakenly continue to be referred as the universal secondary rule governing the finite list of the sources, taking into consideration its demonstrated obsolescence and insufficiency.

On the contrary, international law should increasingly recognize the existence of new law ascertainment phenomena led by the informalization of processes such as law making, law evidence, law determination, *inter alia*. However, it is pleaded here that the process of law ascertainment should remain formal as to preserve the integrity and coherence of the international system. Such an objective can be achieved by for-

<sup>174</sup> Using Philippe Sands’ expression.

malizing law ascertainment criteria of relevant current informal processes highly supported by international practice.

From that perspective, it turns out to be that broadening the spectrum of the sources of international law is not an artificial invention of scholars; rather it is something which recognition is required in accordance with the evident changes that have already happened in reality. International law has already grown; however there is still a lack of enough recognition among international subjects. This is an era where traditional sources still continue to exist although its contents have evolved, where new sources are emerging.

Altogether, it is undeniable to accept that there is still much to see apart from the traditional list of sources of international law, as there is another side of the coin in which novel ways of making law are still to be explained. Soft law, not being the only candidate, is definitely a promising one, however as the practice continues to increase, what we call “soft” today will be called “hard” tomorrow.

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