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ROLE OF SOFT LAW IN THE DEVELOPMENT OF INTERNATIONAL LAW: SOME RANDOM NOTES

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The Asian African Legal Consultative Organization (earlier the Committee) was constituted with one of the important objectives to promote common standards of international law first among the large number of States composed of these two continents and in the process influence the trends at the universal level to create more just and equitable world order. The Organization has been performing this task admirably over these 50 years. It has adopted a number of instruments of considerable international legal value on different matters. But all those instruments by their very nature are recommendations for the consideration of the member States in particular and States in general. These may be regarded as soft law in the sense in which the legal value of such instruments can be properly understood. The following is an essay or rather some random notes on the role and value of soft law in the development of law. This discourse may be useful in putting the work and contribution of the AALCO in proper perspective.

I. Soft Law and its many forms

Soft law comes in different forms and it may be difficult to define the same. The lack of rigorous and generally accepted definition of the term 'soft law' makes the task of defining the parameters of the subject unclear and mostly the concept refers to only written law as opposed to unwritten law. The softness could be attributed to the formal source of the prescription as well as to softness of the normative content of an otherwise obligatory prescription[1]. It must be borne in mind that any distinction between hard and soft obligations is not the same as a distinction between a treaty and non-treaty. Moreover once soft law begins to interact with binding treaties its binding character may be lost or altered. What is obvious however is that "the distinction between

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1 Francesco Francioni, "International 'soft law': A Contemporary Assessment" in Vaughan Lowe and Malgosia Fitzmaurice (eds.), Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings (New York: Cambridge University Press, 1996), pp.167-178 at p.167.

treaty and soft law is not clear-cut: a treaty can be both hard and soft and in several different senses at once"[2].

One way to identify and define soft law is by way of distinguishing the same from law proper or what is called hard law. Defining law is itself not a simple matter but within a national or domestic setting, prescription is popularly believed to be the one that is promulgated by a legislature, applied by courts and enforced by the executive authorities of a State. According McDougal, Lasswell and Reisman this is a narrow conception of law. They noted that,

> "Prescription is at once broader and more specific than the commonly used term 'legislation'. In conventional usage legislation is an "organic" concept, deriving from the concept that law is made from a centralized legislature. Such an approach is inadequate for the study of government anywhere and especially of international law, since there is little formal international legislation".

They further pointed out that in many ways national legislatures were known to produce ineffective laws, which tend to reduce 'legislation' to a mere procedural label and the same does not cover what is universally respected as 'judicial legislation'[3]. It is also obvious that all the three institutional components of a State system, which legislate, apply and enforce law are absent at the international level in their formal sense. In the absence of a world legislature, judiciary and executive, we may have to approach the enquiry about international law making with an open mind and broader conception of law. According to Reisman, such an examination could be pursued in terms of its functional components and law making "refers to the processes in which expectations of authority and communications about intentions of control are generated and mobilized to sustain certain policy formulations that are designed to affect human behaviour"[4].

There are other conceptions of law. The most prominent of them is reflected in Article 38(1) of the International Court of Justice. Treaties and custom are decidedly the primary sources of international law. Article 38(1) of the Statute of the International Court of Justice, also refers to

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2 Alan Boyle, "Some Reflections on the Relationship of Treaties and Soft Law", *International and Comparative Law and Quarterly*, vol. 48, 1999, pp. 901-912 at p. 902.

3 McDougal, Lasswell and Reisman, "The World Constitutive Process of Authoritative Decision", in Rchard Falk and Cyril E. Black, *The Future of International Legal Order* (Princeton NJ: Princeton University Press, vol. I, 1969), pp. 73-154 at p. 139.

4 Reisman, "The Concept and Function of Soft Law in International Politics", in E.G.Bello and B.A. Ajibola, Essays in Honor of Judge Taslim Olawale Elias (Dodrecht: Martinus Nijhoff, 1992), pp. 135-144, at p. 135.

other sources such as the general principles of law recognized by States, judicial decisions, and writings of the publicists. But these other sources are utilized sparingly and with caution[5]. State consent is central to both treaties and custom as sources of international law. Treaties are effective as law when adopted and ratified by States. Uniform and consistent State practice for a length of time, followed by *opinio juris*, that is the conviction that the practice is matured into legal obligation is necessary for custom to create a binding international obligation.[6] In general, hard law is generally believed to be composed of several elements. Clear and precise legal content is one of them. For example, numerically specific obligations contained in the Ozone Convention amounted to a hard obligation. In contrast, the obligation to guarantee religious freedom in human rights treaties could be treated as soft norm. The prescription of a due diligence standard of liability and the very generalized form in which the provisions on State responsibility and liability concerning the preservation and protection of the marine environment are couched in the 1982 Law of the Sea Convention appear to also to give them the character of a soft law[7]. Moreover the availability of a specific controlling or enforcement or implementing mechanism or the lack of it could make a difference between a hard or soft law[8]. The institution of a compulsory

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5 The International Court of Justice, like its predecessor the Permanent Court of Justice exhibited restraint in its use of this source. See, Jonathan I. Charney, "Universal International Law", *American Journal of International Law*, vol. 87, 1993, 529-551at p. 536. Chinkin noted also that most recently in its 1996 Advisory Opinion on the Legality of the Threat and Use of Nuclear Weapons, "the majority made no reference to general principles of law to fill the lacuna caused by the lack of any relevant treaty obligations and by conflicting state practice". Further, according to her, the formulation of 'general principles of law' as a source of law in Article 38(1) (C) was the result of a compromise between two opposing schools of thought. One wanted reference to general principles drawn from the conscience of civilized nations, that is natural law and justice, and another rejected the concept of binding obligations that had not been "developed into positive rules supported by an accord between all States". Christine Chinkin, "Normative Development in the International Legal System", in Dinah Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford: Oxford University Press, 2000) pp. 21-42, p.21.

6 For an analysis of the sources of obligation at the global as opposed to domestic level, see, Jonathan I. Charney, ibid, p.531-532, where he notes that depending upon the theory, the consent of States may or may not be found at the root of all international law.

7 See, Bernie and Boyle, *International Law & The Environment*, (Second Edition, Oxford: Oxford University, 2002) pp.382-383. This is however different from the nature of the Law of the Sea Convention itself, which is by all means a very hard law, particularly because it provides for a compulsory settlement of disputes in Part XV. On this point see Alan Boyle, supra note 2, and other citations at fn.36, p.909.

8 Reisman, supra note, 4, p. 135.

dispute settlement mechanism surely lends to the obligations incorporated by the WTO Agreements the nature of a hard law.

Further, State responsibility should invariably arise for failure to comply with the obligations imposed by hard law. Soft law then could be the result of any law making process, which missed any one or more of these essential components that make up hard law.

Resolutions of International Organizations, having only the status of recommendations, declarations, agendas and programs or platforms of action, understandings, legal texts elaborated by experts, guidelines, framework conventions and final acts of conferences and other forms of legal texts containing non-binding arrangements or aspirational norms could be referred to as examples of soft law. Noting the infinite variety of forms of law, Baxter, referred to the Yalta Agreement as one of the early examples of soft law[9]. Treaties with imprecise, subjective, or indeterminate language could be termed as legal soft law. This is where, as Chinkin explained, soft obligations are fused with legal form. The Declaration of Principles on Interim Self-Government Arrangements between Israel and Palestine Organization of 1993 is an example of soft law in as much as PLO does not enjoy the status of statehood[10]. She also helpfully categorized soft law, first with respect to their different forms and second on the basis of their relationship to the hard law. Different forms of soft law are those that: are formulated in non-binding form, according to traditional modes of law making; contain vague and imprecise terms (or obligations); emanate from bodies lacking law making authority; are directed at non-state actors whose practice cannot constitute customary international law; and lack any corresponding theory of responsibility; and are based solely upon voluntary adherence, or rely upon non- juridical means of enforcement.

In respect of their relationship with hard law, soft law forms were categorized into those that: provide guidance to the interpretation, elaboration, or application of hard law (elaborative soft law); are formulated first in non-binding form with the possibility, or even aspiration, of negotiating a subsequent treaty, or hardening into binding custom through the development of state practice and *opinio juris* (emergent hard law); provide evidence of the existence of hard obligations; are articulated parallel to the hard law, to be available for invocation as a fall back position; and is a source of legal obligation, through acquiescence and estoppel, perhaps against the original

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9 Baxter, R. "International Law in her 'Infinite Variety', *International and Comparative Law and* Quarterly, vol. 29, 1980, p. 549.

10 Christine Chinkin, supra note 5, at p.26.

intentions of the parties[11].However, it is not the form or the title under which the particular subject matter is incorporated that matters as much as the intention of the parties to the document that will determine, whether under the circumstances, a binding legal relationship as between them is to be inferred[12]. Soft law instruments are thus stated to create and delineate 'goals to be achieved in the future rather than actual duties, programs rather than prescriptions, guidelines rather than strict obligations'[13].

II. The Need and Occasion for Soft Law

A. Some Practical Problems Concerning the Conclusion of Treaties

It must first be acknowledged that law making through treaties, based on the requirement of consent of States has not been too easy. Identification of common interests and working out consensus through package deals has become much more difficult with the enormous increase in the number of states, which today stand at nearly 200. Owing to their different stages of economic development, social, religious and cultural preferences and practices, States have diversified and often divergent national interests and priorities. Reconciliation of these multiple layers of conflicting interests is one that needs time for negotiations, patience and transparency among negotiators, and an attitude of accommodation and commitment to peaceful resolution of all outstanding differences and disputes. The negotiation of the 1982 Law of the Sea Convention is one example that could be readily cited to illustrate this point. More recently negotiation of conventions is displaying a different set of rather disturbing features. Bypassing difficult or persistent objectors, conducting negotiations in small groups often out of glare of attention from and without knowledge of most of the participating States, springing final compromise solutions in the wee hours of the conference, giving little or no opportunity for States to consult their capitals or among like-minded States, and forcing decisions through majority votes, when major interests remain unreconciled has been quite common. These features were unfortunately more striking in the case of negotiation of the Statute of International Criminal Court and the Doha round of international trade negotiations. Such a situation would generally result in robbing the credibility and persuasiveness of instruments adopted as universal

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11 Christine Chinkin, ibid, pp.30-31.

12 M. N. Shaw, *International Law*, (Cambridge: Cambridge University Press, 2003, 5 edition), p. 112.

13 P.M. Dupuy, "Soft Law and the International Law of the Environment", *Michigan Journal of International Law*, vol. 12, 1991, p. 420.

regimes. More importantly, treaties concluded with less than fuller acceptance from a broad spectrum of countries tend to attract wide-ranging reservations or result in some significant group of States not joining the convention at all. States are also reticent to agree upon any new obligation, which might impinge upon their sovereignty, and is too intrusive affecting their domestic jurisdiction. Christine Chinkin explains the point,

> "During 1990s a multiplicity of non-binding instruments in the form of declarations, agendas, programs, and platforms for action emanated from global summit conferences. The subject matter of these conferences-- human rights, population, environment, development, human habitation, and the empowerment of women-- could suggest that issues of social justice are deemed by states as inherently soft, or perhaps too intrusive into domestic jurisdiction to be the subject of binding obligations. Despite high governmental participation in the conferences and preparatory meetings, the normative weight of the final conference document is uncertain…. Their texts are both declaratory and programmatic, targeting governments, international organizations, and non-governmental organizations (NGOs) for future action. They cut across established legal categories in ways that may mold future international legal discourse".[14]

The technique and the forums of negotiation of treaties are no longer confined to States. Inter governmental Organizations and non-governmental organizations (NGOs) also participate in many multilateral negotiations. The role of the NGOs is no longer confined to the status of observers. They make proposals; lobby as effectively as some well-developed countries with better infrastructure than most of the small and medium states. They are better prepared with facts and technical details and more motivated to pursue goals they set for themselves than several of the States they confront in these negotiations. Modern conference procedures provide for their participation, mostly in the form of observers, and giving them opportunity to make their submissions. They of course do not enjoy the right to participate in any formal decision making procedures. The visibility and active participation of NGOs is generally welcome. But, there is tension between what is practicable from the perspective of a State, representing the interests of all of its citizens and what do representatives of civil societies, representing the interests of one specialized sector or the other consider as desirable. Besides, the NGOs themselves are not a monolithic entity and as between different

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[14] Chinkin, supra note 5, p. 28.

NGOs also there is clash of interests and priorities. This also accounts for difficulties in some measure to find the necessary universal consensus.

2. Conceptual Problems concerning the Process of Formation of Customary International Law

Similarly, identification of an international customary obligation poses even greater challenge in modern times. Assessment of uniform and consistent State practice over a period of time accompanied by *opinio juris* is required for an international obligation to emerge and be crystallized. With nearly 200 States, dispersed in all corners of the vast continents of the globe, with different practices conditioned by their relative economic levels, divergent national interests, and varied pace in response to the dynamics of practice set and shared by others, it is not easy to establish the uniformity and consistency of State practice within an optimum period of time that is required for custom to be established. It is even more difficult to identify the *opinio juris* under contemporary conditions. That is, when a State acted in conformity with the uniform and consistent practice, which is already in existence, it is difficult to show that it acted not simply to add its own weight of support to that practice but acted out of a conviction that such conformity is required of it by law. The establishment of this subjective condition so essential for the *opinio juris* is so difficult to show in practice as to lend to it almost a mystical quality to it. What is *opinio juris* and when and under what circumstances it could be said to exist? Practice of which kind of States and for what length of time is essential? These are some of the questions for which there are no widely accepted answers.[15] It is suggested, "When authorities examine the evidence necessary to establish customary law, they consider actions of a limited number of states, often only the largest, most prominent, or most interested among them". Accordingly, "the evidence traditionally used to establish new norms of international law is considerably less comprehensive and persuasive than some theory would suggest and substantially less than is necessary to establish that all States actually or tacitly consented to all new rules of customary international law". It is pointed out that in fact law is made without the conscious acceptance of most states and that "Traditionally, customary law has been made by a few interested states for all"[16]. Unfortunately this lack of truly democratic and universal base coupled with the lack of consensus in several cases on perimeter of content of the prescription, like the principle of self

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15 Frederic L. Kirgis, Jr., "Custom on a Sliding Scale", *American Journal of International Law*, vol. 81, 1987, p. 146.

16 Jonathan I. Charney, supra note 5, p. 537-538.

determination,[17] make it necessary to approach customary law, as a source, with great caution. In addition when the claim is further made that provisions of a treaty negotiated incoporated a customary obligation, it could even be a cause for concern for those States that opposed the Convention precisely for the reason that it contained those provisions.[18]

3. Appeal of Soft Law

States adopt soft law therefore on occasions when they are not in a position to effect new law through treaties or custom. They also resort to it to postpone acceptance of hard obligations, which they are not in a position to give immediate implementation. There are often problems for States about adopting implementing domestic legislation, committing immediately limited national economic and financial resources for the realization of the obligations, which are pressed. In such situations setting standards and leaving implementation to the discretion of States according to their national capabilities and consensus on priorities of

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17 Jennings and Watts (eds.) Oppenheim's International law, 9 edn., (1992), noted that "the point at which the principle of self-determination begins to apply is more difficult determine. The problem is part of the larger question whether the right of self-determination is limited to the colonial and similar situations in which it had its origins, or whether (particularly as the colonial content of the principle becomes primarily a matter of history) is a concept of continuing and universal application". p. 290. According to Crawford, the practice of States since 1945 had shown 'extreme reluctance to recognise or accept unilateral secession outside the colonial context'. This practice according to him has not only changed since 1989, despite the emergence during the period some 22 new States, but is actually reinforced. See J. Crawford, "State Practice and International Law in Relation to Secession", *British Year Book of International Law,* 1998, pp. 85-117, at p. 115.

18 On the question of current methods of international law making and the concern that international law might constitute an instrument to impose the values and preferences of a select oligarchy of States over the rest of the international community of States, see Prosper Weil, "Toward Relative Normativity in International Law ", *American Journal of International* Law, vol. 77, 1983, pp. 413-442 at p.441 (para41). This is a submission which is very persuasive in many respects but encountered many different responses in the legal literature. See for example Reisman, supra note 4, Jonathan Charney, supra note 5, and Ulrich Fastenrath, "Relative Normativity in International Law", *European Journal of International* Law, vol.4, 1993, pp. 305-340. There is much value however to the principal point that in the absence of any real emergence of an international community, some States either the powerful or the numerous among them should not arrogate to themselves the role to legislate for the entire world. Insistence, on the other hand, on consent of State as the ultimate or the only test until the true emergence of an international community would bring the Westphalia conception of international law back with all its negative consequences for the world order which has since evolved under the UN Charter scheme. For a perceptive presentation on this score, see Richard A. Falk, "The Interplay of Westphalia and the Charter Conceptions of International Legal Order", in Falk and Black, supra note 3, pp. 32-70, at pp. 55-62.

social and economic goals is considered far better than insisting on hard, universal and uniform standards. Such an approach would help States to accept in principle the basic policies that underpin the obligations without having to commit themselves to the obligation in all its details. Some other reasons are also suggested for adopting soft law over hard law: 1. More and more international organizations are taking over the functions of initiation of norm creation, monitoring, assisting in the performance of norms, and secure compliance. Where institutions can assess performance, hard law may not be necessary because State behavior is likely to change in response to the assessment. 2. States do not like to default on hard law. Hence, States tend to rely upon soft law as an option, particularly when there are no clear measurable means to evaluate compliance. 3. They are useful as instruments to induce States to participate or to pressure non-consenting States to conform. 4. Its emergence may also be a measure or sign of maturity of international system. 5. Legally binding norms may be inappropriate when the issue or the effective response is not yet clearly identified, due to scientific uncertainty or other causes but there is urgent reason to take some action. 6. Soft law may allow for more active participation of non-State actors. 7. Soft law sometimes could be adopted more rapidly, because it is non-binding[19].

By way of one illustration, we may note the case of the Antarctic treaty regime. The Antarctic treaty regime provides the possibility for the Consultative Parties to adopt recommended measures under Article IX, which become 'effective' after they receive approval from all the Antarctic Treaty Consultative Parties (ATCP). These recommendations are soft normative instruments, and by adopting them, the ATCP retain the advantage of assuming obligations that they might not be able to assume otherwise. Many recommendations embody norms that have been

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[19] Dinah Shelton, "Law, Non-Law and the Problem of Soft Law", in Dinah Shelton (ed.) supra note 5, pp.1-18, at pp.12-13. See also C. Lipson, "Why are Some Agreements Informal?", *International Organization,* vol. 45, 1991, p. 495 noted that States prefer soft law to avoid formal and visible pledges, to avoid ratification, to be able to renegotiate and modify as circumstances change, and to achieve a result. He sees speed, simplicity, flexibility and privacy as part of informal agreements (cited by Dinah Shelton, id, fn. 14, at p. 11). Alexander Kiss refers to several of the same reasons for the appeal of soft law as an instrument of frequent resort to by States and non-State actors. In particular he makes the point that soft law is useful for achieving better compliance by yielding control of the level of commitment involved to the authorities of the State. In addition, non-biding instruments may be more appropriate to the nature of the subject matter under regulation, given the different stages of economic development of participating States. Alexander Kiss, "Commentary and Conclusions", in Dinah Shelton (ed.), ibid, pp. 223-242, p. 224, and 237-239).

distilled and harmonized by the ATCP so that they can be promulgated as common aims and standards. As non-binding norms, "the obligations contained in recommendations can be formulated in a more precise, distinct, and restrictive manner than is acceptable in a formally binding international agreement. These recommendations are not susceptible to formal municipal approval by ratification, as are international agreements"[20]. Resort to recommended measures thus permits the ATCP "to address serious problems collectively while refusing to hamstring their ability to act. This has been especially significant in recommendations pertaining to environmental matters, when scientific evidence is wanting or inconclusive, but precautionary measures are still deemed necessary"[21].

4. Treaties and Soft Law

The relationship between soft law and treaties could be seen in several ways[22]:

(a) Soft law could be used as a basis for concluding later multilateral treaties. Examples are the IAEA Guidelines which formed a basis for the conclusion of the 1986 Convention on Early Notification of Nuclear Accidents, and the UNEP Guidelines on environmental impact assessment providing a basis for the conclusion of the 1991 ECE Convention on Environmental Impact Assessment in a Transboundary context. Similarly the UNEP's Guidelines on Land-based sources of Marine Pollution provided a model for the conclusion of regional treaties such as the Kuwait Protocol.

(b) Soft law could be used as mechanisms for authoritative interpretation or amplification of the terms of the treaty. Several General Assembly resolutions, such as those on decolonization or non-use of force, are examples. There are other instances, for example, UNEP's Cairo Guidelines could be seen as an amplification of the obligation of 'environmentally sound management' referred to in article 4 of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes.

(c) Soft law could be used to provide detailed rules and technical standards required for the implementation of some treaties. For example they elaborate 'best practices' or due diligence standards often referred to in environmental agreements. These detailed rules or 'ecostandards', as

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20 Christopher C. Joyner, "The Legal Status and Effect of Antarctic Recommended Measures", in Dinah Shelton (ed), ibid, pp163-195, at p. 183).

21 Ibid, p. 182

22 The following material is extracted from the article of Alan Boyle, supra note 2, pp. 902-906.

sometime they are called, could easily be changed or strengthened as scientific understanding develops and political priorities change. IAEA has particularly used the non-binding ecostandards, with the approval of its Board of Governors, to promote an authoritative legal framework, even in a soft form, to regulate and control safety of nuclear activities.

(d) Some treaties give binding force to soft law arrangements through incorporation into their terms by an implied reference. The UN Convention on Law of the Sea refers and by implication incorporates many of the recommendations and resolutions of the IMO and such treaties as the MARPOL Convention.

(e) Soft law instruments may operate in conjunction with a treaty to provide evidence of *opnio juris* for the possible emergence of a rule of customary international law. The Nicaragua case demonstrated that UN General Assembly resolutions interacting with UN Charter provided a customary law basis for the principle of prohibition of the use of force in international relations.

Conclusion is that the non-binding nature of soft law is overstated. Even without incorporation into treaty terms, they represent an agreed understanding of its terms and cannot be ignored. Sometimes by interacting with treaties they may be transformed into imperative statements of law.[23] Soft norms, like the ATCP recommendations may not be binding *per se*, but they can indicate the likely direction in which formally binding legal obligations will develop[24]. Treaties are not necessarily more authoritative than soft law instruments. Citing the example of the 1992 Rio Declaration, it is noted, "It is not obvious that a treaty with the same provisions would carry greater weight or achieve its objectives any more successfully. On the contrary it is quite possible that such a treaty would, seven years later, still have far from universal participation, whereas the Declaration secured immediate consensus support, with such authority as that implies". But this does not mean that soft law instruments are more preferable in all cases. For example in cases where new law has to be made and detailed terms of obligations have to be set up with institutional provisions, as in the case of the agreements on climate change and biological diversity, adopting a treaty format is highly suitable[25].

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23 Alan Boyle, ibid, p.906.

24 For examples in the Antarctica context, see, Christopher Joyner, supra note 20, p.180-181.

25 Id. p.904.

III. Customary Law and International Soft Law: Resolutions of the UN and Other International Organizations

The resolutions of the political organs of the United Nations are one of the forms of such soft law, which accounted most for the development of international law. The resolutions of the United Nations addressed to States, according to Article 10 of the UN Charter only have the status of recommendations and in principle are not binding. However some of the resolutions of the General Assembly which incorporated carefully negotiated declarations, conventions, guidelines and directions have in fact exerted greater influence than many other sources of international law mentioned in article 38(1) of the ICJ Statute. Rosalyn Higgins, now President of the International Court of Justice, in her important and influential work noted that,

> "Collective acts of states, repeated by and acquiesced in by sufficient numbers with sufficient frequency, eventually attain the status of law. The existence of the United Nations…now provides a very clear, very concentrated, focal point for state practice….
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> Similarly it may be observed that political organs sometimes make declarations of consciously legal content- the Declaration on the Nuremberg principles and the resolution on the sovereignty over natural resources may be both cited as examples… Resolutions of the General Assembly are not *per se* binding: though those rules of general international law which they may embody are binding on member states, with or without the help of the resolution. But the body of resolutions as a whole, taken as indications of a general customary law, undoubtedly provides a source of evidence. Those resolutions of the Assembly which deliberately - rather than incidentally - provide declarations on international law are invariably based on other quasi-judicial forms of support"[26].

IV. Recommendations and Binding Law

Resolutions of the United Nations adopted by near unanimity and with a clear content are treated as authoritative expression of the will of the world community or as evidence of the *opinio juris*, which is necessary for the crystallization of customary international law[27].

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[26] See Rosalyn Higgins, *Development of International Law by the Political Organs of the United Nations* (Oxford: Oxford University Press, 1963), pp. 2, 4 and 5.

[27] For the views of McDougal in favour of the proposition and, Schwebel, asking for more evidence and rejecting any suggestion that the voting for the resolutions would in itself be sometimes conclusive evidence of the *opinio juris*, see B.H. Weston, R.A.Falk, and A. D' Amato, *International Law and World Order: A Problem Oriented*

Such resolutions are cited and relied upon repeatedly by other and subsequent resolutions of the United Nations and other international organizations. They are also used as basis of claims States make against each other and are often honored and used for the purpose of resolution of the differences or disputes between them. It is also said that even if the resolutions of the United Nations are treated as recommendations, those acting in pursuance of the recommendations are considered to be acting in accordance with international law. The greater the number of States implementing the recommendation the larger would be the normative value gained by the recommendation[28].

Assessment of the process of international law making through UN and other multilateral forums is however not always easy. These forums could be abused. Results announced may not conform to the true wills or interests of States[29]. Despite the possibility of abuse and sometimes the deliberate confusion, which may be created as to their legal value, certain

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Coursebook (West Publishing, 1990), pp 136-140, and at p.137 and 139, and p.139 and 140 respectively. See Dinah Shelton, "Law, Non-Law and the Problem of Soft Law", supra note 19, pp.1-18 for the view that-"The process of drafting and voting for non-binding normative instruments also may be considered a form of state practice". (p.1)). D'Amato took the position that if voting for the UN resolution meant investing it with opinio juris, and the latter would have lost all legal content. In which case, he argued, there was the danger that one would simply apply the UN resolution and mislabel it as customary international law. For a mention of this view, see Christine Chinkin,"The Challenge of Soft Law: Development of and Change of International Law", *International and Comparative Law and Quarterly,* vol. 38, 1989, pp. 850-866 at p.858.

28 On the legal value and the role of UN recommendations, see Obed Y. Asamoah, *Legal Significance of Declarations of the General Assembly of the United Nations* (1966). Jorge Castaneda, Legal Effects of United Nations Resolutions (1970). Rosalyn Higgins, supra note, 26. Gaetano Arangio-Ruiz, "The Normative Role of the General Assembly of the United Nations and the Declaration of Friendly Relations" *Hague Recueil des Cours*, vol.3, 1972; Bin Cheng, "United Nations Resolutions on Outer Space: 'Instant' International Customary Law", *Indian Journal of International Law,* vol.5, 1965, pp. 23-45; Richard Falk, "On the Quasi Legislative Competence of the General Assembly", *American Journal of International Law,* vol. 60, 1966, p. 783-791; F. B. Sloan, "The Binding Force of a Recommendation of the General Assembly of the United Nations", *British Year Book of International Law*, vol. 25, 1948, pp. 1-33; D. H. N. Johnson, "The Effect of the Resolutions of the United Nations", *British Year Book of International Law*, vol. 35, 1955-56, pp. 97-122; F. A. Vallat, "The Competence of the U.N General Assembly Resolutions ", *Recueil des Cours*, vol. 97, 1959-II; Samuel A. Bleicher, "The Legal Significance of Re-Citation of the General Assembly Resolution", *American Journal of International Law,* vol. 63, 1969, pp. 444-479. K. V. Raman, *Customary Prescriptions of International Law* (unpublished Yale law School dissertation, 1967).

29 Reisman, "The Cult of Custom in the Late 20th Century", *California Western International Law Journal*, vol. 17, 1987, p. 133.

criteria could be employed to gauge the legal value of the outcomes of multilateral forums.

As noted by one perceptive commentator,

> "The authoritativeness of the debates at these multilateral forums varies, depending upon many factors. Among the first is how clearly it is communicated to the participating states that the rule under consideration reflects a refinement, codification, crystallization or progressive development of international law. Of crucial importance is the amount of support given to the rule under consideration. Adoption of the rule by the forum in accordance with its procedures for decision-making may not be necessary or even sufficient. On the other hand unanimous support is not required. Consensus, defined as lack of expressed objections to the rule by any participant, may often be sufficient. The absence of objections, of course, amounts to tacit consent by participants that do not explicitly support the norm. Even opposition by a small number of participating States may not stop the movement of the proposed rule toward law. The effect of the discussion depends upon the number of objecting states, the nature of their objections, the importance of the interests they seek to protect and their geopolitical standing relative to the States that support the proposed rule. Moreover, when objections are expressed, it must be determined that they go to the heart of the norm under consideration or to subsidiary issues. Also relevant is whether the support for the norm is widespread and encompasses all interest groups. Do the objections demonstrate that an important group of States is not supportive, precluding the widespread support of the international community, or relatively isolated states alone raising objections?".[30]

In short,

> "The specificity of the subject matter at issue, the consensus expressed through the process of voting, the expectations created by the resolution in the international community, and the actions pursued after the adoption of the resolution are among the relevant contextual circumstances that transform a U.N. resolution from a mere recommendation into legislative force capable of creating a customary prescription binding the international community".[31]

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30 Jonathan I. Charney, supra note 5, pp. 544-545.

31 P. S. Rao, *Public Order of the Ocean Resources* (M. I. T. Press, 1975), p. 89. George Abi-Saab noted similar criteria for assessing when a soft law could have hardened into proper obligation in international law. In his view the circumstances of the adoption

V. Some Prominent Examples of Soft Law and their Contribution to the Development of International Law

1. The Universal Declaration of Human Rights (UNGA Resolution 217 A (III) of December 10, 1948) is still celebrated and cited as an authoritative statement of human rights law. This is so even after the Covenants on Human rights are concluded in 1966, the content and the adoption of which it influenced.

2. The Uniting for Peace Resolution (UNGA Resolution 337 A (V) of November 3, 1950) enabled the General Assembly to call for collective action including use of force, when the Security Council failed to act because of a veto. This provided a basis for some crucial and successful UN peacekeeping operations, among other things, in the Middle East (Suez crisis), 1956 and the Congo crisis in 1960, when the Security Council failed to act. Even though France and the then Soviet Union and few other member States opposed this as a legal basis for the conduct of peace-keeping operations of the UN, the International Court of Justice in the Certain Expenses of the United Nations (I .C. J. 151, 1962), approved the budgetary expenses incurred in respect of those operations as payments obligatory for the member States of the UN under article 17(1) of the Charter. It also endorsed the authority of the General Assembly to call for such collective action as long as this did not amount to use of force by the UN. The latter power to use force is regarded as 'action', with the meaning of Article 11 of the UN Charter, which is only reserved for the powers of the Security Council[32].

3. The UN Declaration on the Granting of Independence to Colonial countries and Peoples, (UNGA Resolution 1514(XV) of Dec.14, 1960), the subsequent adoption in 1970 of program of work for full implementation of the Declaration and the work of the UN Special Committee on the implementation of the Declaration were instrumental in expediting the process of eradication of colonialism. The Assembly declared the further continuation of colonialism in all its forms and manifestations to be a crime which constitutes a violation of the Charter, the Declaration and principles of international law[33].

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of the instrument including voting patterns and expressed reservations and the concreteness of language, and the existence of follow-up procedures are very material for this purpose. Cited in Christine Chinkin, supra note 5, p.32.

32 See for a brief mention of the Uniting for Peace resolution and the controversy surrounding the same, Shaw, supra note 12, pp.1152-1153. See also for some pertinent questions in this regard, B.H. Weston, R. A. Falk, and A. D' Amato, supra note, 27, pp. 950-951.

33 See Jennings and Watts, supra note 17, pp. 292-293.

4. The UN Resolution on the Permanent Sovereignty over Natural Resources (Resolution 1803 of December 14, 1962) is equally important in the context of the efforts of the United Nations to strengthen the economic base of the newly independent countries and to affirm their right to freely choose any political or economic system. This also provided a substantial basis for the nationalization of several foreign corporations, which until then and during the colonial period owned and exploited the national resources of the dependent countries for their profit. Further, as Brownlie noted referring to the adoption of the resolution by 87 votes in favor, 2 against and 12 abstentions, 'there is strong evidence in support of the conclusion that the adoption of resolution 1803 indicated that the principle of compensation was no longer based upon the "adequate, effective and prompt" formula of Cordell Hull, but upon the principle of "appropriate compensation"[34].

5. The UN Resolution on International co-operation in the Peaceful Uses of Outer space (UNGA Resolution 1721(XVI) of 10 December 1961), declaring that outer space and celestial bodies are not subject to national appropriation was an important first step to free the outer space from the traditional rule of occupation. Further the UN Resolution 1884(XVII) of 1962 and the UN Declaration of Principles on Outer Space (UNGA Resolution 1962 (XVIII) of 1963) provided a basis for the later Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and other Celestial Bodies, 1967. These resolutions and in particular the Declaration of Principles have prevented the pioneering States from clashing with each other or carving among themselves the moon and other celestial bodies. It also helped demilitarization of outer space and provided the beginnings for the concept of common heritage of mankind, which later took firm roots in the context of access to and exploitation of the international seabed area and its resources[35].

6. UN Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations (UNGA Resolution 2625(XXV) of

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34 Ian Brownlie, "International Law at the Fiftieth Anniversary of the United Nations, *Recueil des Cours,* vol. 255, 1995, p. 150.

35 For an analysis of the legal claims for sovereignty on the basis of discovery, or contiguity or effective occupation, see Myers S. McDougal, and W. Michael Reisman, *International Law in Contemporary Perspective: The Public Order of the World Community,* 1981, Section 4, Ch.5. On the customary prescription that 'access to, and use and enjoyment of, outer space are the inclusive right of all peoples, on a basis of complete equality, see McDougal, Lasswell and Vlasic, *Law and Public Order in Space,* 1963, p. 227.

October 24,1970) is one of the most well acclaimed UN Declarations, as an authoritative statement of some very 'basic principles of international law'. Seven principles were affirmed and clarified. These are: the non-use of force, peaceful settlement of disputes, self-determination, sovereign equality of States, the principle of non-intervention in the domestic jurisdiction of States, the duty of States to cooperate and the principle of good faith. According to Jennings and Watts, the "fact that the Declaration was prepared within the framework of the United Nations after extensive inter-governmental discussions, and was adopted by acclamation, and without dissenting vote by the General assembly, gives the seven principles contained in it a preeminent value in contemporary international law"[36].

7. The UN Declaration of the Principles Governing the Sea Bed and the Ocean Floor, and the Subsoil thereof beyond the limits of National Jurisdiction, UNGA Resolution 2749(XXV) of 17December, 1970. The influence of this Declaration on the eventual adoption of the 1982 convention on Law of the Sea cannot be underestimated. Prior to the adoption of the Declaration the debates of the UN Seabed Committee displayed considerable antipathy to establish an international seabed authority. There was also a strong pull towards establishing the unilateral right of States to seek the resources of the deep seabed beyond the national jurisdiction using and enlarging the concept of the freedom of States. This Declaration not only rejected all such attempts but also firmly established the concept of common heritage of mankind applying the same to such resources[37].

8. Several other resolutions of the United Nations, like the Manila Declaration on Peaceful Settlement of International Disputes (Resolution 37/10, of 1982) have provided a basis for stating the law first in a general and non-binding manner. Some, if not all, of them eventually lead to the adoption by States of firmer obligatory commitments.

VI. UN Security Council and International Legislation

As opposed to the General Assembly, the Security Council enjoys, under Chapter VII of the Charter the power to take decisions, which are binding on States, in accordance with Article 25. These are decisions involving enforcement action taken for the maintenance of international peace and security. The Security Council is required to determine the existence of a threat to the peace, breach of the peace, or act of

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36 Jennings and Watts, supra note 17, p. 334.

37 See, P. S. Rao, supra note 31, for discussion of the matter in the UN Seabed Committee and on the value of the 1970 UN Declaration, chapter 4, on "Access to Deep Ocean Resources", pp.76-108.

aggression under Article 39 before either making recommendations or decide on measures under Article 41(not involving military measures) or 42 (involving military action).

In recent years, the Security Council used its powers under Article 41 to establish an international Tribunal for the prosecution of war crimes in the context of the Yugoslavian conflict. There is some doubt about the power of the Security Council to establish an international criminal jurisdiction, which is not contemplated under Article 41. This question never got resolved even though the same was raised before the International Criminal tribunal for Yugoslavia in the Tadic case[38]. This is more a matter of legality of the Security Council's actions but the question has been raised in this and other contexts, whether member States are obliged "to accept and carryout" decisions, much less the recommendations, of the Security Council "not taken in accordance with the present Charter". With respect to recommendations made by the Security Council, they are as much a soft law as the recommendations of the General Assembly or other organs of the UN or any other international organization. But the question for consideration is whether the Security Council could act under Chapter VII and take sanctions against a State which did not honor its recommendations, without more, by way of additional evidence necessary, for the determination to be made under Article 39.

In other words, the broader question is as Brownlie posed, what are the legal limits of the power of the Security Council? There is the view that the International Court of Justice, as a principal judicial organ of the United Nations is empowered to review the legality of the recommendations or actions taken by the Security Council, if that is an issue in any case before it[39]. For Brownlie, the "conclusion must be that the Security Council is subject to the test of legality in terms of its designated institutional competence"[40].

Following the events of September 11, 2001, dealing with the suppression of international terrorism, the Security Council of the United Nations adopted Resolution 1373 on September 28, 2001. This required all States to take certain actions against the financing of terrorist activities, as well as a miscellany of other actions designed to prevent any support for terrorists and terrorist activities. In addition the Resolution also

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38 Prosecutor v. Tadic, ICTY Case no.IT-94-1-A, Judgment of the Appeals Chamber (July 15, 1999), available at http://www.un.org/icty/tadic/appeal/judgment/index.htm.

39 See the view of Bowett, *European Journal of International Law,* vol. 5, 1994, p. 89.

40 Brownlie, supra note 34, p. 218.

established a plenary committee of the Council, since referred to as the Counter-Terrorism Committee, to monitor implementation of the resolution and called upon all States to submit reports on compliance with it. This resolution did not address a specific situation of threat to peace and security in terms of Article 39 of the UN Charter, which is normally the basis for the UN to issue mandatory directions to States. It did not contain any time limitations for its operation, which is otherwise normal for all resolutions passed under Chapter VII. It incorporated in certain respects binding obligations and established a monitoring mechanism. For these reasons as correctly noted by Paul Szasz, it broke a new ground of law making, which is not sanctioned by either the provisions of the UN Charter or other sources of international law. Compliance with this resolution nevertheless has been very good. This may be attributed to the belief of States that such compliance is in their common interest and out of fear that any failure to do so would attract further review by the Security Council, which eventually may lead to sanctions under Chapter VII of the Charter.

This raises the question whether a new form of international legislation is now available for example to deal with nuclear disarmament, extreme violations of human rights, humanitarian law, or massive assaults on the international environment. This, as Paul Szasz himself rightly noted, is subject to the determination of the Security Council that any one of the events or series of events involving one of those subject matters is a threat to peace and security of mankind, within the meaning of Article 39 of the UN Charter. But any such determination, as already noted, is also open to challenge as beyond the powers of the Security Council and could become a matter of review by the International Court of Justice if it is cognizable issue in a case which is under the jurisdiction of the Court. Nevertheless, according to Paul Szasz, Resolution 1373 established a new possibility to put pressure on any few recalcitrant States[41]. This could then be understood as another form of soft law with (dangerous?) potential for influencing the future course of action and development of law[42].

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41 Paul C. Szasz, "Notes and Comments: The Security Council Starts Legislating", *American Journal of International Law*, vol. 96, 2002, p. 901.

42 On apprehensions expressed by India on the legislative role of the Security Council in imposing treaty obligations which they have not otherwise accepted, see Letter dated April 27, 2004 addressed to the President of the Security Council in the context of the Security Council Resolution S/Res/1540/(2004) which among other things urged States to cooperate in promoting more effective implementation of the prevention of proliferation of the nuclear weapons. See Pemmaraju Sreenivasa Rao, "The Indian Position on some General Principles of International Law", in Bimal

VII. Invocation of Soft Law in the Jurisprudence of the ICJ

The International Court of Justice in its advisory Opinion in the Certain Expenses of the United Nations[43] declared that the resolutions of the United Nations are not merely "hortatory". In the Nicaragua case the Court recognized that *opinio juris* could be deduced from the circumstances surrounding the adoption and application of the resolutions of the UN General Assembly [44] In its Advisory Opinion on the Legality of the Threat or use of Nuclear Weapons it examined a series of UN General Assembly resolutions on the legality of nuclear weapons for assessing whether any *opinio juris* emerged from these resolutions. In this connection it observed that,

> "The Court notes that the General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris.* To establish whether this is true of a General Assembly resolution, it is necessary to look into its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.'[45]

Francisco Francioni gives a very interesting account of the International Court of Justice expounding and relying upon soft law in several of its cases[46]. The Court relied upon soft law, and that too an unwritten one, in its Corfu Channel case (1948) between U.K and Albania. While dealing with the Albanian responsibility to notify the existence of mines in its territorial waters to foreign naval vessels exercising their right of innocent passage in times of peace, and hence not being able to apply the dictates of the Hague Convention No. VIII, which is applicable only in times of war, the Court relied upon "certain general and well recognized principles, namely: elementary considerations of humanity, even more exacting in times of peace than in times of war." Similarly, in its Advisory Opinion on the Reparations for Injuries Suffered in the Service of the United Nations (1949), in the absence of a specific treaty rule or precedent, it relied upon the soft foundation of the general object and purpose of the United Nations to assert abroad right

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N. Patel (ed.), *India and International Law* (Martinus Nijhoff Publishers, 2005), pp. 33-65, pp. 43-44.

43 *I. C. J. Reports,* 1962, p. 13.

44 *I .C. J. Reports*, 1986. pp. 14, 99-100).

45 *I. C. J. Reports*, 1996, para 70.

46 Francioni, supra 1, pp. 169-173.

of the United Nations to intervene against the offending State. The Anglo-Norwegian Fisheries Case (1951) could be cited as another example, where the Court 'resorted to the soft law principles to weaken the rigidity of existing hard law and bend their interpretation to the desired outcome'. In this case the Court approved the Norwegian practice to adopt a system of straight baselines, in derogation of the principle of low-water mark, in order to fit 'practical needs', provided that such baselines did not 'depart to any appreciable extent from the general direction of the coast'. According to Francioni, this enunciation of law by the Court confirmed to all elements of soft law prescription, that is: "the absence of its legal expression in a treaty, custom, or general principle, the lack of a precise normative content, and the fact that it was essentially left to the unilateral determination of the interested state"[47]. In its Advisory Opinion on Namibia (1971), relying upon soft human rights law developed by the United Nations, The Court declared that south Africa in practicing apartheid was in violation of the international human rights law. The Court concluded that despite the recommendatory nature of the UN General Assembly resolutions, that forum was not "debarred from adopting in specific cases within the framework of its competence, resolutions that make determinations or have operative design". Accordingly it determined that the General Assembly had the authority to terminate the Mandate given to South Africa by the League of Nations. Similar examples of reliance on soft law could be found in other decisions or advisory opinions of the Court. For example, it held in the Western Sahara Case (1975), that it was not a terra nullius, given the existence of political and social organization of nomadic tribes.

VIII. Framework Conventions as a form of Soft Law

Framework Conventions are also very common form of soft law. According to Aust, a framework convention is a multilateral treaty 'which is no different in its legal effect from other treaties.' He adds that 'the term is no more than a description of a type of treaty which provides a framework for later, a more detailed, treaties (usually called protocols), or national legislation, which elaborate the principles declared in the framework treaty'[48]. Chinkin elaborates on this point,

> "Typically, the framework convention establishes a structure for further cooperation between the parties through monitoring and implementation procedures, exchanging data, and facilitating scientific research, while protocols provide for greater specificity in

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47 Ibid, p. 170.

48 Anthony Aust, Modern Treaty Law and Practice, (Cambridge: Cambridge University Press, 2000), p. 97.

> complex regulation. They also permit ease of response to changed scientific knowledge and circumstances. A convention may also anticipate subsequent conference resolutions, administrative agreements or even memoranda of understanding when further agreement can be reached"[49].

One recent example is the UN Convention on the Law of Non-Navigable Uses of International Watercourses, 1997. Article 3, which deals with the relationship of that Treaty with other previous or subsequent treaties, by implication, describes the nature of obligations entered into. These are obligations of reasonable and equitable utilization of watercourses and of notification and the duty to enter into negotiations when the use of one riparian State significantly affects the uses of the same watercourse by another riparian State. Apart from specifying some factors for achieving the reasonable and equitable use, the Convention leaves it to the States parties to enter into more practical arrangements to realize the objectives of the Convention. It is in this context, Article 3 incorporates a carefully constructed compromise. It provides that States are under no obligation to modify the treaties to which they are parties prior to becoming parties to the present Convention. They may however attempt to harmonize their prior obligations, if there is agreement to that effect among all the parties. Further, while entering into new agreements in future, the parties to the Convention may 'apply' the provisions of the present Convention, and if desired 'adjust' the same to suit 'the characteristics and uses of a particular international watercourse or part thereof'. It is clear from this that the provisions of the Convention have the character of 'guidelines' for those negotiators of future agreements[50].

IX. Soft Law and International Environmental Law

Soft law has been playing a very prominent role in the development of environmental law[51]. The UN Environmental Program with the help of group of experts for long has been able to draft guidelines and principles, which are submitted to the UN General Assembly after adoption of the same by its Governing Council. These Resolutions in turn become the basis of other international agreements or national legislation. Moreover,

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49 Chinkin, supra note 5, p.27.

50 Lucius Caflisch, 'Regulation of the Use of International Watercourses", Salman A. Salman, and Laurence Boisson de Chazournes, *International Watercourses; Enhancing Cooperation and Managing Conflict* (World Bank Technical report No.414, 1998) pp. 3-16, at p.11. See generally, Stephen C. McCaffrey, *The Law of International Watercourses* (Oxford, 2001).

51 The following examples have been drawn from the presentation of Alexander Kiss, supra note 19.

under the leadership of UNEP, non-binding regimes in several fields have evolved into binding treaties, reflecting the belief that; form of an instrument makes a difference and that non-binding instruments could facilitate later achievement of consensus on hard obligations[52]. Further, while1979 Montreal Protocol set 1999 as the deadline for reducing by 50% substances affecting the ozone layer, the same could be revised upwards to phase out completely most of such substances by 1996, thanks to developments outside the treaty framework. The 1989 London Conference of the European Community first pledged a reduction of 85 percent as soon as possible and 100 percent by 2000. This was followed by the 1989 Helsinki Declaration by which 82 countries called for a complete phase out by the end of 2000. This indicated that an interaction between hard law instruments and soft law declarations and pledges could create a process which leads from hard law to the creation of soft law and from there to new hard law standards[53].

X. Globalization, International Economic Law and Soft Law

In the context of globalization and global governance, the role of soft law has become even more appealing and compelling. Globalization is more than interdependence, internationalization, or transnationalism, and it is distinctive process by itself. According to Mary Ellen O'Connell, "It is not just the presence of an issue in more than one state, it is the existence of the issue regardless of states"[54]. Global markets and global culture are accelerating aspirations of peoples all over the world to have equal levels of power and security, well-being and human dignity. This creates new tensions and problems and all of them do not release productive energies. Terrorism and proliferation of weapons of mass destruction and breaking of serious local conflicts and commercial greed and aggrandizement of markets are some of the ills we face in the immediate future. O'Connell however sees a positive outcome in the long run. She noted that, "These challenges of globalization, whether in the area of environment, economics, arms control, or human rights, are not going to be unmet. Indeed, an unprecedented level of activity, by an unprecedented array of actors, is occurring to address the ills of globalization. "Soft law in all its infinite variety, a product of the participation of non-State actors in the process of international law making, alongside States, as distinct from hard law, is being pressed into the job of regulating the globalization. She adds that,

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52 Id, p. 225.

53 Id, p. 224.

54 Mary Ellen O'Connell, "The Role of Soft Law in a Global Order", in Dinah Shelton (ed.) supra note 5, pp. 101-114, p. 10.

> "Much of this is correctly labeled legal activity. In addition to resolving some of globalization's challenges, such activity also may be leading to a new international order. If the trend toward globalization turns out to be dominant one, for the first time in human history we may be creating an international society under the rule of law"[55].

She is conscious of the need, in the present phase, which is a transition phase, to not to mix or confuse the soft law with the hard law for it would undermine the traditional and time-tested processes of law making, application and enforcement. Without having to be equated with hard law, soft law as tool of global governance has several advantages. She notes some of them:

> "Its instruments are flexible, being able to take almost any form global actors wish to use. Soft law instruments thus can provide an experimental response to new challenges as they continually arise. Consider for example, what lies ahead in Internet regulation. Non-binding instruments can attract adherence to new and even detailed regimes because States or others accepting soft law norms may choose non-compliance if the approach turns out to be the wrong one, or they more easily may correct the errors rather than drop the approach altogether. Another attractive aspect of soft law for globalization is that it can regulate the behavior of non-state actors from giant multinationals to NGOs and individuals. Soft law can fill the gaps of a hard law instrument, without the need for entering into the laborious procedure of treaty amendment"[56].

A question might be raised as to the value as *opinio juris* of action taken in compliance with an instrument for example concluded in the context of promoting a new international economic order, specifically denied to be legally binding and asserted to be voluntary. As Chinkin noted the intention to be bound may be denied, either expressly by the words of the instrument, or implicitly by the choice of a soft law form. The interests of States in voting for the adoption of a soft law instrument will differ along with their expectations and intentions as to implementation. Accordingly, she believes that depending upon the circumstances, a soft law instrument may have a catalytic effect and may develop and change the law, if it is the intention of at least some of the participants by adopting a practice consistent with it. However, she warned "it cannot be expected to happen instantly and readily, as the notion of instant customary law appears incompatible with the

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55 Mary Ellen O'Connell, id, pp.105-6.

56 Id, p.109-110.

revolutionary content of much of economic soft law"[57]. In any case the practice or rather the controlling activities in the case of most of the economic law may not be that of States directly but that of individuals and corporations tat are crucial to the creation of expectations as to the observance of the regulating instruments[58].

XI. Compliance and Soft Law: Soft Enforcement

Several factors contribute to compliance. These are: In the context of norm creation, soft law could be sometimes a precursor of hard law and at other times could be used to clarify or supplement or fill gaps in the existing norm. 2. The harder the content of norm the better compliance there would be. 3. Perceived economic costs could play role in compliance or non-compliance.4. Competition in international economy may sometimes be a reason for non- compliance with certain norms concerning environment, labor standards or financial accountability. Compliance in such cases could sometimes be enhanced with incentives and coupling of subject areas like human rights and security.5. Institutions and mechanisms that could give authoritative interpretation of the norm involved could help in promoting compliance, for example verification by reliable sources help compliance. 6. Role of non-State actors in achieving compliance is important. They could play the role of social audit. When they are to act in conformity with the obligations, generally an implementing legislation would be of help. But in any case if they are given an adequate role in the negotiation of the norms intended to regulate their conduct, there is a better chance to secure compliance from them[59].

In the context of the legal regime governing the Antarctica, certain factors were noted that influence the rate of compliance by the Antarctica Treaty Consultative Parties (ATCP) with various agreed recommended measures: "the recommended measure's perceived links to other international norms recognized in international law; its links to state practice, or links to practices by the Antarctic scientific community; the legitimacy of the adoptive process of a recommended measure; the perceived fairness and legitimacy of the recommended practice by the international community; and the control that ATCP governments have over national agents who are targets for an agreed measure"[60].

No clear or conclusive answers could however be found to identify factors which contribute to the compliance of either hard or soft

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57 Chinkin, supra note 27 p. 857.
58 ibid, p. 857.
59 Dinah Shelton, supra note 19, pp. 14-17.
60 Christopher C. Joyner, supra note 20, at p. 180.

obligations. For that matter, equally there are no easy answers to determine which of the two forms, hard or soft law, are better complied with in practice. It is believed that States or negotiators do not make conscious choices, when they adopt a soft law or hard law, keeping compliance in view. These result from 'unforeseen and unplanned circumstances'. There is no such thing as soft law, once it is outside the framework of formal sources of international law. However, norms which are not binding or hence called soft "are predetermined generalized norms of behavior that, while not binding as law, attract compliance by the targeted members of the international community"[61]. It is emphasized that, "the factors that influence compliance are infinite and no menu of definitive factors can be developed". However, there are some significant factors that "often are part of the environment in which these norms operate and can be linked to the rate of compliance"[62] Soft enforcement relies on agreed solutions rather than adversarial legal proceedings or on claims for reparation. It thus evades issues of responsibility for breach and relies on a "combination of inducements or the possibility of termination or suspension of treaty rights to secure compliance"[63].

This is thus more a method for promoting compliance rather than a procedure for enforcement, a method that relies on political, economic and other means, rather than on judicial means, on persuasion rather than on formal findings of a breach of obligations. There are many examples of this approach. The non-compliance procedure adopted by parties to the 1987 Montreal Protocol to Ozone Convention is one example. A Protocol was adopted in 1990 and revised in 1992 and can be invoked by any party to the Protocol or by the secretariat established under the protocol, or by the party itself, whenever there is thought to be a problem about compliance. An investigation Committee composed of 10 elected members would consider the matter on the basis of submissions, information and other observations made with a view to achieve an amicable settlement. It could also seek such information and help from the secretariat as it needs and could even seek a visit to the territory of the party under investigation if invited to do so. The task of the Committee is then to make necessary proposals by way of a report to the full Meeting of the Parties. That meeting in turn would decide on the steps to take, including the extension of financial, technical and training assistance. If any of the suggested measures failed to achieve compliance,

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61 Jonathan L. Charney, "Commentary: Compliance With International Law", Dinah Shelton (ed.) supra note 5, pp. 115-118, p. 116.

62 Id, p. 117. At pp.117-118 he noted some 15 factors.

63 Alan Boyle supra note 2, p. 909.

a caution could be issued and as last resort, a suspension of rights and privileges in accordance with the law of treaties could be considered[64].

Article 18 of the Kyoto Protocol to the Framework Convention on Climate Change, under negotiation also had a soft enforcement procedure. A 'multilateral consultative process' is provided for in the climate Change Convention itself, which is another innovation in the scheme of soft enforcement. In this case only a panel of experts is appointed. The procedure is non-judicial, non-confrontational, and purely advisory in character. There is no power to follow up the recommendations of the Panel with any type of sanctions, and not even suspension of rights and privileges, but only the right to make recommendations to facilitate cooperation, clarification of issues and implementation on the basis of a better understanding of the Convention[65]. Other soft means that enhance the culture of compliance are persuasion, provision of inducements, and establishment of international monitoring bodies with mandate to receive and review reports from States. This in turn might help resolve ambiguity and indeterminacy of norms and sometimes providing technical assistance to boost the capacity of national regulatory agencies[66].

XII. The Scope and Limits of Soft Law

Reliance upon soft law as an instrument for the development of international law has its drawbacks and better be avoided. Stretching it beyond its true legal significance and limits to the extent of equating it with law itself or as a viable substitution for the same is counter-productive. Prosper Weil decried the normative ambiguity that such soft form of law sometimes possesses[67]. Others suggested that legal certainty and stability and uniformity should not allowed to be undermined by the fuzzy and the intermediate categories, otherwise known as soft law, even though it might reflect in several cases the actuality and relativity of political accommodation[68]. Some writers reject the very idea of soft law as a contradiction in terms. According to them, there is either law or no law.

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64 Id, p. 910.

65 Id, p. 911.

66 Dinah Shelton, supra note 19 p. 2. See also Szell, on the "Development of Multilateral Mechanisms for Monitoring Compliance" in W. Lang (ed.) Sustainable Development and International Law (1995), Wolfrum on economic means for promotion of compliance of environmental obligations. Koskenneimi criticism of soft enforcement procedure).

67 P. Weil, supra note 18.

68 For a mention of the views of Brownlie, Klabber, and Danilenko see the review of Dinah Shelton (ed.), supra note 5, by Dougls M. Johnstone, *American Journal of International Law,* vol. 95, 709-714, p. 710. See also Chinkin, supra note 7, pp. 23-24.

Schachter however pointed out that the often-cited distinction between binding and non-binding obligations was too rigid a distinction and that legal obligation could be expressed in different degrees. According to him the nature of obligation is dependent on a variety of variables, and there is need to take account of interactions and influences in the concrete context to appreciate its precise contours. The uncertainty, he warns in relying upon this approach is less serious compared to,

> "The more serious risk of living in a 'make-believe world', where 'the law is always the law' and as a consequence in cynical reaction to reject a large body of normative phenomena that are actually operative in international behavior. To impose hard-and - fast categories on a world filled with indeterminacies and circularities can only result in a pseudo-realism which does justice neither to our experience nor to our higher purpose"[69].

Reisman also pointed out that normativity is not monolithic or one-dimensional and that the phenomenon of soft law is neither new nor necessarily a legal pathology[70]. According to this view concept of law and particularly treaties is broad enough to encompass all categories of determinate and indeterminate obligations. Of itself this is neither contradictory or problematic, so long as we are clear about what we mean when we use the terms hard and soft law[71]. What is important in each case is to evaluate the nature and scope of obligations. Some treaties contain such general principles as are often devoid of a harder edge of a "rule" or an "obligation". But these are not without their legal significance and should not be confused with non-binding agreements. They could set the legal parameters within which a court could decide a case or an authority could exercise its discretionary powers. They can set limits, provide guidance or determine how conflicts between other rules or principles could be resolved[72]. It should be appreciated that there exist different types of instruments, outside the framework of formal sources of international law, to which States and non-state actors contribute regularly in an effort to advance the cause of law-making. It is to be recognized that they could acquire the necessary formal status as law if their content is transformed into either a treaty or customary law. Accordingly, a strict distinction should be maintained between law-seeking and law-finding, and as between promotional or aspirational goals

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69 Oscar Schachter, "Towards a Theory of International Obligation", *Vanderbilt Journal of International Law,* Vol. 8 (1968), pp. 301-322, at p.322.

70 Reisman, supra note 4, p.136.

71 Alan Boyle, supra note. 2, at p. 902.

72 Id, at p. 907. Article 3 of the Convention on Climate Change is a prime example. For an elaboration, see pp. 907-908.

and operational norms or prescriptions[73]. Brownlie refers to various recent proliferation of claims concerning new human rights without any quality control, such as the right to food, right to a decent environment, the right to development as a human right and the right to peace and makes the point:

> "As policy goals, as standards of morality, the so-called new generation of human rights would be acceptable and one could sit around a table with non-lawyers and agree on practical programmes for attaining these good ends. What concerns me as a lawyer is the casual introduction of serious confusions of thought, and this in the course of seeking to give the new rights an actual legal context….
>
> The type of law invention about which I have reservations involves a tendency to cut out the real pioneering-- the process of persuasion and diplomacy--and to put in its place the premature announcement that the new settlement is built….
>
> Much more rigour is called for in the handling of legal materials. The elements of formation of rules of general international law--international custom--are not some esoteric invention; rather they provide criteria by which actual expectations and commitments of States can be tested. International law is about the real policies and commitments of governments, it is not about the incantations of secular or religious morality."[74]

XIII. Final Observation

Despite its non-binding nature, soft law has its legal value and cannot be ignored. These are often relied by States and other participants in the international arena in making their claims against each other. They have a tendency to influence the formation of hard law as reflected in international custom or the adoption and ratification of treaties. They are

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73 As Reisman warned, the tendency to blur promotion and prescription is frequently intentionally aggravated by advocates who press a particular formulation as law because they anticipate that it will advance the common interests of the world community as they see them or, more meanly, because they believe it will discriminate in their favor in the case they are arguing". Reisman, supra note 4, p.140. R.Y. Jennings, 'The Discipline of International Law', McNair Lecture, International Law Association, 57th R (1976), p. 632).

74 Ian Brownlie, "The Rights of Peoples in Modern International Law", in James Crawford (ed.,) The Rights of Peoples (1988), pp1-16, at p.14-15. On the need for quality control in asserting any new human right not specified in the Universal Declaration of Human Rights or in the two International Human Rights Conventions, see P. Alston, "Conjuring up New Human Rights: A Proposal for Quality Control" *American Journal of International Law,* vol. 87, 1984, p.607 cited by Brownlie at p.12.

also relied upon by the International court of Justice or other influential international law bodies or forums in appropriate cases as evidence of law. It is noted that 'soft law is where international law and international politics combine to build new norms' and 'soft law solutions can thus be useful steps on a longer journey' to create new legal regimes[75]. These 'half-way stages' have their own legal significance, even if they are not meant to be strict legal obligations. As pointed out by Bernie and Boyle,

> It is characteristic of all of them that they are carefully negotiated, and often carefully drafted statements, which are in many cases intended to have some normative significance despite their non-binding and non treaty form. There is at least an element of good faith commitment, an expectation that they will be adhered to if possible, and in many cases, a desire to influence the development of state "practice and an element of law-making intention and progressive development. Thus they may provide good evidence of *opinio juris,* or constitute authoritative guidance on the interpretation or application of a treaty, or serve as agreed standards for the implementation of more general treaty provisions or rules of customary law. Like law-making treaties, such instruments can accordingly be vehicles for focusing consensus on rules and principles, and for mobilizing a consistent, general response on the part of states."[76]

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75 G. Palmer, "New Ways to make International Environmental Law", *American Journal of International Law,* vol. 86, 1992, p. 259, 269. See also Reisman, supra note 4, p. 144.

76 P. W. Bernie and A. E. Boyle, supra note 7, p. 25.