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Understanding the Hard/Soft Distinction in International Law

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Understanding the Hard/Soft Distinction in International Law

Arnold N. Pronto*

ABSTRACT

A common characterization employed in contemporary international law is that between "hard" and "soft" law. A determination that an instrument falls into either category carries with it a series of implications, including that pertaining to the legal consequence of noncompliance with the rules contained in the text. What is at times overlooked is the relatively common phenomenon of the two types of law co-existing, where hard rules provide the context or the limits (boundaries, ceilings, and floors), and the details are "filled-out" by soft rules. A full appreciation of the resulting legal picture requires not only a familiarity with both types of rules but also an understanding of how they relate to each other. This is explored on two levels: the relative "authoritativeness-deficit" of the distinction under international law, and the reflection that the ambiguity inherent in the distinction reveals not two, but four, possible outcomes.

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I. INTRODUCTION

In the contemporary narrative of international law, it is common to find analyses of the pedigree of instruments framed in terms of the hard/soft law dichotomy. The former concerns those texts adopted in a form that suggests the existence of a legal obligation, while the latter refers to those that are not recognized as being binding under international law. A determination that any one instrument falls into either category carries with it a series of implications, the main such implication being the legal consequence of noncompliance with the rules or norms contained in the text. In other words, the characterization suggests a certain intention on the part of the drafters and provides a hint as to their understanding of the legal and political context in which they drafted the instrument in question. It also allows for a range of assertions as to the normative nature of the text. That this is tolerated (sometimes even lauded) in international law is well known and accepted. It is merely a confirmation of the open-textured nature of international law, which (perhaps more than domestic law) allows the regulation of human activities through nonbinding law. While the focus herein will not be on an analysis of questions of compliance with international law (nor whether "soft law" is really "law"), it is worth restating the obvious fact that the notion of soft law challenges traditional conceptions of the role played by compliance in confirming the legal character of a rule.

However, in international law, formal compliance is sometimes not the intended goal. Instead, the function of the law may be to guide the action of states and other actors at the international level. Therefore, that such rules may not be formally "binding" is often not by fault but by design. It simply was not an issue of particular concern to the negotiators to secure a legal basis for compliance. Or, if it was a consideration, a cost-benefit analysis might have led to an assessment that a nonbinding approach would, in the aggregate, have a greater impact than a formally binding text (ratified by few). What is at times overlooked is the relatively common phenomenon of the two types of law co-existing, where hard rules provide the context or the limits (boundaries, ceilings, and floors), and the details are "filled-out" by soft rules. In such circumstances, a more nuanced analysis based on the subtle interaction between hard and soft rules is called for.

The fact is that a significant amount of the “law” regulating the activities of states undertaken in response to a disaster exists in a nonbinding form.¹ At the same time, the field is also characterized by the existence of several hundred bilateral, and a number of multilateral, treaties.² A full appreciation of the resulting legal picture requires not only a familiarity with both types of rules but also an understanding of how they relate to each other. A further reason for looking at the hard/soft dichotomy relates to yet another consequence of the characterization, namely what it suggests for the prospect of codifying essentially soft rules into hard law texts. The label of soft law typically carries with it assumptions as to the non-suitability for incorporation into a binding treaty. It is the view of the present writer that such understanding oversimplifies the prevailing position, precisely because it does not sufficiently take into account the complex legal picture that arises in the presence of existing hard law.

The suggested hypothesis is that such disconnect is not unique to International Disaster Response Law (IDR), but rather is a consequence of the lack of precision inherent in the hard/soft law characterization. This will be explored on two levels. First, it bears pointing out that the distinction has no formal basis in the law. Instead, it is merely employed as a descriptor of the law, with an attendant quasi-sociological analysis of the lawmaking process. Such “authoritativeness-deficit” will be explored, and some suggestions will be made as to how the distinction might be brought into line with more traditional descriptions of the law and lawmaking process. Some observations will also be made about the choice of soft law as a lawmaking technique.

The second question to be explored relates to the problem of the lack of granularity in the distinction. The binary form in which it is traditionally presented (binding vs. nonbinding) is misleading since the inherent ambiguity in the distinction reveals not two, but at least four possible outcomes. It is in the appreciation of the nuanced difference in such outcomes that a fuller understanding of the rules in question is to be found.

1. For a list of relevant non-binding instruments, see U.N. Secretariat, Protection of Persons in the Event of Disasters, Memorandum by the Secretariat, at 2, 20-25, Int'l Law Comm'n, U.N. Doc. A/CN.4/590/Add.1 (Feb. 26, 2008), available at <http://legal.un.org/ilc> [<http://perma.cc/PJ3S-4PU7>] (archived on Sept. 5, 2015).

2. *Id.* at 2-17.

II. PROBLEMS OF AUTHORITY AND SUBSTANCE

No attempt will be made here at reprising what has been written in the academic space³ about the hard/soft dichotomy in international law. Suffice it to state that it has been accompanied by some hand-wringing and theorizing about what the distinction implies about the nature of international law. What is of equal if not greater interest is what it implies for the distribution of lawmaking authority in the international community. The distinction is of relatively recent provenance, as it does not appear in older textbooks and manuals of international law. Instead it seems to have emerged as a common way of describing the phenomenon of the proliferation of adoption of nonbinding ("soft law") texts, a technique resorted to primarily by teachers of international law to describe the phenomenon to their students. Its relative success is owed in no small measure to the tension inherent in the dichotomy: by presenting each type of "law" in contradistinction to the other, the basic features of each are brought more starkly into view. Yet, such intellectual arrangement suffers from lack of authority, over simplicity, and ambiguity.

It is perhaps somewhat odd that a distinction that has gained such widespread currency in the narrative of international law enjoys, as indicated earlier, no formal basis. It is not recognized in the Statute of the International Court of Justice as one of the recognized forms of international law.⁴ Nor does it feature in the standard

3. See R. R. Baxter, *International Law in "Her Infinite Variety,"* 29 INT'L COMP. L.Q. 549 (1980); Michael Bothe, *Legal and Non-Legal Norms—A Meaningful Distinction in International Relations?*, 11 NETH. Y.B. INT'L L. 65 (1980); C. M. Chinkin, *The Challenge of Soft Law: Development and Change In International Law*, 38 INT'L COMP. L.Q. 850 (1989); Dug Cubie, *An Analysis of Soft Law Applicable to Humanitarian Assistance: Relative Normativity in Action?*, 2 J. INT'L HUMAN. LEGAL STUD. 177 (2011); Tadeusz Gruchalla-Wesierski, *A Framework for Understanding "Soft Law,"* 30 MCGILL L.J. 37 (1984); Hartmut Hillgenberg, *A Fresh Look at Soft Law*, 10 EUR. J. INT'L L. 499 (1999); Jan Klabbers, *The Redundancy of Soft Law*, 65 NORDIC J. INT'L L. 167 (1996); Jan Klabbers, *The Undesirability of Soft Law*, 67 NORDIC J. INT'L L. 381 (1998); Cynthia Crawford Lichtenstein, *Hard Law v. Soft Law: Unnecessary Dichotomy?*, 35 INT'L LAW. 1433 (2001); Alain Pellet, *The Normative Dilemma: Will and Consent in International Law-Making*, 12 AUSTL. Y.B. INT'L L. 22 (1988); Arnold N. Pronto, *Some Thoughts on the Making of International Law*, 19 EUR. J. INT'L L. 601 (2008); Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT'L L. 296 (1977); Blaine Sloan, *General Assembly Resolutions Revisited (Forty Years Later)*, 58 BRIT. Y.B. INT'L L. 39 (1987); A.J.P. Tammes, *Soft Law*, in *ESSAYS ON INTERNATIONAL AND COMPARATIVE LAW IN HONOUR OF JUDGE ERADES* 187 (T.M.C. Asser Instituut ed., 1983); Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413 (1983).

4. Cf. Statute of the International Court of Justice, art. 38, ¶ 1, available at <http://www.icj-cij.org/> [<http://perma.cc/VN5W-P2AW>] (archived Sept. 5, 2015) (listing the forms of international law to be applied by the International Court as: international conventions, international custom, general principles of law, and, as a subsidiary means, judicial decisions and the teachings of qualified publicists).

description of the formation of customary international law. While the International Court has on occasion referred to texts that are, strictly speaking, “non-binding,”⁵ it has not formally endorsed the distinction. In other words, the distinction does not carry with it any substantive implications. It makes no claim of precedence over other categorizations, and it is often resorted to merely because of its perceived usefulness in describing the types of law a reader might encounter.

The usefulness of the hard/soft dichotomy should be distinguished from the advantages of adopting international law texts in nonbinding form. At first, this might seem counterintuitive. The point is that it is true that states have, in recent times, increasingly preferred to adopt international instruments in nonbinding form. Legally binding instruments are orders of magnitude more difficult to negotiate (especially in a world of nearly 200 states) and trigger complicated internal ratification processes with their attendant political ramifications. Binding instruments are also hard to get out of, partially implement, or even entirely ignore without legal consequences. Nonetheless, the predilection of states toward adopting nonbinding texts should not be confused with the hard/soft law distinction enjoying formal recognition in the law.

Likewise, the perceived success of the phenomenon being described should not be confused with the success of the characterization used to describe the phenomenon. While the continuing success of the distinction is no doubt linked to the continued proliferation of nonbinding texts, the same cannot be said the other way round. Formally speaking, no new “categorization” of law has been established or recognized. Instead, the secret of the success of the characterization is attributable to its simplicity in describing “reality,” as well as the fact that it makes a sociological observation about lawmaking in the twenty-first century.

A. *Lawmaking Authority in Contemporary International Law*

The established distribution of authority in the international system, which is based on an architecture at least seventy years old, recognizes only a few entities as enjoying “lawmaking” authority. These are typically the states themselves, international organizations to the extent empowered by their respective mandates, and to a more

5. See, e.g., Rep. of the I.C.J., at 14-15, U.N. Doc A/41/4 (1986), available at <http://www.icj-cij.org/> [<http://perma.cc/DN9R-FARA>] (archived Sept. 5, 2015) (“the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV)) . . . the adoption by States of this text affords an indication of their *opinio juris* as to customary international law on the question.”).

limited extent, international courts and tribunals. With some exceptions, other entities such as non-governmental organizations, while participating in the process, simply do not have lawmaking authority (and, at most, can be said to participate as "law-proposers"). What this means is that it is somewhat misleading to refer to texts developed by such entities as "nonbinding," which suggests *a contrario* the possibility of such entities adopting binding instruments. This is simply not the case. As such entities do not have the authority to "make" law, the instruments they adopt do not enjoy the status of law, regardless of the form in which they are presented. This is not to say that such texts cannot enjoy a measure of general recognition and authoritativeness as reflecting, in an expository sense, "the law" (as discussed further below), but this is not the same as actually making the law.

The hard/soft law distinction is better applied in a context in which an entity that does enjoy lawmaking authority decides not to exercise such authority, for example, where states, for whatever reason, opt for a nonbinding text instead of adoption as a treaty. As indicated earlier, they might do so for reasons of convenience. It might also be a reflection of a prevailing view among them as to the (non-)suitability of certain topics to regulation by binding law. They might also agree to undertake the negotiation through a process that limits the possibility of a binding text being the final product (despite the fact that they, in principle, have the capacity to adopt the text as a treaty). This would be the case, for example, where states establish a negotiation process that allows for the participation of civil society partners. Even in such mixed arrangements, the notion that an instrument may be equally "binding" on a state and non-governmental organization is not easily tolerated under contemporary international law and, therefore, is generally avoided.

In other words, the form in which a text is adopted also provides information about the prevailing understanding as to the distribution of lawmaking authority and speaks to the choices being made by states when exercising their authority to participate as lawmakers. The difficulty with the hard/soft characterization is that it does not sufficiently shed light on such nuances. Instead, the prevailing colloquial understanding of the hard/soft distinction tends to paint all negotiation processes with the same brush. This results in the over-evaluation of some instruments and under-appreciation of others. It also tends to blur the distinctions in the established distribution of lawmaking authority: nonbinding texts adopted by states are inherently more authoritative than those negotiated under the auspices of non-state entities.

B. *The Codification-Progressive Development Analogue*

Another way of looking at the hard/soft law distinction is by comparing it to another distinction commonly employed in international law, namely that between the codification and progressive development of the law. That distinction seeks to describe the process of international lawmaking as one of consolidating existing law as opposed to developing the law further (either by creating “new” law to regulate an area previously not regulated by law or by changing existing law). While both sets of distinctions enjoy a degree of overlap, they are not identical. For one thing, the distinction between the codification and progressive development of the law enjoys formal recognition in the international law, in the form of Article 13, ¶1(a), of the Charter of the United Nations, which grants the General Assembly the authority to “initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification.”

Nonetheless, they are comparable because codification involves the recognition of specific rules as being established “law” or, in the nomenclature of the hard/soft scheme, the “hard” law. The comparison reveals that in the codification of international law less emphasis is placed on matters of form, both during the determination of established rules and in the outcome of the codification process. In fact, the basic assumption is that of the prior existence of rules enjoying the status of customary international law, which are then systematized in a codification exercise. The identification of customary international law is less a matter of a specific “form” and more of substance, namely whether it enjoys the necessary basis in state practice and recognition as binding on states (*opinio juris*). In other words, and importantly for present purposes, the customary law status of a rule is not affected in any meaningful way by the form in which it is reflected. International law already recognizes that law can be “hard” without being encapsulated in a treaty. While prominent examples exist of “codification treaties” having been adopted by the United Nations,⁶ codification of international law does not require a treaty.⁷

Similarly, when coming to the progressive development of international law, the established understanding is that rules enjoying a *de lege ferenda* status are not formally binding on states.

6. The most prominent perhaps being the Vienna Convention on the Law of Treaties, of 1969. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

7. See G.A. Res. 174 (II), Statute of the International Law Commission, art. 15 (Nov. 21, 1947), available at <http://legal.un.org/ilc/> [<http://perma.cc/T6JL-SYHE>] (archived Sept. 5, 2015).

They are "soft" and hortatory in nature, reflecting at most what the law might be one day, and at least what states might wish to do in the meantime. This is the positive sense in which progressive development is understood. There is also a negative, pejorative, connotation in which the label progressive development is sometimes employed—namely that it is "merely" someone's idea of what the law should be, and not reflective of the law itself. Such latter sense is even closer to the colloquial meaning of "soft" law in that it is shorn of any aspirational component. There is no expectation of the proposed law eventually becoming actual law. It remains purely in the realm of recommendation. Here too, the question of form is not straightforward. While, on the face of it, it would seem contradictory for a proposed ("soft") rule to be incorporated in the "hard" form of a treaty, the Statute of the International Law Commission nonetheless anticipates precisely that. Article 15 confirms that "the expression "progressive development of international law" is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States . . ." In fact, there are many examples of treaties having been adopted to regulate an area or subject for the first time.⁸ There are also examples of treaties including rules of a *de lege ferenda* nature within them (as discussed below).

The point being that the question of which side of the hard/soft divide a rule falls is not only a question of form but also of substance. Contrary to the basic assumption underlying the hard/soft distinction, the fact that a rule is reflected in a particular "form" is not per se determinative of its legal value. It is at most suggestive. This applies in both directions. While the fact that a rule is encapsulated in a treaty would suggest that it is binding, it is not necessarily so if it is only recommendatory in nature. Likewise, a rule contained in a soft law form would likely not be binding. However, such assumption would not hold if the referred-to rule enjoys the status of customary international law. In other words, the intrinsic legal nature of the rule is of equal importance, if not more relevance, to the form of the instrument in which it is to be found. Once again, such appreciation for the relative nature of international rules is not sufficiently captured by the hard-soft delineation.

C. Expository Codification—A Comment on Technique

There is a further consideration. At the level of practice, the drafters and negotiators of texts hardly ever undertake an

8. As is the case of many environmental law treaties. See, e.g., Convention on Biological Diversity, Dec. 29, 1993, 1760 U.N.T.S 79 (English text begins on page 143).

investigation into the legal nature of the rules being incorporated into the text. The impulse is to systematize the law by presenting a structured text that is comprehensible and accessible to the intended audience. Frequently, the goal is not to establish the law, but to restate it. As such, the decision not to pursue the adoption of a treaty can also be understood as the negotiators simply not considering it necessary to do so. As previously indicated, the Statute of the International Law Commission does not envisage codification necessarily requiring a treaty, but rather "the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine."⁹ It is perfectly possible for the law to be codified in forms other than a treaty, such as in instruments that do not enjoy any formal legal status but seek to restate the law in an accessible and authoritative manner. An analogy can be drawn to the Restatement of the Foreign Relations Law of the United States, prepared by the American Law Institute.¹⁰ While the text enjoys no formal legal status, it is nonetheless generally recognized as being an authoritative restatement of the law.¹¹

Such "expository codification" is quite common and has in recent times become the outcome of choice among many states and other negotiators alike. This is done as a matter of convenience and choice. The position is further complicated by the relative nature of the law, since what constitutes an established rule of customary international law is sometimes in the eye of the beholder. For some, a rule may be well established (i.e., "hard law" being codified), while others may choose to call into question its status as law, preferring to label it as progressive development (i.e., "soft law"). In fact, the International Law Commission long ago abandoned its efforts to systematically indicate whether the texts it adopts reflect either codification or progressive development of the law, or as is frequently the case, whether both elements are present.¹² In short, such basic characterizations and distinctions rarely hold up in the face of practice and are responsible for much ambiguity in the understanding of the law.

9. G.A. Res. 174 (II), *supra* note 8, art. 15.

10. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. (AM. L. INST. 1987).

11. See David B. Massey, *How the American Law Institute Influences Customary Law: The Reasonableness Requirement of the Restatement of Foreign Relations*, 22 YALE J. INT'L L. 419, 424 (1997); Karl M. Meessen, *Special Review Essays: The Restatement (Third) of the Foreign Relations Law of the United States*, 14 YALE J. INT'L L. 433, 433-35 (1989).

12. See Int'l L. Comm'n, *Report of the Working Group on Review of the Multilateral Treaty-Making Process*, U.N. Doc. A/CN.4/325 (1979), reprinted in [1979] 2 Y.B. INT'L L. COMM'N 187-88, U.N. Doc. A/CN.4/SER.A/1979/Add.1 (part 1).

III. PROBLEMS OF AMBIGUITY

The hard/soft characterization is presented in binary terms: a dichotomy with only two possible outcomes. It has already been demonstrated that neither outcome is preordained, so that contrary to the received understanding, a rule can be "hard" even if it is not encapsulated in a "hard" form. Furthermore, any single text might have elements of both "hard" and "soft" law, as many in practice do. Such uncertainty is tolerated because of the ambiguity inherent to the distinction, namely that it refers simultaneously to both form and substance. In other words, it refers to instruments adopted (or not) in one of the accepted "hard" or "soft" forms of law. At the same time, it seeks to convey information about the legal substance of the rule, namely whether it is "binding" or not. Since the two connotations are not synonymous, it is possible to unpack each.

Accordingly, at the more granular level, once considerations of form are distinguished from those pertaining to substance, the application of the hard/soft distinction means that not two, but four, positions are possible, as follows:

<i>Form</i>	<i>Substance</i>
Hard	Hard
Hard	Soft
Soft	Hard
Soft	Soft

The first and last positions track the traditional "pure" conceptions of "hard" and "soft" law. What is more interesting are the mixed arrangements in the middle.

A. *Hard-Hard*

The first type of rule is that which is encapsulated in a "hard" form and accordingly is legally binding on the parties to the agreement. It is well accepted that treaties are a form of "hard" law *par excellence*. The Statute of the International Court of Justice lists international conventions among the existing forms of international law.¹³ The underlying basis for the binding nature of treaties is the principle of *pacta sunt servanda*, which is explained in the Vienna

13. See *Statute of ICJ*, *supra* note 4.

Convention on the Law of Treaties, 1969, in the following terms: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."¹⁴

Article 38 of the International Court's Statute refers to "international conventions" as "establishing rules" between the parties.¹⁵ This is the key purpose of a treaty. However, the "hard" form of a treaty does not automatically extend to all of its provisions. As will be discussed below, not each provision of a treaty necessarily constitutes a binding obligation (i.e., the "hard" law) between the parties. Nonetheless, each treaty *ex hypothesi* establishes at least one such obligation *inter partes*. This position thus covers standard treaty obligations, the violation of which would constitute an internationally wrongful act, thereby triggering the international responsibility of the wrongdoing state with specific legal consequences.¹⁶

B. *Soft-Soft*

On the opposite end of the spectrum, and tracking the traditional conception of "soft law," are those rules that are "soft" both in the sense that they were adopted in a nonbinding form and, by their own purport, that they are nonbinding in substance as well. These are your standard recommendations, guidelines, and observations. As indicated earlier, the fact that they are not binding ("soft") on states and other international actors is not only a consequence of the form in which they are being presented, but also because they are adopted by entities that do not have the legal authority to adopt binding ("hard") rules. This latter point is significant when coming to texts adopted in a form purporting to reflect "harder" law. The legal value of instruments adopted as "declarations" or statements of principle is constrained by the limited authority of the adopting entity. Such instruments are legally indistinguishable from simple recommendatory texts. This applies equally to the formulation of the provisions within the text. Traditional "soft law" instruments are formulated in terms of recommendatory language, using "should" as opposed to "shall." "Harder" language calls for an evaluation of the legal purpose of the provision in question. If the text is adopted by an entity not enjoying the authority to make "hard" law, then the stronger language is, formally speaking, misplaced, as it will not achieve what it seeks. Alternatively, as will be discussed shortly

14. Vienna Convention on the Law of Treaties art. 26, ¶ 1, May 23, 1969, 1155 U.N.T.S. 331.

15. See *Statute of ICJ*, *supra* note 4, art. 38 ("[I]nternational conventions . . . establishing rules expressly recognized by the contesting states").

16. See G.A. Res. 56/83, annex, Articles on the Responsibility of States for Internationally Wrongful Acts (Dec. 12, 2001), available at <http://legal.un.org/ilc/> [<http://perma.cc/TS7V-KJB8>] (archived Oct. 22, 2015).

("soft-hard"), the position may be different in the case of "harder" language contained in an ostensibly "soft law" text adopted by an entity with the authority to make law.

C. *Hard-Soft*

In all treaties, there are at least some provisions that do not establish legal obligations. Some relate to the management of the treaty regime, such as those on entry into force, termination, etc. In some treaties, there are also provisions that contain recommendations or hortatory exhortations. A well-known example is Article 33 of the Charter of the United Nations, which recognizes the freedom of states to choose from a nonexhaustive list of recommended modes of peaceful settlement of disputes.¹⁷ Likewise, the UN Convention on the Law of the Sea of 1982 contains several provisions formulated in permissive terms.¹⁸ For example, the treaty provides that a "coastal State *may* adopt laws and regulations, in conformity with the provisions of [the] Convention and other rules of international law, relating to innocent passage through the territorial sea."¹⁹ It is not a question of the coastal state being required to establish such rules. Rather, the treaty recognizes its freedom to do so, subject to the requirement that the rules established be in conformity with the Convention and other rules. In other words, the Convention serves as a legal framework within which states exercise their freedom of action.

The implication for the present analysis is that the form of an instrument provides, at most, only a general indication of the possible legal nature of its content. The fact that recommendatory provisions are included in a binding instrument does not affect their substantive status (as essentially "soft law"). Each individual provision needs to be evaluated on its merits, taking into account its ordinary meaning in the context of the object and purpose of the treaty.²⁰

Often such provisions are included as part of a "package" compromise at the time of negotiation to satisfy those constituencies agitating for the recognition of a particular issue within the text,

17. U.N. Charter art. 33, ¶ 1, available at [http://www.un.org/\[http://perma.cc/HXB5-WMVC\]](http://www.un.org/[http://perma.cc/HXB5-WMVC) (archived Oct. 22, 2015) ("The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.").

18. See *infra* note 20 for a specific example.

19. United Nations Convention on the Law of the Sea art. 21, ¶ 1, Dec. 10, 1982, 1833 U.N.T.S. 3 (emphasis added) (English version of article 21 can be found on page 405).

20. Vienna Convention on the Law of Treaties art. 31, ¶ 1, May 23, 1969, 1155 U.N.T.S. 331.

while at the same time assuaging others concerned about doing so at the level of rights and obligations of states. Many such provisions also help to contextualize the overall text, by filling out some of the details, or by way of allowing parties a margin of discretion in the fulfillment of their obligations. An example of the latter is found in Article 5, ¶1, of the International Convention for the Suppression of the Financing of Terrorism of 1999, which establishes an obligation on states to ensure, under their domestic laws, that legal persons engaging in the financing of terrorism are held liable. The treaty then grants states the right to choose from a list of options: "Such liability may be criminal, civil or administrative."²¹ While the obligation to ensure liability is a "hard" obligation, the specific means of doing so is not. The recommendatory list helps "fill out" the content of the obligation and injects an element of flexibility allowing for differentiation at the level of each state. Many states recognize only certain methods of holding legal persons liable. Allowing them the freedom to choose their preferred method goes a long way to ensuring compliance with the underlying obligation.

D. *Soft-Hard*

Perhaps the most interesting configuration is the soft-hard. As already alluded to, it is possible to have "hard" rules reflected in nonbinding instruments. This flows as a further consequence of the point that the form of the instrument is not per se determinative of its content. If that means that a "hard-law" instrument can contain "soft" provisions, then the opposite is true as well. Some of the reasons why such arrangement may be selected have already been alluded to. Modern treaty making is a complex undertaking, and, once adopted, treaties are not easily amended, revised or terminated. While such position exists by design so as to ensure the stability of the law, as in the 1969 Vienna Convention, it also means that states are generally reluctant to have all questions regulated by treaty. Nor is it entirely necessary, or always entirely suitable, to have a treaty (which typically establishes reciprocal rights and obligations) proclaim the law in a declaratory or expository manner. Instead, states (and other actors with the necessary authority) have from time to time preferred to use strictly nonbinding forms to declare "the law" on a particular issue.

The UN General Assembly has, on several occasions, resorted to its declaratory authority to proclaim the law by adopting nonbinding declarations (usually by consensus). A prominent example, referred to above, is the Friendly Relations Declaration, adopted by the

21. International Convention for the Suppression of the Financing of Terrorism art. 5, ¶ 1, Dec. 9, 1999, 2178 U.N.T.S. 197.

Assembly in 1970, which to this day continues to reflect the legal framework for the peaceful co-existence of states. The prevailing understanding is that such texts serve as authoritative expositions of the law, even if the instrument itself does not establish formal legal rights and obligations for states. In some cases, declarations adopted by the General Assembly have served as the basis for the subsequent adoption of treaties. The most famous example of this is the Universal Declaration of Human Rights of 1948,²² much of which served as the basis for the two Human Rights Covenants.²³

A similar phenomenon occurs with nonbinding texts adopted by bodies, such as the International Law Commission, whose function is precisely that of the systematization of the law, which play a specific role in the intergovernmental lawmaking process. There exist several examples of provisions in instruments developed by the Commission being cited by international courts, governments, and academics as an accurate exposition of the existing customary international law on a particular issue.²⁴ The authority, both actual and perceived, of the entity in question is important. Different from the General Assembly, which enjoys the inherent authority to what amounts to "making law" whether through the adoption of treaties or, in a more indirect manner, through the exercise of its declaratory functions, the authority of other entities to provide a persuasive exposition of the law is linked to their mandates and functions. The Institut de Droit International and the International Law Association have both developed numerous authoritative expositions of international law. The statements of the International Committee of the Red Cross on matters pertaining to international humanitarian law are usually

22. See generally G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/> [<http://perma.cc/WH93-PT7L>] (archived Oct. 22, 2015).

23. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

24. A prominent such example can be found in the articles on the responsibility of states for internationally wrongful acts, adopted by the ILC in 2001, which have been cited by courts and tribunals alike as reflecting rules of customary international law. See, e.g., U.N. Secretary-General, Responsibility of States for Internationally Wrongful Acts: Compilation of Decisions of International Courts, Tribunals and Other Bodies, at 5-6, U.N. Doc. A/62/62/Add.1 (Apr. 17, 2007); see also U.N. Secretary-General, Responsibility of States for Internationally Wrongful Acts: Compilation of Decisions of International Courts, Tribunals and Other Bodies, at 86, U.N. Doc. A/62/62, annex I; U.N. Secretary-General, Responsibility of States for Internationally Wrongful Acts: Compilation of Decisions of International Courts, Tribunals and Other Bodies, at 86, U.N. Doc. United Nations documents A/62/62 and Corr.1 and Add.1, A/65/76; U.N. Secretary-General, Responsibility of States for Internationally Wrongful Acts: Compilation of Decisions of International Courts, Tribunals and Other Bodies, at 86, U.N. Doc. A/68/72; U.N. Secretariat, United Nations Legislative Series, Materials on the Responsibility of States for Internationally Wrongful Acts, at 365, U.N. Doc. ST/LEG/SER B/25 (2012).

considered to be legally authoritative. Similarly, given its extensive participation in international disaster response, the views of the International Federation of the Red Cross and Red Crescent Societies (IFRC) on questions of IDRL are also likewise considered authoritative. The IDRL Guidelines,²⁵ developed by the IFRC, contain some such provisions; if they do not reflect customary international law, then they at least contain evidence of state practice, in the sense that they are drawn from an existing body of treaty law.

This does not mean that every text developed by such entities is equally authoritative. Nor is every provision necessarily a restatement of existing law. Some are in the realm of expository codification (in the sense referred to earlier), while others are more clearly in that of aspiration, or progressive development, of the law. There are many intangibles that might sway the legal picture in either direction. The point being that, once again, a proper legal assessment is called for. Simply dismissing out of hand such texts as being in the realm of “soft law” undervalues their valuable contribution to the process of the consolidation and further development of international law.

IV. CONCLUSION

The present essay has sought to make two basic observations about the hard-soft characterization. First, authority matters. Few entities actually possess the authority to make international law. Understanding this basic insight goes a long way to appreciating why the hard-soft scheme has proved remarkably successful. For many, it is the only way to participate in the process of further elaborating the law. In other words, it has provided an entry point for the participation of entities that do not have formal “lawmaking” authority in the process of law elucidation. The resultant explosion in the number of instruments and texts that have been developed has enriched the body of the law. While most, if not all, are “soft” in form, some contain “hard” elements and have proved particularly influential in the course of the development of the law.

Second, while the simplicity of the hard-soft characterization has played a significant role in its widespread adoption, it has also proved a point of weakness. As with all dichotomies, the two end points are presented as absolute alternatives. This tends to obscure the possibility of intermediate positions and risks throwing out the

25. See 30th Int'l Conference of the Red Cross and Red Crescent, Res. 4, *Adoption of the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance*, at 93 (Nov. 30, 2007), available at <http://www.ifrc.org/> [<http://perma.cc/9A66-CXTK>] (archived Sept. 5, 2015).

proverbial baby with the bathwater. While it may be a useful shorthand description of the law, negotiators of such instruments rarely ever resort to broad generalizations, preferring instead to focus their efforts at the level of individual provisions. In other words, the effect of the simplicity of the hard-soft scheme is a loss of granularity as to the intended legal effect of the instrument, which diminishes its effectiveness as a descriptor of the reality of the law. Instead, a more thorough assessment is called for each time one is confronted with any text purporting to reflect international law.