Hard Decisions, Soft Laws – Exploring the authority and the political impact of soft law in international law

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Abstract
The question of whether there is soft law in international law has been as much the subject of contemporary debate as whether or not there is private legal authority in the international society. The legal boundaries seem to be blurred by the process of globalisation and the recent shift in international law. The traditional definition of international law has been outdated as new forms of treaties has introduced new subject of law to the judicial arena. At the same time a supplementary map of law has been added to the cartography of international law, soft law. These correlating processes have comprehensive political and legal consequences at both the international and national levels.

This essay examines and identifies soft law from a legal-political perspective and locates and explores private forms of legal authority on the map of contemporary international law. In respect to theory, it accounts for an interdisciplinary approach involving issues of both international law and international relations. In the process this study examines issues regarding the relative legal normativity and the blurring of legal authority in international law. The focus is on the legal character, the constitutive practices and the legal and political influence of soft law. It discusses the influence and power exerted by soft law over state actors in the international system and at the national level.
The essay finds that soft law is of substantial relevance in the international ambit. To some extent a limited normative force of certain norms is recognized in soft law even though it is conceded that those norms would not be enforceable by an international court or other international organ. To say that it does not exist because it is not of the enforceable variety, might blind students of international law to another dimension of the landscape of international practice. Soft law does not translate to soft obligations in the reality of international society, and it seems to be some confusion surrounding the obligations conceived by it. The research here presented suggests that its political and legal power is substantial.

The researched examples do not display any real private legal authority in soft law. This is because soft law is found to be a separate phenomenon from international law proper. However, soft law’s impact on national governments combined with the wider acceptance of the presence of private actors in the creation of soft law suggests that private power is noteworthy in comparison. In one of the studied examples, the soft law is concluded by private business representatives solely, but in requiring the status of soft law it is dependant on the recognition of the international and national legal bodies.

Nyckelord
Keyword
statsvetenskap, internationell rätt, internationella relationer, privat auktoritet, juridik, international law, international relations, soft law, private legal authority, legal-political, legal normativity
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1. Introduction

Despite the doubts of scholars worldwide about recent trends in international society (see Krasner 1982; Grieco 1988), the role of international law went through a significant transformation during the recently past century. As technology brought states, people and other actors closer, as interactions multiplied and the numbers and rate of contacts between these actors continuously increased, rules evolved to regulate such contacts and interaction. In a word, in order to regulate the growing interdependency international law has expanded “both in terms of its content and its subjects” (Wallace 1986:1). This camelisation of international law, borrowing Baounta De Sousa Santos’ (1987) term spinning on Friedrich Nietzsche’s (1991) spirit metamorphosis, giving submission to a whole new range of values and beliefs, has not just changed the subjects of international law but also the political power exerted by them (Jayasuriya 1998; Seidl 1999; Sztucki 1990; Slaughter, Tulumello & Wood 1998; Held 2002). From their viewpoint, the more traditional view of international law such as Oppenheim’s classical definition, has become obsolete:

“Since the law of nations is based on the common consent of individual States, and not of individual human beings, States solely and exclusively are the subjects of international law.” (Oppenheim 1912:19)

The classical sources of international law (international treaties, agreements in simplified form, customary international law, general principles of law and subsidiary means of determination), albeit still relevant to the field, has, too, been challenged by new sources with legal authoritative weight (Seidl 1999:29-34, Cutler 1999).

Accordingly, we need a quite different, broader, definition of international law. Contemporary international law could more accurately be defined as “a set of binding rules that seek to regulate the behaviour of international actors by conferring rights and duties” (Arend, Beck & Lugt 1997:290) or, based on actual practice, as “a system of international legal rule applicable to situations of international relevance” (Detter 93:2). However, neither of these definitions does fully explain the recent developments in international law and the political implications involved.

International law, it has been argued, has come to recognize powers, restrictions,
rights and duties, which exceeds the scale of nation-state jurisdiction and, in turn, encompass far-reaching consequences (Held 2002). This recognition of rules supplementing international hard law, often in the form in unilateral acts or as recommendations by international organisations, which emanate from multiple sources, can be said to play “a rudimentary or fundamental role in the development of law” (Detter 1993; Sztucki 1990; quote Johnston 1986:224). The phenomenon of soft law, which this description refers to, is not a new one. Its impact on international law-making has, however, grown tremendously in proportion since the 1960:s (Sztucki 1990:557). Soft law is perhaps insufficiently but best described by two connotations, different but not unconnected; either as non-binding rules which “entail certain legal consequences for states” or as soft content in formally binding law, “which are imprecise and flexible in scope, leaving considerable latitude in the degree of implementation (Detter 1993:234; Sztucki 1990:551). Soft law can in some cases be said to supply non-governmental actors the ability to assert a substantial degree of political power, through its legal constitutive nature. It is still a matter of discussion, however, whether, and to what extent, organisations and other private actors wield any real legal authority through its practices and contribute to the making of international customs law, and if they have direct and indirect effects on state behaviour and on national law. The direct effects are perhaps most visible in their preparatory work for international treaties, sometimes adopted by states at intergovernmental conferences. Indirect effects on states by International Non-Governmental Organisations (INGO) might be most evident in areas where they generate standards, methods and models providing rationales, and means by which states are able to meet their responsibilities. Harold Berman (1988) has contributed with an illuminating example in his discussion on international commercial law. According to him, rules established by the International Chamber of Commerce (ICC) form the legal basis upon which national courts make decisions in disputes regarding trade contracts, bills of lading and financial instruments. In their extensive study, John Boli and George Thomas (2001) has shown that INGO’s stimulate states to enforce INGO conceptions and rules, through the legal-bureaucratic legal system of the states, thus, shaping the agendas and behaviours of the states. These conclusions have, again and of course, been challenged by students from other schools of thought in international relations and international law. The private sphere’s influence over politics and law in this ‘new’, globalised international society has been discussed, feared, justified and also ignored by many students of international law and international relations. I am, however, convinced that the changes we see in the character of international law, disregarding the normative values, are worthy of further attention from both fields of study. If it is true that the scope, the sources, the subjects and, thus, the entire definition of the field has changed, then, questions how and to what extent arises.

1.1 The purpose of this essay
This essay aims at examining forms of international soft law and to explore sources of private authority in international law. In respect to theory, it accounts for an interdisciplinary approach involving issues of both international law and international relations. The purpose is to examine and identify soft law from a legal-political
perspective and to search for, locate and explore private forms of legal authority on the map of contemporary international law. In the process this study examines issues regarding the relative legal normativity and the blurring of legal authority in international law. The attention is aimed at the legal character, the constitutive practices and the legal and political influence of soft law. It discusses the influence and power exerted by soft law over state actors in the international system and at the national level.

To elucidate further, this essay proposes to consider the following questions:

(i) How has the theoretical nature of international law changed in respect to its subjects and its content over the last century, with focus on international soft law?
(ii) Does international soft law have any legal and political influence, and in that case, through what mechanisms and in what way?
(iii) Are there private sources of legal authority in contemporary international law and how, if it can be located, is this authority constructed?
(iv) Does soft law wield any political power, and if so, in what way?

1.2 Methodology, material and disposition

This essay will draw on the analytical tools developed by Baoventura De Sousa Santos in Law: A Map of Misreading – Towards a Postmodern Conception of Law (1987). This approach deals with law as maps, different in scale, projection and symbolisation with elements of distortion and inter- legality. I do not wish to propose that this understanding of international law is entirely correct in its definition of the field or directly applicable on the subject here discussed. I merely utilise De Sousa’s useful insights in this essay to facilitate the understanding of international law and soft law due to their high explanatory factor of the multilayered and ambiguous character of law. This approach constitutes, however, a significant part of the analytic toolbox used in this essay. In situations where this approach is insufficient, other applicable theoretical approaches will be used to increase the understanding of the issues discussed.

This study employs qualitative studies of literature with a theoretical analysis, with a complementary qualitative case study. It utilises a range of topic related literature and publications which are analysed with help from the theoretical foundations submitted in the first part of this essay in order to fulfil its purpose. In its opening part, this essay seeks to establish a framework for analysis for the subject at issue by exploring questions of what international law is beyond the matters of its mere definition. This part mainly consists of a legal theoretical discussion on sources of international law, compliance, comity, relative legal normativity, as well as trends in international law. Definitions of these concepts are handled subsequently. It starts off in a short descriptive section on the genealogy of international law and the major
schools of thought.

The second part explores the territory of international soft law, its constitutive significance and effects on the international legal system. This part deals with theories on soft law and empirical examples to depict soft law’s significance in international society. It tries to, with the help of empirical examples, map out the blurred borders between custom, informal rules, hard and soft law. Six soft laws (non-binding resolutions, policy agendas, charters and conventions) have been studied for this purpose. Hence, this does not constitute any higher statistical significance but due to the documents’ representative quality, the number of cases analysed was restricted to the following six topics:

- the Universal Declaration of Human Rights (UDHR);
- the 1975 Helsinki Final Act, the 1990 Charter of Paris for a New Europe and the Copenhagen Meeting on the Human Dimension of 1990;
- the 1988 Basle Capital Accords; the 1990 and 1999 ICC Incoterms.

The samples have been chosen to provide a high degree of representation from different legal areas at the international level and to include soft law concerning international trade, banking regulation, environmental and social issues as well as questions of international security and health issues. The date of creation has also guided the selection of the studied soft laws as well as the diversity of their legal and political significance.

The scope of the research has been limited in the way these soft laws have been dissected. Four questions have been used to eliminate divergence from the core purpose. First, who or what actors were responsible for the founding of the soft law? Second, what was the forum for establishing the soft law? Third, has the character of soft law, as to legal normativity and political influence, transformed? Four, has the soft law led to hard legal obligations and/or tangible political consequences?

When examining international soft law, the discussion is often held at a more theoretical level, with empirical examples from the studied soft laws to facilitate the argumentation. The majority of the material used for this section is comprised by academic articles and literature on international soft law, as well as treaty texts and documents of international soft law, mainly from the latter part of the 20th century and more recent publications.

The third and last section of this essay, which is the concluding part, focuses on the legal and political implications of these instruments. It discusses the sources political and legal power and influence in the international realm and presents a logical argumentation from the discussion developed in the first part of this essay.
2. Framework for analysis

2.1 The international law/international relation interface
The course of international law thinking is always closely related, and should be, to international relations thinking. How we understand international law is intimately interconnected to how we understand the world and the international system. Separating the two could be said to only contradict the two disciplines’ inseparableness and correlation in reality. For Hedley Bull, for instance, international law can be regarded as “a body of rules which bind states and other agents in world politics in their relations with one another and is considered to have the status of law” (2002:122). This conception should be seen in the light of his notion of international society as formed by states with common values and interests in which they conceive themselves bound by rules in their relations with another and contribute to the administration of common institutions. The definition is clearly based on Bull’s understanding of the workings in the international sphere and purports international law as a certain set of rules, distinct from other rules in that sphere. This positivist conception of international law as a body of rules has been rejected by the legal realists of the New Haven school and the more traditional supporters of legal positivism. The New Haven policy-oriented jurisprudence discards the rule-based conception of international law, being incapable of governing or describing international affairs. They seek to include into their analysis elements generally considered extraneous to law in an attempt to transcend the with-standing debate on what constitutes law by defining law as a product of authority and control (Arend, Beck & Lugt 1996:110-112). According to the advocates of legal realism, especially Myres S. McDougal and Harold D. Lasswell, like classical realists, such as George F. Kennan and Hans Morgenthau, law is on the whole irrelevant to the relations of sovereign states. On the whole, examining international law less attention should be paid to the body of rules and the institutions constituting it and, instead, more focus ought to be turned to the interests of single states and the social process forming it (see Kennan 1984; Morgenthau 1967; Lasswell & McDougal 1959). The classical realists, like the later neo-realists (or structural realists), drawing from the philosophies of the political realism, which holds the autonomy of the ruler and the state in the centre of attention. Little attention is directed towards other actors in
international relations and the notion of an international society in Bull’s meaning is repudiated, since the world is seen as in a state of anarchy in which the actors are states promoted primarily by the will to survive (see Waltz 1965).

Turning the attention to the traditional legal positivists, especially John Austin, certain similarities with the legal realist school of thought can be seen, especially when looking at their mutual reluctance to observe international law as law proper. What the realists and the Austinian view have in common is that law is the “command of the sovereign” and that there exists no sovereign in the international sphere (Austin 1954:VI). However, realists do not share the view of the classical positivists that there is a positive international morality, quite opposite they stress the separation of law and politics from morality. While rejecting the Austinian view’s more dogmatic elements, Hans Kelsen builds upon and refines Austinian positivism. He distinguishes law from other forms of social order. Arguing that law has a character of a coercive order, requiring a delict to be followed by a sanction, Kelsen separates law from morality, a correlation propagated by natural law theorists, and states that:

“international law is law in this sense if a coercive act on the part of a state, the forcible interference of a state in the sphere of interests of another, is permitted only as a reaction against a delict and the employment of force is to any other end forbidden – only if the coercive act is undertaken as a reaction against a delict can be interpreted as a reaction of the international legal community.” (Kelsen 1970:61)

In contrast, students of natural law argue that a just and good law is always derived from moral standpoints. With much of their theoretical heritage in the classical writings of Hugo Grotius, Francisco Suarez and Samuel von Pufendorf¹, natural law scholars’ account of law, in a very pale depiction, should be based on issues of right and wrong, good and just adding up to a highly normative understanding of law and its constitutive practice (see George 1999; Rubin 1997).

Like legal realists, Kelsen’s view of international law reflects a close connection to a certain view international phenomena. By asserting that there is an “international legal community” and an international law, Kelsen not only declares the existence of an international law, but also of an international community of some kind. Here, again, we can see that international law and international relations are closely related in thought.

The same can be said about the relations between the critical schools of international law and international relations. The critical legal approaches, pioneered by David Kennedy in the 1980:s, rejecting positivist and naturalist explanations of law, have close theoretical correlation to the neo-Marxist Frankfurt school and the structuralistic narrative used by critical international relations scholars. According to the so called New Stream scholars, ideology creates a base for the construction of politics, strengthened by the structures of international legal discourse (Arend, Beck & Lugt 1996:227-229). A stereotypical description of critical thinkers is that they

¹ For more reading on the classical natural law theorists see Hugo Grotius (1583-1645) Fransisco Suarez (1548-1617) Samuel von Pufendorf (1632-1694)
consider ideology, discourse, class relations and economy to be foundation upon which all law and politics are constructed.

It does not serve the purpose of this essay to dwell further on the debate on the origins or the genealogy of the different paradigms of international law. I hope, however, that my point has not passed unobserved. It is important to note the concurrent relationship between international law and international relation studies. I will now account for the theories laying the basis for the analysis here.

2.2 The cartography of law

In order to facilitate our understanding of the character of law, international and domestic, hard and soft, and its connection to the workings in international affairs, I will borrow some of the insights made by Boaventura De Sousa Santos (1987). Sociologist Santos uses cartography to explain the sociology of law, arguing that the relation law has to society is very similar to those between maps and spatial reality. Laws, like maps, distort reality, to be adequate and convenient, through three specific mechanisms; scale, projection and symbolisation. These mechanisms are independent and autonomous, and involve different procedures and call for separate decisions. The advantages and limitations of maps derive from their ability to reduce and generalize reality. A lack of generalisation on a map may hinder orientation in reality at one instance, but in other situations a map with a high degree of representation of reality may be helpful. For example, in an orienteering race a high degree of representation will assist the participant in finding the advance direction sign, while in his attempts to return to Greece Odysseys would not have had use for a map depicting each and every rock and creek on the isle of the Cyclops. Hence, certain maps, like laws, are useful for certain fields of applications. The tension between orientation and representation are often articulated by scale.

2.2.1 Scale

Scale decides the degree of representation by defining the degree of detail. Large-scale maps contain more details, small-scale maps less, given that the size of the sheet is constant. As in the case of orientation and representation a decision of scale, too, applies to the designated use of the map. The making of a map, therefore, comprise the process of filtering details (De Sousa 1987:283).

At the same time, scale can also be defined, like in geography, in terms of scale of analysis (small-scale) and scales of action (large-scale). Scale of analysis can be illustrated by climate and scale of action by erosion. Seen from this perspective scales are not merely quantitative, they are qualitative as well. It asserts that “a given phenomenon”, such as climate, “can only be represented on a given scale”, while it distorts other phenomenon, or in other words, “the scale creates the phenomenon” (De Sousa 1987:284). Therefore, it can be said that international law it self creates a phenomenon at the international small-scale level, while distorting the reality for other phenomena in the process. Law is in this connotation a tool for action with much resemblance to Jürgen Habermas account of the power of discourse and communicative action (see for example Habermas 1992). Scale, so
understood, mediates between intention and action, much as it mediates between maps and reality. This analogy applies to social and political action:

“Urban planners as well as military chiefs, administrators, business executives, legislators, judges, and lawyers define strategies on a small scale and decide day-to-day tactics on a larger scale. Power represents social and physical [as well as political] reality on a scale chosen for its capacity to create those phenomena that maximise the conditions for the reproduction of power. The distortion and concealment of reality is thus a presupposition of the exercise of power.” (De Sousa 1987:284)

When applying the theories of cartography to theories of law, scale can be said to be one of the most prominent arguments for the correlation. As De Sousa points out, the modern state is constructed on the superstition that law only operates on the single scale of the state (De Sousa 1987:287). However, this assumption is false. On the one hand, within the state there exists a locally restricted, large-scale law, such as municipal law. On the other hand, research has shown the surfacing of an international legal space formed amongst the agents of international economic exchanges sometimes overlapping national legal spaces (see Haufier 2000; Cutler 1999, 2000; Slaughter, Tulumello & Wood 1998:370-1). As De Sousa puts it: “transnational capital has thus created a transnational legal space, a supra-state legality, a world law [or more accurately, world rules] informal [and] based on dominant practises” (De Sousa 1987:287). Hence, law divides reality into three scales of legality (large, medium and small) and thereby different laws create different legal objects out of the same social objects. The legal area of this type of overlapping is of interest in this essay, because when conflicts between national and international legality emerge, there must be an international legality to speak of; an international legality that invades on the sovereignty of the nation states. These theories on international law will be discussed in more detail later.

2.2.2 Projection

The second mechanism, projection, is perhaps best explained by the distortion that occurs when producing a flat map from the curved surface of the earth. The type of projection is, like in filtering details by choices of scale, chosen for the purpose of the map. When, for example, making a map of a five storeys building which displays all floors without separating them, using a projection from above would be extremely inconvenient. As with scale, each type of projection creates “a field of representation within which forms and degrees of distortion are unequally but determinably distributed” (De Sousa 1987:284). Different projections distort different characteristics in different ways. A projection may preserve certain characteristics while distorting others. It is impossible to acquire the same accuracy in the representation of all the different characteristics, because increasing the accuracy for one of them will increase the distortion of one of the other. Projection can therefore be said to be a compromise between the accuracy of certain features in the map and the decision is based on the use intended and the ideology of the cartographer.

Another important aspect of projection is that each map has a centre, “a physical or symbolic space in a privileged position around which the diversity, the direction, and the meaning of other spaces are organised” (De Sousa 1987:285). The greater the distance to the centre, the greater the distortion.
Legal orders, too, uses the mechanism of projection. Projection defines the limits of the legal order’s operation and the legal spaces between them. Like in the case of law and scale, the different types of projection also creates different types of legal objects from the same social objects. Legal orders found their choice of projection in the ideology or “superfact” that establishes them (De Sousa 1987:291). For economic law the underlying superfact can be said to be the liberal economic theories of the free market, while the laws on Human Rights developed mainly based on theories of universalism (see Polanyi 1944 & Rawls 1999). In the case of law and projection, there also exists an overlapping of the legal spaces. There is, according to De Sousa, an unequal distribution in the distortion of reality caused by different types of projection. The centre of the legal space produced by a certain legal order is mapped with a higher degree of detail and absorbs the inputs from institutional and symbolic resources to a greater extent. The centre can be said to be more influential on the outcome and construction of a legal order. Another centre/periphery implication, De Sousa argues, is that conceptualisations tend to be taken out of context when exported from the centre to the periphery (De Sousa 1987:294). In a sense, as a law expands in to new legal spaces and regulates areas far from the centre intended, the concepts of the superfact imposes restrictions in fields of social interaction remotely connected to the ideology giving birth to the legal order in the first place. De Sousa points out as one such example the export of the contractual perspective to other legal orders, such as constitutional, marital and administrative law (De Sousa 1987:292).

2.2.3 Symbolisation

The third mechanism refers to symbolisation, the representation of specific details and characteristics of reality in different graphic symbols. As with the two earlier mentioned mechanisms, different sign systems, the language of the cartographer, are chosen to fit the purpose of the map. Signs can be divided into iconic and conventional. The iconic resembles reality in resemblance, while conventional signs are more random. The signs can be more figurative or more abstract, more readable or more visible and they may be based on emotive, expressive or on referential, cognitive signs (De Sousa 1987:286).

Symbolisation in law is formed in the legal discourse and is a complex procedure, due to the fact that it is conditioned by the two other mechanisms, scale and projection. This discourse can be said to hold the normative legal reasoning to back the arguments of the law and its application in reality. As we will see later, the formulation of a legal agreement can have a major impact on the compliance in certain situations, and not in others. For example, soft law in its first connotation is sometimes abided to the same degree as more explicit formulations (Hillgenberg 1999:500-1). De Sousa identifies two ideal-typical modes of legal symbolisation of reality, contrasting in their characteristics. One is the Homeric style of law, which is characterised by the “conversion of everyday flux of reality into a succession of disparate solemn moments”, such as legal contracts or legal disputes, which are “described in abstract and formal terms through conventional cognitive and referential signs” (De Sousa 1987:295). The other one, the biblical style of law,
assumes an illustrative legality and is embodied by a multilayeredness of legal interaction in the context of which they occur, describing them in “figurative and informal terms” with the help of “iconic, emotive and expressive signs” (De Sousa 1987:295). Modern law is mainly a Homeric style of law, whereas in older law the biblical style was prominent. However, the biblical style of law is gaining ground in the emergence of the particularistic law produced by new transnational legal subjects (De Sousa 1987:296).

As has been pointed out before, these three mechanisms are not neutral. They express certain choices made within each of them that convey particular interests and disputes. The creation of law can in the same way be said to express choices, interests and disputes and is multilayered, covering different and the same objects at the same time. The same object can be overlapped by laws of different scale, projection and using the same or different types of symbolisation. The very autonomy of the law can be said to derive from the operation of these procedures, as “a way of representing, distorting and imagining reality” (De Sousa 1987:297). Here, De Sousa’s quite vague idea of what comprise law will not be utilized. This text simply constitutes an explanatory fundament for facilitating the understanding of how the different layers of law can overlap each other, why laws are constructed in certain ways, paradoxical in certain cases, and to assist in establishing a comprehension of influential practices and actors in international law. In this essay the scope of international law is more limited, but a quite broader definition will be given to international law, than those mentioned earlier. Let me elaborate.

2.3 Compliance & sources of international law

As I mentioned in the introductory part of the essay, international law could more accurately be defined as “a set of binding rules that seek to regulate the behaviour of international actors by conferring rights and duties” or, based on actual practice, as “a system of international legal rule applicable to situations of international relevance” (Arend, Beck & Lugt 1997:290; Detter 1993:2). These definitions are broader in a sense than the more traditional descriptions of international law. Consequently, the critique of this view has been comprehensive. By stating this definition, it is therefore of vital importance to point out some its features.

Unlike the realist notion this definition states that the legal rules of international are binding and not a kind of social process. Law can be said to be created through a process and it can also be changed through a process but law is not a process in itself (Arend, Beck & Lugt 1996:290). The system of legal rule might be seen as concrete and readable rules which actually regulate, in that they are binding, the objects of international law. International actors must be obliged to follow the rules if the term law should be applicable. This posits a distinction between rules in general, sometimes termed as comity, and legal rules in particular. Legal rules are here said to be explicit, known and mandatory (excluding certain exception prescribed by law) while other rules can be implicit, unknown and voluntary. Certain rules at the

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2 Here, comity is a rule which is not legally binding, but are respected by states, not on the basis of any treaty or legal obligations and not to be confused with the term sometimes used by international lawyers as a form of recognition.
international level are not mandatory, for example codes of conduct. This is not to say, however, that law requires sanction to be law proper. The Austrian view, and despite the efforts of Kelsen, falls short on this remark and I am of the apprehension that sanction is not a requirement to establish law. Nations, and other actors in the international system, follow international legal rules for quite different reasons. Neither should we forget that the majority of the legal rules are formed out of informal rules through custom-based treaties and agreements. We will take a closer look at this later.

A legal rule also differs from other rules in the sense that it is decided upon by states, as the constitutive agents at the international level, in a forum where agreements are met and that they regard them as valid (Arend, Beck & Lugt 1996:291). The question of what makes rules binding has been one of the main issues in the continuous debate on international law. Hans Morgenthau's conjecture on this matter was that states only express national interests in the shaping of international law and that law, as understood here, does not exist in the international system. He argued that the only law that exists at the international level are the "law of politics", and that politics itself is "a struggle for power" (Morgenthau 1967:25-26). This realist assumption suggests that states would only commit to international legal rules when it suits their national interest. This analysis might not be entirely false, when creating international law there must be something beneficial for the actors involved, but it does not explain what this beneficial factor might be or why it is beneficial. The motivating interests for acquiesce with a legal agreement can be as divergent as environmental benefits, human rights improvements and developments of economic security standards. My conclusion is that the realist account for international legal rules is quite narrow and unsatisfactory. If states, the more powerful ones at least, were only to act out of their own interest, international legal rules would be violated more frequently. The fact remains, states tend to obey international law, or to put it in Louis Henkin's often cited words: "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time" (Henkin 1979:47). In the rare cases of non-compliance, states still issue explanations, excuses and statements (Detter 1993:9).

Compliance with international rules and law is based on several forms of relationships between rules and conduct. Some scholars have differentiated compliance from obedience, in which compliance is a form of conformity for instrumental reasons and obedience is characterized by a behaviour resulting from norm-internalisation (Koh 1997, 1998; Kratchowil 1989). There is a difference in obeying, complying with and conforming to certain behaviour. When considering the impact on behaviour, reluctant acceptance of a rule can not be compared with the internal imperative of habitually obeying it. If we were to be in a situation without any risk of sanction, the rules would not be obeyed in the first sense. However, through an evolutionary process people in their everyday lives regularly obey these rules and become familiarized with them, moving from conformity to compliance and obedience, which can be said to be driven by norm-internalisation (Koh 1998:1400-1).

"If you see someone driving 100 mph, and then suddenly they see a police car and slow dramatically
to 60 mph, you might say they are complying with; but not really obeying the speed limit. But, if one witnesses people routinely driving at the speed limit (without witnesses around), or routinely disposing of litter, or recycling without being told, we are seeing an internalized normative form of behavior—an increase in normativity, if you will—which derives from the incorporation of external norms or values into a person’s or organization’s internal value set.” (Koh 1998:1401)

This raises interesting questions on the institutionalisation of rules and laws on the international, as well as in the national, scale. For present purposes, however, the definition of compliance has to be a much narrower one. Compliance, in the limited scope of this paper, is defined as “a state of conformity or identity between an actor’s behaviour and a specified rule” (Raustiala & Slaughter 2002:539).

To sum things up, states, even the most powerful, do comply with international law and states do constitute these rules amongst themselves. These legal rules are binding to the parties involved and differ from other rules in that they are explicit, obligatory and in that they change the behaviour of their parties. From this point of view, international law is a regulatory instrument for states created by states.

Hence, the traditional view of states as the only subjects of international law has become obsolete. Today international law can instead be said to refer to those “[...] rules and norms which regulate the conduct of states and other entities which at any time are recognised as being endowed with international personality in their relation to each other” (Wallace 1986:1). This view is closely related to notions of the many critics of realism on the developments in the international system. It identifies a rise in new powerful international actors, fed by the rise of globalisation and acceptance of liberal economic ideology within the national and international spheres. According to this notion, there has been an increase in the number of actors at the international arena and the singular authority claimed to once have been established at the 1648 Peace of Westphalia is now dissolving (Matthews 1997). While globalisation often is regarded as the impact of economic interdependence on domestic political systems and the interaction between states, it also reconceptualise the very field of political science as a whole as how to explain both the power of the states and the current change in the complex political, social and economic webs which comprise the international system (Cerny 1996). Susan Strange’s claims, in her frequently cited The Retreat of the State (1996), that due to advances in technology, which has created new sources of wealth and power (i.e. market shares instead of territory), one basic of function of the state has been undermined - establishing security. The rise in capital costs of most technological innovations is causing an increasing need for states to create a competitive environment, thus attracting transnational corporations. The role of the state has changed, she argues, from a welfare provider, providing social security and defending public interests, to competitive players in the game of world market economy. Leaving the role as a provider of welfare, the state has abandoned a central element in legitimising its existence, namely, taking responsibility for the well-being of its citizens.

Other international relation scholars contest this view. They argue that consequences

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3 The concept of globalisation is in itself a highly contested term. It is perhaps best defined by Jan Aart Scholte (2000) as “deterritorialization” or the growth of supranational relations between people, a “reconfiguration of social space”, bringing an end to territorialism (Scholte 2000:46).
of globalisation for the permeability of national borders and that the transformation of sovereignty appears irreversible, but the transformation of sovereignty should be viewed as a process of socialisation in which the state can afford to rely more on the institutions of international society and less on national means to achieve domestic objectives (Keohane 2002; Wendt 1992). But to regard globalisation simply from a top-bottom perspective would be to disregard important features of the events taking place. As Saskia Sassen (1999) rightly argues, the state itself is active in establishing structures that furthers globalisation, and common terms like deregulation, liberalisation and privatisation does neither register this process nor the transformations taking place inside the state. She suggest that while “globalisation leaves national territory basically unaltered, it is having pronounced effects on the exclusive territoriality of the nation state – that is, its effects are not on territory as such but on the institutional encasements of that geographical condition” (Sassen 1999:159). There has been a relocation of national governance functions to transnational private arenas, which still however are, according to Sassen, under the control of the states. Private firms in international accounting, finance, law, and standardisation, and supranational organisations all act in this non-government centred governance, but largely within the territory of the state (Sassen 1999:160). Thus, in this context, the retreat of the state is occurring, but not in all fields and not by all states. Quite opposite, in certain areas many states are advancing, taking the part of competitive actors in the international economic system, as well as in the feud for political power, but not just with other states, corporations as well as private institutions are too their rivals.

Regime theory surfaced in the 1970:ies as a new, useful, but contested model of understanding the workings in the global system (see Strange 1982; Krasner 1983; Rochester 1986). Despite its lack of interest in incorporating private actors in their analysis, authors have argued that the regime concept is helpful for explaining the development of private institutions for self-governance among corporations (Haufler 1997; Cutler, Haufler & Porter 1999). Regimes have been accredited with numerous definitions, but one of the better states regimes as “recognised patterns of practise around which expectations converge [which] may or may not be accompanied by explicit organisational arrangements” (Young 1980:332). These sometimes implicit rules include norms, values, principles and procedures and by these measures they are correspondent to the concept comity. Thus, regimes constitute governing arrangements in which actors blend their “behaviour with principles and norms that distinguishes regime-governed activity […] from more conventional activity, guided exclusively by narrow calculations of interest” (Krasner 1983:14). Private regimes have been and are formed in cooperation among competing firms to establish stability through common rules, standards and principles in a self-regulatory manner, which can reduce costs and expand economic markets (Haufler 2000). They are created by interaction and negotiations within a certain sector. Informal practices in these areas are sometimes codified as standards in organisations and may in turn be adopted by international organisations (Cutler, Haufler & Porter 1999). These can be seen as small-scale rules, often acting at the global level, with a clear projection towards economic values and action. In some cases, the centres of these rules are situated in the economical discourse of international trade and commerce, with focus on lowering transaction costs and maximising profits. These rules are exact in their
representation while vague in orientation, that is to say, they are precise in direction and highly particularistic but indistinct in a bigger context and aim to regulate a certain practice at a certain level. However, the self-regulating rules of these small-scale regulatory regimes sometimes overlap jurisdiction of larger scale. Claire Cutler and others have pronounced that private regimes have not just come to impinge on the “external sovereignty”, using Rob Walker words, that is an increase in the significance of private authority over transnational affairs and the decline in the state’s ability to decide over its external affairs, but has also lessened the states ability to decide its internal affairs, which, due to its blurring of the private/public distinction, the heterogeneity of and pluralism in the forms of regulations, call to mind the medieval *Lex Mercatoria* (Cutler 1997; Walker 1995).

The influence of these regimes is, however, mediated by states. States sometimes enforce rules, constitute international law, which originate from international regimes, such as standards, arbitralional accords and norms. This suggests that private actors can be said to be accredited functions that in traditional thought is ascribed to states. Accepting this view, the realist and regime theorist account of the international system is quite insufficient to explain the mechanisms of the global structure. The arguments here put forward indicate that while the states remains the primary actor of international relations and in ordering legal and political space of the world, other actors have significant influence over their internal and external affairs. So, though not taking it as far as Francis Fukuyama’s (1992) depicted end of the Cold War and forthright victory of economic and political liberalism, or “the end of history”, regimes have created a basis for the adoption of economic neo-liberal ideals by several states, referred to by Stephen Gill as “The New Constitutionalism”, which in turn, drawing on Strange’s arguments, has changed the priorities in their political agenda (Strange 1996; Gill 1995).

These are all very interesting observations, important and relevant for both disciplines. Like international regimes change states’ behaviour, international private regimes also appear to have a considerable influence. For students of international relations, the power of influence held by private international regimes is pertinent for the understanding of the politics in the international system. For international law scholars, it may help explain some of the processes comprising some of the developments in international law. For the purpose for this essay, however, private international regimes can not be considered to possess legal authority in the international ambit. International law, we have established, is constituted by states. States may be affected by other actors. Their decisions on what legal contracts to conclude, what treaties of international law to ratify or even what position they hold in negotiations on legal agreements at the international level, may be influenced by powerful corporations and INGO’s, influential domestic actors or international private regimes. But the fact remain, international law is established by states. This is not to say that private actors do not matter. As discussed above, it seems reasonable to assume that the nature of the state has changed and that its power in certain areas has been challenged. That would probably also entail certain consequence for the constitutive process of international law.
3. Soft and hard law—empirical findings

As we have seen, there are several methods of explaining the way states and other actors interact with and influence each other. There are also several stances on how strong legal and non-legal rules really are and how they are constituted. So far I have concentrated my efforts on drawing the lines for the analysis in this essay, defining international law and dividing it from comity and other rules, giving attention to theories of compliance and the sources of authority in the international ambit. Before we draw any conclusions from the discussion we will turn our attention to the core purpose of this essay. First, an additional distinction, and an interesting alteration to the here presented notion of international law, has to be made between international hard and soft law. This is a supplementary map in the cartography of law; a small-scale map often with high level representation and a low degree of distortion, in relation to one connotation, the opposite according to the other. It also adds a new dimension to the metaphor. I have found that soft law is neither entirely included nor entirely excluded in the cartography of law. As shown below, the map of international soft law is in-between, a map of shifting representation, distortion and projection, all in the same map. It has fittingly been described by Pierre-Marie Dupuy as “... either not yet or not only law” (Dupuy 1977:258).

The term soft law was originally invented by lord A. D. McNair and has been defined as “apparent non-binding rules that entail certain legal consequences for states” (Detter 1993:234). However, this definition does little to explain its vast scope and its importance in the development of international law. These non-binding rules which appear to regulate the international system are distinguished from and work as a supplement to international hard law, characterised by treaties and customary law. Only hard law is technically binding whereas soft law, which is later shown, can reach comparable objectives through other processes.

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4 According to R. J. Dupuy (1977:252) and Hartmut Hillgenberg (1999:500), but without references to any printed source or any date for when it first was used.
3.1 Hard law

3.1.1 Treaties
The generally accepted categories of international law are treaties, "general principles of law", and customary international law. Article 38 (1) of the Statute of the International Court of Justice identifies the above three categories as sources of international law and also adds "[...] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law" (ICJ 1995). Treaties are codified rules concluded by states in writing in various ways, depending on their importance and impact. More important treaties are concluded through long procedures which involve specific mechanisms. They are habitually subjects to ratification which denotes the final approval of the obligations. In most democracies, the ratification has to be approved by some certain governmental institution after treatment in a legislative body (Detter 1993:195-197). In Sweden, for example, the Ministry of Foreign Affairs, Utrikesdepartementet, is responsible for the preparation and co-ordinations of issues related to relations with other states, including international law, and ratifications is finally approved after treatment in the legislative body of the Swedish parliament, Riksdagen. Other treaties are not subjects to the ratification process and are concluded by short procedures, where a signature of the state representative is adequate (Detter 1993:198).

3.1.2 Custom
Customary law is the other important aspect of international hard law-making. Rules in the international system frequently emerge through custom, or practice. Article 38 of the Statute of the International Court of Justice defines custom as “evidence of a general practice accepted as law” (ICJ 1995). Generally, there are two requirements in order for practice to be considered as customary law. First, practice has to be a consistent conduct over a period of time. Second, for the formation of customary law, it has to exist an assessment of practice as law, to put it differently: “a mental qualification of the material facts to upgrade the usage to customary law” (Detter 1993:204). The material side, out of which the rules of international relations emerge, in this manner represented by the actual custom or the act, are tied together with the psychological side or the articulation, the opinio juris, where considerations on what rules are to be regarded as legally binding are conducted (Detter 1993:204). However, sometimes customary law is constituted without the two requirements being met. Through a process that has been called instant custom, customary law can be constituted before practice even exists (Wallace 1986:15). This indicates a phenomenon where states follow a practice that they already consider as binding and, thus, that law sometimes precedes custom. This points to an observable fact that in itself is contradictory. Custom suggest that the parties has been engaged in an activity ruled by practice over a period of time, whereas instant implies an immediate occurrence of the activity. An example of this instant customary law is the Doctrine of the Continental Shelf. Rather than waiting for an agreement, the doctrine, establishing the Exclusive Economic Zone in the 1970:s, became recognised as customary law through assertion and general acceptance without the presence of
actual practice (Wallace 1986:16). It was later canonised in the 1982 UN Convention on the Law of the Sea (UNCLOS 1982 art. 55 & 56). Another example of instant custom, it has been argued, is the Bush Doctrine of September 11 2001. On the evening of the terrorist attack, Bush stated that the US “will make no distinctions between terrorists and those who harbour or provide aid to them”, later included in the National Security Strategy of the United States of America (NSS 2002). The following day the members of the UN General Assembly and Security Council passed resolutions that enforced the Bush Doctrine, thus regarding sanctions founded on these grounds as legally acceptable and required all member states to pursue terrorists and those who support them (UN res. 56/1; UN Res. 1368). In addition, 46 multilateral declarations was stated in support for the Bush Doctrine and steps were taken by a long list of countries in accordance with Bush’s statement. Due to these immediate legal and active response to the articulation in the wake of September 11, the Doctrine became law through instant custom (Langille 2003). It has been argued that instant custom is applicable on certain mechanisms constituting rules within the international private sphere. Berthold Goldman showed as early as 1968 that several so called standard contracts were created by a single powerful firm and then imposed on their business partners (De Sousa 1987:294). Hence, it is possible for highly influential corporations to enforce new rules regulating standards and conduct within the private sphere, which at once becomes the expected practice in their sphere of influence through the process of instant custom. In regard to international law, however, this type of instant custom lacks the characteristics of law in a proper sense.

### 3.2 Soft law

Treaties and other conventions are obligatory upon the states signing them. By their nature, they are intended to be agreements governing the legal relations between the signatories, and in theory parties can enforce their non-compliance through arbitration, actions before the ICJ or other institutionalized dispute resolution mechanisms. Soft law, as implied above, is a non-binding agreement and does not strictly follow the principle of *pacta sunt servanda* in a traditional sense. This not to say that states do not comply with soft law or that soft law only exists on matters of less significance. The status of an agreement is irrespective to whether it is of central or peripheral importance for international affairs (Hillgenberg 1999:504). The Charter of Paris for a New Europe 1990\(^5\), the UDHR of 1948\(^6\) and the 1941 Atlantic Charter\(^7\)

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\(^5\) The Charter of Paris for a New Europe was adopted by the Organisation of Security and Cooperation in Europe (OSCE) at the Summit Meeting in the wake of the fall of the Berlin Wall in Paris on 21 November 1990, but with no legally binding obligations. The summit consisted of the Heads of States and Governments of the 40 participating states and of the Union of Soviet Socialist Republics. The Summit produced several guidelines on the human dimension for ensuring of peace, democracy and cooperation in Europe proceeding from the Document of the Copenhagen Meeting of Conference on the Human Dimension the same year and the Helsinki Final Act of 1975. The Summit rejected past notions of security being based on the rule of the strong and sphere of influence in favour for the rule of law and supported the belief that integration could bring greater security. In doing that the Paris Summit put an end to the Cold War power politics and established a new form of security policy in Europe. The position of the OSCE, established by the Helsinki Final Act, was hereby furthered in the political interplay of European security (www.osce.org).

\(^6\) The 30 articles of the 1948 Universal Declaration of Human Rights later obtain the force and status of international customary law (UN res. 217 A 1948). A more thorough discussion will follow.

\(^7\) The Atlantic Charter was originally a joint declaration on the purposes of the war against fascism, issued by the UK prime minister at the time Winston S. Churchill and US President Franklin D. Roosevelt the 14 August 1941,
were all non-binding treaties and thus do not fall under the definition of international law, despite their importance. Soft law is in most situations adopted and observed by most states and in cases of non-compliance sanctions by other participants can still be expected (Ho 2002; Shelton 2000:14-15). Either way, the distinction between soft and hard law appears to be indistinct.

The concept of soft law is used in two connotations, different but not conflicting or unrelated. First, the term is sometimes used to refer to soft contents in hard law. That is vague and flexible formulations in the hard law texts, leaving substantial room for interpretation, such as commitments to treaty provisions in which the parties are to take “such action as it deems necessary”, act in a certain manner “as far as possible” or use “all necessary means”, as well as all should-based clauses (Sztucki 1990; NATO 1949 Art. 5; UN Res. 687). Precision, or lack thereof, is not a sufficient condition for ascertaining whether or not a treaty is binding. A treaty is still a treaty, even if the formulations on what action the directives propose are vague. A treaty remains binding, through the principle of pacta sunt servanda, even if there are minimal possibilities for the state to respond to breaches of agreement or if the justification for non-realisation or withdrawal from the treaty is mainly left up to the party (Hillgenberg 1999:500-1). A number of the instruments of this category consist entirely of soft requirements while soft provision in other treaties exists parallel to hard ones8. In this connotation soft law can also include other instruments deriving from international organisations and may simply be limited to plain recommendations. However, to the extent international organisations are authorised to make legally binding decisions upon states, a simple recommendation can be disregarded, but a binding text comprised by the same soft discourse will still obligate the state to act in accordance to the recommendation. The result of the formulation may not in practice necessarily differ if states choose to implement or follow the recommendations to the same extent.

Second, and more often, the term soft law is used to separate soft from hard in the nature of the international construction of provisions. That is, to denote texts with normative claims but with inherently limited power to bind states and thus are of non-legal character from texts with formal authority committing states to comply with the obligations undertaken (Sztucki 1990:552-3). Soft law, so understood, is an abstract international agreement not concluded as a treaty and therefore not covered by the Vienna Convention on the Law of Treaties (Vienna Convention 1969). Soft law in this connotation has provoked more academic opposition, but has long been treated most seriously by states and is the form of interest for this essay.

The realists, as mentioned above, have focused on the lack of enforcement powers and have concluded that all international law is soft. Positivist and others have seen soft law as a pro tem step in the formulation of law proper, which is not entirely

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8 As an example of wholly soft provisions the International Labour Organisation’s (ILO) Convention No. 122 on employment policy of 1964 can be mentioned which states that “each member shall, by such methods and to such extent as may be appropriate under national conditions” (ILO 122:1964 art. 2) and examples of parallel usage of soft and hard provision can be illustrated by the several articles of the UN Charter (UN Charter art. 49;55;56;73;74;76).
false. Others have dismissed soft law from a more normative perspective, concerned with the increase in its application which might destabilise the international legal system and that it carries negative implications for the credibility of international law (Weil 1983:423; Hillgenberg 1999:502). Despite what term is chosen to describe the phenomenon, soft law as conceived here posits a real and increasing intermediate level of international rules and is sandwiched between the implicit rules of comity and the legal rules of hard law.

Soft law, in the second connotation, is regularly of unilateral character, but is occasionally produced by multiple sources in a contractual form (Detter 1993:234). The contractual character can be exemplified by the Helsinki Final Act of 1975 and North Atlantic Treaty (NATO 1949) and the more frequently occurring consensual form by most agendas, joint declarations and joint communiqués such as the 1972 Stockholm Declaration and the UDHR. The UDHR was first adopted and proclaimed by the General Assembly in 1948 upon which the Assembly called upon the member states of the UN to “cause it to be disseminated, displayed, read and expounded” (UDHR 1948). However, the UN charter articles 1(3), 55 and 56 specifically state the basic human rights obligations of the UN and its member states (UN Charter 1945).

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9 The Helsinki Final Act of the 1975 Conference on Security and Co-operation in Europe was concluded by the 35 participating states the first of August 1975 after being opened at Helsinki in July 1973 and continued at Geneva from 18 September to 21 July 1975. The Heads of States and Governments of the participating states agreed through a contractual form of non-binding agreement to recognise their mutual interests in “promoting better relations among themselves and ensuring conditions in which their people can live in peace” (Helsinki Final Act 1975:2). Harold Koh has acclaimed the Act to “serve as a model for ensuring that human values are a core element of security”, comparing its importance to the Magna Charta, the UN Charter and the U.S. Declaration of Independence (Koh 2000). Interestingly enough, the soft provisions of the Helsinki Final Act laid the foundation for the Organisation for Security and Co-operation in Europe (OSCE). OSCE has since then gained influence and responsibility in the area of international security and is now the largest regional security organisation in the world with 55 participating states and employ some 4000 staff in 19 missions and field activities on a budget of 185,7 million euros (2003) (www.osce.org).

10 UN Conference on the Human Environment held in Stockholm in 1972 laid the foundation for the 1992 UN Conference on Environment and Development in Rio de Janeiro and the UN Summit on Sustainable Development held in Johannesburg 2002. The Stockholm Conference initiated the global co-operation on environment and development later combined in the concept of sustainable development. The Report from the Conference has come to stimulate national efforts and hard legislation in the environmental area, through the Rio Conference and its soft law result, Agenda 21. Of the 32 specific objectives of Agenda 21 16 has been implemented in over 50 per cent of the 150 participating countries. The National Co-ordination Body objective, for example, had in 1998 been implemented in 73 per cent of the participating states and an additional 9 per cent were in the process of creating one. The Sustainable Development in School Curriculum objective had at the same time been achieved in 63 per cent of the states, and in process in another 17 per cent (www.un.org). The number of environmental international agreements in total after the Stockholm Conference in general and the Rio Declaration in specific has been augmented as well as the general acceptance of these agreements. The rate of ratification is well over 65 per cent. Of the twelve international agreements in question only three (the Kyoto, Indigenous Peoples and Biosafety agreements) have a ratification percentage lower than 40 (NIA Report 2002). The participation at these meetings is generally high, both from Heads of State and governments as well as NGO representatives. The latest of the conferences on sustainable development, the Johannesburg Summit, attracted the attention of some 100 political leaders, 10,000 delegates, and 8,000 NGOs and civil society representatives. (www.johannesburgsummit.org, www.unep.org)
Soft law often act as specifications for future action such as various final papers from conferences and meetings, for example Agenda 21 from the Rio Conference, the Paris Charter and the Declaration of the Conference on Human Rights in Vienna 1993. They also may record the content of existing customary international law on particular matters, such as the international legal code articulated in Principle 21 of the Stockholm Declaration, or articulate and refine common practice in the relations of international actors, like the ICC Incoterms. As such, although they are not hard law, they evince governmental positions on particular issues. Soft law may also articulate existing legal norms and create expectations for the future development of international law. Often they are the beginning of a process, generating expectations for future behaviour, emphasising increasingly higher degrees of normative specificity that eventually may result in international hard law. Kratchowil has provided an informative definition of the normative resources encompassed by soft law.

"It [soft law] represents a weak institutionalization of the norm-creation process by prodding the parties to seek more specific law-solutions within the space laid out in the declarations of intent [...] by legitimizing conduct which might diverge from the existing practices, soft law provides an alternative which can become legally relevant crystallization for newly emerging customs or more explicit norms." (Kratchowil 1989:32)

It is important to note that while saying that soft law is not legally binding, it does not mean that soft law is not affecting state behaviour. Sometimes the non-binding rules of soft law result in direct legal consequences for states (Detter 1993:234). The Universal Declaration of Human rights, for example, has had tremendous repercussions on the international discourse and politics. After the declaration was produced in 1948 a vast range of declarations and conventions, such as the Conventions on Racial Discrimination (1965), Discrimination Against Women (1979), Torture (1984) and Rights of the Child (1989), and the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights (1966), and international organisations, such as the OSCE and the Organisation of African Unity (1961), has been established with reference to the human rights.

The legal status of the Declaration of Human rights, International Human Rights Law (IHRL) and International Humanitarian Law (IHL) are confusing and ambiguous. The soft provisions of the IHRL are often mistaken for hard law obligations by many NGO’s and in the rhetoric of ministers of foreign affairs (Forsythe 2000 Ch. 7; Jaquemet 2001). This might relate to the indistinct border between the numerous declarations and conventions produced on the map of IHL and IHRL with different legal standing. IHRL and IHL are two distinct and yet closely related branches of the international legal system. While IHL can be seen as the principles and rules which limit the use of violence in times of armed conflict, established through treaties and custom with hard law status, IHRL is a set of international rules, also established by treaty or custom and numerous non-treaty based principles and guidelines or, in other words, soft laws (ICRC 2003; Kracht 2000; OHCHR Fact Sheet No. 13). IHRL has developed into hard law in the International Bill of Rights of 1966, consisting of the two aforementioned Covenants and the UDHR, since the original creation of the UDHR of 1948. The two Covenants are legally binding in nature and constitute treaty law (Kracht 2000). The other above mentioned declarations and resolution are of
soft, non-binding character, but, according to the General Assembly, “on matters concerning general norms of international law, their adoption by consensus or nearly unanimous acceptance can provide a basis for the progressive development of customary law” (United Nations 1996a, §18).

In other cases, soft law merely reflects other binding obligations, in other words a legally binding agreement between two nations. A third state can never be bound by a treaty which to it is a res inter alio acta, concluded by other states, but if the treaty reflects another binding treaty, the third state will be obligated by this agreement, not by the first treaty, but through an opt-in process (Detter 1993:234-7). This makes it possible for a soft law to impose hard law restrictions on a third party and adds to the indistinctness of the boundary between hard and soft law. As Sztucki argues, the ”[...] threshold of legal normativity need not fully coincide with the division into the two categories” (Sztucki 1990:553).

Partly due to the multilayeredness of international law it is difficult for international and national lawyers to determine the boundaries of different types of rules. Another difficulty is that legal judgements of the normative value of the instruments assumes a static position of the objects of assessment at a specific moment, whereas soft law consists of an endless variety of normative phenomena in international law that “reflects their dynamism and transitional phase” (Sztucki 1990:554). The ICC’s Incoterms11 for example, first produced in 1936, has long been accepted rules for buyer’s and seller’s responsibilities for delivery under sales contract. The Incoterms were produced as a complement to existing rules of contracts in trade and later as a supplement to the international regulations. However, their acceptance as rules of significance has increased. At the United Nations Commission on International Trade Law (UNCITRAL) first session on the rules in 1968 the Commission identified Incoterms 1953 as an “international instrument of special importance with regard to its harmonization and unification of the law of international sale of goods” (UNCITRAL 1968 A/7216 §48). At its twenty-fifth session in 1992, the commission concluded that the 1990 Incoterms succeeded in providing a modern set of international rules for the interpretation of most trade terms and recommended the dissemination of the document and its use (UNCITRAL A/CN.9/479 2000; A7/47/17 1992 §160,161). Accordingly the Incoterms legal influence has increased over the years. Not only do the UNCITRAL recognise Incoterms as the ”authoritative rules for the interpretation of trade terms”, a number of World Trade Organisation member states have recommended the use of these rules as trade facilitation instruments proposals relating to a new round (www.unece.org 2001). Although created by the ICC, a world business organisation, comprised of over 7000 members in 140 countries, the Incoterms appears to constitute soft law. A comprehensive comparative study of national jurisprudence and arbitral awards in relation to the Incoterms has shown that they are generally binding when impliedly or expressly incorporated into the contract by the parties (Bateson & Flambouras 2003).

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11 The Incoterms constitute the ICC rules for interpretation of frequently used trade terms in foreign trade and shipping and was first introduced 1936 and has been revised six times, the two latest 1991 and 2000. It consists of 13 definitions used for the harmonisation of transnational trade contracts and are close to universally accepted as binding contract features. However, they are conflicting with the American Foreign Trade Definitions (www.iccwbo.org; Plitz 1998)
Soft law agreements have been suggested to be of mounting significance, particularly in the fields of environmental protection, international economic and trade relations, and determining corporate behaviour (Branson 2000; Hillgenberg 1999:503). There have been numerous suggestions on why states choose to avoid treaty agreements. States may choose soft law in order to:

- establish an impetus for coordinated efforts
- stimulate processes still in progress
- avoid unwieldy domestic approval procedures in case of amendments
- reach a higher degree of confidentiality
- be able to establish an agreement with actors not authorised to conclude treaties under international law
- found simpler procedures and by this means facilitating a more rapid finalisation
- create preliminary, flexible regimes
- lower the transactional costs on agreements

(Hillgenberg 1999:501; Abbot & Snidal 2000)

Soft law may in addition be used when there is a general agreement on the regulations considered necessary, but there is an unwillingness or incapability to commit to legal constraints and may also reflect a compromise (Sztucki 1990:558).

Research has shown that states do follow rules concluded in these non-treaties despite the lack of legal constraints. For example, the Basle Accord12 on International Convergence of Capital Measurement and Capital Standards of 1988, replaced by the refined New Capital Adequacy Framework in 1999, has been adopted and implemented by 107 countries, affecting their national capital and banking laws, albeit it is not binding by law (Basle Capital Accords 1988; Ho 2002). In deed, the difference between international hard law and the binding political effects of international soft law is smaller than generally considered by many politicians, which, in turn, may play part in the states’ increasing interest of non-treaty agreements in the international system where soft law non-treaties are often used when for example the non-binding character or a higher degree of confidentiality is desirable (Hillgenberg 1999:502).

Important to observe is that law is only one category of the norm systems, one which has been put into writing, constituting a set of binding rules that seek to regulate the behaviour of international actors by conferring rights and duties, which govern the national and international communities. These norm systems are mutually supporting and affecting each other in the interplay of international relations. In other words, laws of different scale and projection interact and mutually influence each other in the creation of new legislation and in the recapitulation of existing laws. The regulatory process of the international system is divided into different levels in which but a few acquires the status of law. In this process, soft law can be

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12 The Basle Capital Accords was produced in 1988 as capital measurement system and led to the implementation of a credit risk measurement framework with a minimum capital standard of 8 per cent in 1992. The rules of the Accord has been adopted in not only the member countries of the Basle Committee, responsible for the introduction of the document, but also in practically all other states with active international banks. The Committee, established in 1974 by the central bank governors of the G-10 countries, consists of central bank representatives from 13 countries from Europe and North America and does not posses any formal supranational supervisory authority or legal force (www.bis.org).
said to constitute one normative instrument. In other words, soft law is in a way a
legal normative tool possible of constructing law through its custom creating
character. Often, soft law put forward at conferences in the form of standards or as
agreements on conduct, gradually has become a binding obligation. Soft law may
thus occasionally be considered pré-droit, or pre-law, in the relationship that it leads
to hard law obligations (Hillgenberg 1990:502). The non-binding agreements may
develop into hard obligations through domestic and/or international judicial
processes. Through this process, the supplementary map in the cartography of law,
soft law, overlaps the larger scale maps and gradually becomes integrated into them.
For example, the outcome of the Copenhagen Meeting on the Human Dimension of
1990 regarding the protection of national minorities´ rights to freely express,
preserve and develop their ethical, cultural, linguistic and religious identity was later
included in Germany’s binding agreements with Poland in 1991 and the CSSR in 1992
(CSCE 1990; Hillgenberg 1999).

Considering the inherent transformation of many soft provisions into hard, soft law
may be said to entail considerable consequences for international law proper and the
international political climate. The Incoterms, the Report from the Stockholm
Conference, the Universal Declaration of human rights, the Helsinki Final Act, and the
Basle Capital Accords, IHR\(^\text{13}\) and the Paris Charter has all had significant
consequences for states and substantial impact on the state behaviour in the
respective fields. In many cases, states have chosen to comply with these soft
provisions in a manner similar to international hard law. The Helsinki Final Act, for
example, led to the creation of the world’s largest security organisation, OSCE, and
the cooperation of 55 countries in Europe, Asia and North America with significant
influence in its area of activity (www.osce.org).

Another interesting example is the WHO’s IHR. As part of the of the WHO system the
IHR’s aim to prevent spreading of infectious diseases across national borders. The
original IHR from 1969 covering smallpox, typhus and relapsing fever has come to be
revised in 1973 and 1981, but are considered to be insufficient to meet the
contemporary global challenges and are since 1995 therefore under review. The
regulations include a system of notification of instances of the covered diseases on a
voluntary basis, but they define WHO member states’ normative duty to report and
cooperate with other states and the WHO in response to outbreaks (www.who.org).
Being soft law, the IHR duty is neither binding nor enforceable. However, the duty
has turned out to hold pungent political weight internationally. According to David
Fidler, China’s initial reluctance to international assistance and its attempts to conceal
the Severe Acute Respiratory Syndrome, or SARS, outbreak in 2003 led to an
international response similar to a sanction backed by law. He suggests that the
recent developments might lead to customary law of the IHR with the fourth revised
version (Fidler 2003).

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\(^{13}\) The IHR are produced by the WHO. The WHO supreme decision-making body the World Health Assembly
attended by delegations from all its 192 member states and meets in May each year with the function to
determine the policies of the organisation (www.who.org).
4. Analysis

The study here conducted and the six areas with the accompanying documents of soft law here examined have contributed to several noteworthy insights. Despite the range of the topics and the different contemporary legal status, certain comparable indications can be seen.

The Basle Credit Accords
The Basle Credit Accords were established through negotiations between central bank representatives from participating countries at the international meeting on creating a capital measurement system. The political and legal impact has been substantial - the rules of the accord were by 1999 implemented in 107 countries, affecting national legislation and custom in the area of credit measurement. The Accords constitute a map projecting economical values deriving from the central bank representatives involved in the constitutive process. These normative values have, through the acceptance of the document, been exported to the participating third parties. The private influence over the Accord is limited and/or hard to determine. Nothing I have found suggests a significant private influence. However, this does not guarantee absence of private power over the outcomes of the non-binding agreements.

The ICC Incoterms
The ICC Incoterms were and are established entirely by private actors in a private organisation. They are produced and written by private business representative at a global business organisation without any visible influence from governmental representation. They did not and could not, however, obtain their soft law status without the official recognition of the WTO and UNCITRAL, which in turn suggests a limited scope of the private authority in this matter. The Incoterms have had more legal influence than political, since they regulate private contracts in trade. The political effects are reduced to the implementation and acceptance of the rules by
national governments and suggest that even though the projection of this soft law concentrated to strict economical private terms their normative powers are limited to issues restricted to the private sphere.

The UDHR

The UDHR and the International Bill of Rights are probably the example hardest to analyse with the tools here presented. Human Rights constitute a web of rules, non-rules, recommendations, hard laws and soft provisions which make it practically impossible to examine in general terms. What has been found is that, coming from an entirely soft provision of the UDHR of 1948, Human Rights hard law has developed through the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights establishing the International Bill of Rights in 1966. The political influence wielded by this document has been extensive, altering the terms of international relations by adding the perspective of universality. Other findings suggesting a comprehensive impact is the number of documents, agreements and resolutions produced with reference to the UDHR.

The private influence over the outcomes in these documents is hard to estimate. The presence of INGO’s and NGO’s at the conferences and meetings on Human Rights issues, as well as the continuing call upon Human Rights as law by many NGO’s suggests a substantial interest in these questions and a high participatory level, but it does little to reveal the power exerted by them.

The legal, so to speak, projection of the Human Rights and especially the International Bill of Rights is interesting in that it represents traditions and cultural differences in its contents. Normative values of different cultures are acted for, representing the idea of universalism itself. It is hard to argue that the documents are skewed towards Western philosophy on individual freedoms since the Covenant on Economical, Social and Cultural Rights was adopted.

The Stockholm, Rio and Johannesburg declarations

The Stockholm, Rio and Johannesburg declarations are similar in the character and genealogy to the development of Human Rights discussed above. These three Conferences have however not resulted in international hard law, but their political and legal influence has been tremendous. The degree of implementation suggests a vide acceptance of the normative values presented at the meetings and mediated by the documents there produced. The findings on the character of the private influence at the conferences and over the Declarations face the same problems as for the analysis of the Human Rights already discussed.

The Paris Charter and the Helsinki Final Act

The Paris Charter and the Helsinki Final Act were both produced at intergovernmental meetings by governmental representatives and Heads of States. The results of these documents have been significant, establishing OSCE and altering the very concept of security in Europe. The political dimension of the Helsinki Act and the Paris charter has been comprehensive, not just for the participating states. Since both were established before the fall of the Soviet Union, consequences of these non-binding agreements have had effects for the new Central and Eastern European
states. As to whether private actors have had any political power over the creation of the documents, the facts here studied do not disclose any such indicators.

The IHR

The WHO’s IHR was concluded at the WHO supreme decision-making body, the World Health Assembly, attended by delegations from its 192 member states. The WHO leaves room for INGO’s to report on the health situations and give recommendations. The IHR is, however, concluded by the delegations from the member states. As has been suggested, the character of the IHR might be changing. After the SARS epidemic voices have been raised to accredit the IHR with hard obligations. The IHR constitute more of a positive right to aid in situations where it is required to limit an epidemic than it raise questions of political or legal power.

As aforementioned, soft law constitutes an alternative map in cartography of international law. Its presence in the international sphere, it can be assumed, is real and significant. Despite its non-binding character, the findings suggests that it wields power over the actors at the international and national level, affecting state behaviour in a manner similar to international hard law. Maps of international soft law sometimes overlap national large-scale maps and in other cases it merely complements existing law. The scale of the map of soft law varies as well, sometimes comprising a few co-operating states while in other cases it covers the entire international society. Not seldom, as the research indicates, the soft rules of these non-binding treaties become solidified through custom, new treaties or in national legislation. Hence, covering the territory of soft law with a single, one scaled, map is impossible. Soft law can not, according to the facts here presented, be generalised into one single entity and is not easily described. As discussed earlier, the blurred boundaries of soft and hard laws are often confusing not only for states people, but also for international lawyers. Their legal and political impact suggests that the map of soft law might be hard to read but the landscape, which it describes, is of interest for students of international law and international relations, as well as political science.

The research has shown a noteworthy private influence over or presence at the production of soft law documents. As above indicated, in the case of the Rio Declaration, the Johannesburg Summit and the participation in the creation of IHR, the extensive presence of private actors suggests a wider acceptance of private elements than in the creation of international law proper. The only documented example of private authority in creating international soft law, though, is the ICC’s Incoterms. The Incoterms were and still are entirely produced by the private actors that comprise the Chamber. It is an interesting example of how soft law can be produced without the influence of state representatives. The Incoterms did, however, require the acceptance of state power in order to be reached the level of international soft law.

It seems reasonable to assume that soft law does not just affect the contents and projection of the domestic laws, but also the domestic and international political debate. The aforementioned paradox of states committing themselves to non-binding rules while underestimating the impact of them has had interesting political
implications. The correlation between compliance and the legal character does not necessarily correspond. As mentioned above, soft law does not necessarily translate into soft compliance. In the same fashion, hard law does not always call for a higher degree of compliance. Human Rights in its hard law form, for example, command a low degree of compliance in many cases while the degree of the implementation of paragraphs of the Agenda 21 suggests the opposite. With this comparison, the border between hard and soft rules may seem even more blurred. Again the cartography of law comes to mind. Laws, like maps, distort reality, to be adequate and convenient. The advantages of maps and their limitations derive from their ability to reduce and generalize reality. In the case of soft law and by the narrow definition of international law here presented, the power of its provisions is sometimes forgotten. States political will to participate in non-binding agreements might be seen as an inability to see their far-reaching consequences. The blurring of the hard/soft divide raises problems of legal normativity, in the sense that they produce provisions not accredited but still considered as law, reconstructing the legal system. However, as mentioned earlier, soft law corroborate official governmental political positions on particular issues. Soft law may also articulate the core of existing legal and political norms and create expectations for the future development of international law in the areas being addressed. The norms mediated through the non-binding agreements, it can be argued, express the will and expectations of political authorities in the international ambit, constructing a map of ideas and ideologies not ready to be constituted as hard law, but important enough to be allowed to affect international and national behaviour. In this process, it has been shown, private actors has gained political and legal power.
5. Conclusions

Despite the limited scope of this study several interesting conclusions can be drawn from the material here examined. First of all, it can be said, orienteering through the dense jungle of international legal rules with help of the map of international soft law is a difficult task. The divide between hard and soft provisions in the international ambit is vague and contradictory. As shown above, the degree of compliance and conformity with legal and non-legal rules do not always correspond. It seems as if states people, NGO’s and others are more concerned with the content of the provisions than the legal authority that it holds. Thus, it can be argued that the legal normativity of a resolution is not consistent with normative values of the international society. Considering the facts here put forward, it is a false assumption to regard soft law as mere recommendations or proclamations constructed with the purpose to facilitate national interests, as some realists might argue. Soft law do play an important part in establishing the rules that govern the international society.

As to the private legal authority in the international ambit exerted by soft law, the discussion can be held short. From a narrow perspective, soft law does and can not hold any private legal authority for the simple reason that soft law does not constitute law proper. As we have seen soft law does not meet the criteria for international law according to the definition here presented. Even if private actors do make soft law, they do not make law. However, if we look at the question from a larger perspective, private participants at conferences, private actors responsible for the creation of soft law regulations and NGO’s affecting the outcome of the legal discourse in multilateral declarations and resolutions do play a significant part in the creation of international soft law through the process pré-droit. This does still not imply that private actors hold any direct legal authority in this connotation nor that soft law should be regarded as international law due to the fact that it repeatedly turn into international hard law or have similar consequences. But it is important to note the momentous impact soft law has on the international and national political discourse and actions. It is also important to note the different private actors’
influence on these rules. However, this can hardly be seen as a new phenomenon. Private actors have always had influence over legal and political decisions through, for example, lobbyism. The question is how extensive these influences are.

Although an individual declaration or resolution may not be sufficient to constitute state practice, in the light of the discussion above, it should be clear that the normative expressions contained in soft law establish international norms and provide evidence of state practice. Additionally, soft law statements such as the Rio Declaration, the Incoterms, and the UDHR, are normative statements that express the beliefs, aspirations and commitments of the actors involved. Although these documents can not be considered as international law, they bear witness to the increased presence of non-state participants in the international arena, and to the achievement of non-state actors in advancing legal standards which represent their views and values. If soft law seems to explain certain behaviours on the international legal scene, then perhaps it ought to be acknowledged as a separate phenomenon.

It is my opinion that more research in the subject of soft law and private political and legal influence should be conducted. A larger and more comprehensive study on the origins of non-binding treaties should reveal the true power accumulated by powerful corporations, organisations and INGO:s in international governance. Also, more research on the character and significance of soft law is required to fully understand its political and legal implications. Until then, we have to rely on the vague assumptions and misunderstandings common in the debate on legal authority and international rules.
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