

The multifaceted and dynamic interplay between hard law and soft law in the field of international human rights law

La multifacética y dinámica interrelación entre el derecho vinculante y el llamado “derecho blando” o derecho no vinculante en el ámbito del derecho internacional de los derechos humanos

Mariana R. Villegas Ergueta*

Abstract

Two principal methods for creating international rules have evolved over the last centuries: treaties and custom. Although, the rapidly growing world community has raised a new challenge: the need to reach agreement regarding issues of common interest, *inter alia*, human rights. In the current scenario, not only the interaction of states is relevant to the process of formation of international law, but also the interrelation of international organizations. These latter actors have brought to the forefront a new instrument to reflect general consensus, namely, the so-called ‘soft law’. Even though ‘soft law’ is not catalogued

* Lecturer at Law Department, Universidad Católica Boliviana “San Pablo”. LL.M in International Human Rights Law. Contact: mariana.villegas@ucb.edu.bo

as a traditional source of international law, the author displays the rationale underpinning its increasing relevance in the human rights field.

Resumen

Durante los últimos siglos, los tratados y la costumbre se han constituido en las dos principales fuentes del derecho internacional. Sin embargo, la rápida expansión de la comunidad internacional ha planteado un nuevo desafío: la necesidad de realizar acuerdos sobre temas de interés común, tales como los derechos humanos. En el escenario actual, no solamente la interacción entre Estados es relevante en el proceso de formación del derecho internacional, sino que también lo es la interrelación de las organizaciones internacionales. Estas organizaciones han puesto en primer plano un nuevo instrumento para reflejar el consenso general: el derecho no vinculante o “derecho blando”. Aunque tal derecho no es considerado una fuente tradicional del derecho internacional, la autora expone los principales fundamentos que sustentan su creciente relevancia en el Derecho internacional.

1. Introduction

The ascertainment of international law can be a difficult process. There is no single body able to create laws internationally binding upon all the international community, or a single court with comprehensive and compulsory jurisdiction to interpret international law. Nevertheless, there are sources from which the rules may be extracted.

Article 38 (1) Statute of the International Court of Justice (ICJ),¹ constitutes a keystone in the analysis of the sources in question. Although, this provision is technically limited to the sources which the Court must apply, there is no serious contention that it expresses the universal perception as to the enumeration of sources of international law, namely: (i) international conventions, whether general or particular; (ii) international custom, as evidence of a general practice accepted as law; (iii) the general principles of law recognised by civilised nations; and (iv) judicial decisions and teachings of the most highly qualified publicists.

¹ Estatute of the International Court of Justice (entry into force 24 October 1945) 993 TS

It is not always possible to make hard divisions between the sources. As the analysis below will show, these overlap to a great extent. Hence, it is crucial to understand the dynamics between them in the process of making of international law.

One might say that from the beginning of the international community two principal methods for creating international rules have evolved: treaties and custom. However, in the aftermath of the Second World War a new political scenario emerged characterized by a bulk of socialist countries and third-world States advocating for treaty making as the most suitable instrument to create new rules of international law reflecting comprehensively the values of the renewed international community. Also, within the rapidly growing world community, general rules could hardly be supported across the different sectors.² Therefore, it was reasonable to expect that the importance of custom as a source of international law would be diminished.

Such scenario led to new avenues for the interaction among the members of the international community in order to achieve consensus about general standards of behaviour; it also raised a new challenge, which is the need to reach agreement regarding issues of common interest for the whole community, *inter alia*, human rights. In that regard, the interplay between non-binding instruments soft law instruments is less often appreciated, although, as it will be shown, it is no less important.

Accordingly, this essay seeks to illustrate the multifaceted and dynamic relationship between treaty law and the so-called 'soft-law'; and the interplay between the latter and customary law. Thus, the following lines examine the current doctrinal and academic debate, as well as the case law regarding such interrelation, aiming to unveil its particular relevance in the human rights field.

2. Treaties and customary law

Customary rules are normally binding upon all members of the world community (or upon a group of states, in the case of regional customs); whereas treaties only bind those States that ratify or adhere to them.

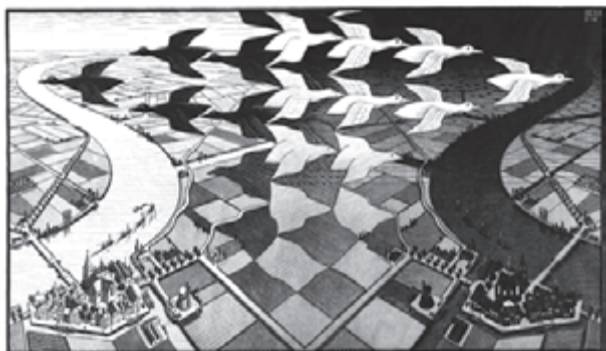
Initially, the only multilateral treaties were peace treaties. However, when the international community was expanded, the international regulation of treaties became more certain and detailed to respond to the new demands of the

² Further explanation in Cassese (2008:165).

socialist and developing States. The landmark of this process is embodied in the 1969 Vienna Convention on the Law of Treaties,³ which was followed by the 1986 Vienna Convention on the Law of Treaties between States and International Organizations.⁴

Nowadays, multilateral, regional and bilateral treaties cover many fields, and they have created international monitoring organs and mechanisms in order to ensure respect for them. On the other hand, even though custom has inherent problematic elements, regarding the difficulty the process of generation of customary norms; there is a continuous need of custom, given the fact that the international community is not able to adopt multilateral treaties in all fields of international law, and customary law fills those gaps. Pursuant to Article 43 of the Vienna Convention on the Law of the Treaties, customary norms also contribute to the universality of norms, because the denunciation of a treaty does not release that state from such obligations in that treaty which are also customary norms.

3. Treaties and custom interrelate



M.C. Escher

The ICJ has clarified the relations between codification treaties and customary international. First of all, it was noted that treaties may have a declaratory effect, that is they simply codify or restate an existing customary rule; in that vein it was established by the Court in *Legal consequences for States of the continued presence of South Africa in Namibia*, where the Court noted that Article 60 of the

Vienna Convention on the Law of Treaties concerning termination of a treaty relationship was merely declaratory of existing law.⁵

Secondly, as the ICJ stressed in the *North Continental Shelf cases* with regards to Articles 1 and 3 of the Convention on the Continental Shelf, treaties can

3 Vienna Convention on the Law of Treaties (entry into force 27 January 1980) 1155 UNTS, p. 331.

4 Vienna Convention on the Law of Treaties between States and International Organizations (entry into force 12 March 1986) 1155 UNTS, p. 331.

5 *Legal consequences for States of the continued presence of South Africa in Namibia* (Advisory Opinion) 1971, para 47.

have a crystallizing effect in that they bring to maturity an emerging customary rule.⁶

Thirdly, a treaty can have a generating effect when its implementation gradually brings about, or contributes to the formation of a corresponding customary rule. For instance in the *North Sea Continental Shelf* the ICJ considered admissible a process whereby a treaty provision while only conventional in its origin, later on is accepted as an international rule, so as to being binding to all the international community.⁷

The ICJ has also established that even where a treaty rule comes into being covering the same ground as a customary rule, the latter will not simply be absorbed within treaty law but it will maintain its separate existence. This assertion was illustrated in *Nicaragua* where the ICJ found in this respect, so that the Court was able to examine the rule as established under customary law, whereas due to an USA's reservation, it was unable to analyse the treaty-based obligation.⁸

4. Elements of customary law

Article 38 of the ICJ Statute reflects the general view that customary international law is made up of two elements: (i) general practice, (ii) a subjective element in the form of a conviction that such practice amounts to law, commonly known as *opinio iuris*. These elements were also signalled in *Lybia/Malta*, where the ICJ noted that the substance of customary law must be looked for primarily in the actual practice and *opinio iuris* of States.⁹

4.1. Practice

In *Asylum* the ICJ stated as the basic rule the 'constant and uniform usage' applied by the States, by referring to the element of practice before a customary rule could come to existence.¹⁰ In the *Anglo-Norwegian Fisheries*, the ICJ emphasized such view, by asserting that some degree of uniformity among

6 *North Continental Shelf Cases* [1969] ICJ Rep, para 39

7 *Ibid*, paras 73-74.

8 *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para. 14.

9 *Libya/Malta* [1985] ICJ Rep, pp. 13, 29

10 *Asylum Colombia/Perú* [1950] ICJ Rep, paras 116, 131, 138.

States' practices was essential.¹¹ In *North Sea Continental Shelf* the ICJ remarked that to form a new rule of customary law, state practice had to be not only extensive but also 'virtually uniform' in the sense of the provision invoked.¹²

However, in *Nicaragua*, the Court emphasized that:

The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of states should in general, be consistent with such rules, and that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.¹³

As to the duration of the practice, the ICJ asserted in *North Sea Continental Shelf* that within the period in question, short though it might be, state practice should have been both extensive and virtually uniform in the sense of the provision invoked.¹⁴ This flexible criterion has led to some writers to propose that instant customary law is possible by virtue of the newness of the situations involved and the necessity to preserve a sense of regulation in international relations, provided that the *opinio iuris* could be clearly established. They mention, for instance, the law relating to a state's sovereignty over its airspace which developed very quickly in the years immediately during the First World War. Similarly, the principle of non-sovereignty over the space came into being soon after the launching of the first satellites.¹⁵

4.2. *Opinio iuris*

Once the existence of a specified practice has been established, it becomes necessary to consider how the State views its own behaviour, assessing the subjective element of *opinio iuris*. In this regard, the Permanent Court of International Justice (PCIJ) expressed an important point of view in *Lotus*, where the Court reasoning allows to infer that only if State action (properly, abstention in the case at hand) was based on the States belief that existed duty to act (or to abstain in this case) it would be possible to speak of an international custom.¹⁶

11 *Norwegian Fisheries (United Kingdom v UK)* [1951] ICJ Rep 11, para 116.

12 *North Continental Shelf* (n3), para 3.

13 *Nicaragua* (n8), para 186.

14 *North Continental Shelf* (n3), para 74.

15 See further detail in Shaw (2008:78-79).

16 *The Lotus Case (France v Turkey)* PCIJ Series A N° 10, para. 18.

A similar approach can be found in *North Continental Shelf*, where the ICJ expressed that extensive and virtually uniform practice should have occurred in such a way as to show a “general recognition that a rule of law or legal obligation is involved”. In the case at hand, the ICJ emphasized that no customary rule had evolved, as the conviction of the States that they were conforming to what amounted to a legal obligation was lacking.¹⁷

This approach was maintained in *Nicaragua* (108-109), where the ICJ noted: ‘for a new customary rule to be formed, not only must the acts concerned amount to a settled practice, but ‘they must be accompanied by the *opinio iuris sive necessitatis*’, so that their conduct is evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.’¹⁸

Experts note that that purely a political or moral gesture does not suffice, but also that the difficulty regarding *opinio iuris*, is that sometimes it is hard to pinpoint exactly when a new rule is created, since that obviously requires action different from or contrary to what until then is regarded as law.¹⁹ However, *Nicaragua* also offers an important key with this regard, since the Court noted that a State’s resort to factual or legal exceptions to justify a prima facie breach of a rule has the effect of confirming the general rule, rather than undermining it or creating an exception to it.²⁰

5. New ingredients in the formation of customary law

Nowadays the views regarding the process of generation of customary law present interesting nuances, largely due to a renewed international scenario, where not only the interaction of States is relevant to the process of formation of custom, but also the interrelation of new actors such as the international organizations. In turn, these latter actors have brought to the forefront a new instrument to reflect general consensus, namely the so-called ‘soft law’.

Moreover, custom has become an increasingly significant source in important areas such as human rights obligations.

17 *North Continental Shelf*, (n3) para 43.

18 *Nicaragua* (n8) paras108-109.

19 See, in this vein, Shaw (2008: 87, n15)

20 *Nicaragua* (n8) para186.

5.1. Traditional and modern approaches on customary law and human rights

The traditional view of custom focuses primarily on State practice in the form of state interaction and acquiescence; it is identified with an inductive process in which a general custom is derived from instances of state practice. This approach is evident in *Lotus*, where the PCIJ inferred a legal custom about objective territorial jurisdiction over ships on the high seas from previous instances of state action and acquiescence.²¹

By contrast, the modern view of custom applies a deductive process that begins with general statements of rules rather than particular instances of practice. It emphasizes *opinio iuris* instead of practice because it relies primarily on statements rather than actions. It can develop quickly because it is deduced from multilateral treaties and declarations by international fora.

In this regard, Cassese (2005) proposes that whenever exists conflicting economic or political interests, *e.g.*, in the law of the seas, practice may acquire greater importance for the formation of a customary rule. In the other hand, *opinio iuris* acquires a prominent role when it is based on evident and inherently rational grounds; this for example, holds true for the customary rules prohibiting genocide, slavery, torture or racial discrimination (158).

Various names have been assigned to such a modern view, among others, 'modern positivism'. It has also been known as the 'Nicaragua method' in consideration that the *Nicaragua* case is commonly cited in this context,²² in particular the rationale stating that state acts in a way *prima facie* incompatible with a recognised rule, but defending its conduct by appealing to exceptions or justifications, confirm rather than to weaken the rule'. *Nicaragua* results also relevant to back this theory since the ICJ derived custom (in the case at hand, with regards to non-use of force and non-intervention) from statements such as the Declaration of Friendly Relations and Cooperation Among States, which for the defenders of 'modern custom', amounts to equate such instrument as state practice.²³

Accordingly, in *Tadic*,²⁴ regarding rules of international humanitarian law, the International Criminal Tribunal for the Former Yugoslavia (ICTY) most elo-

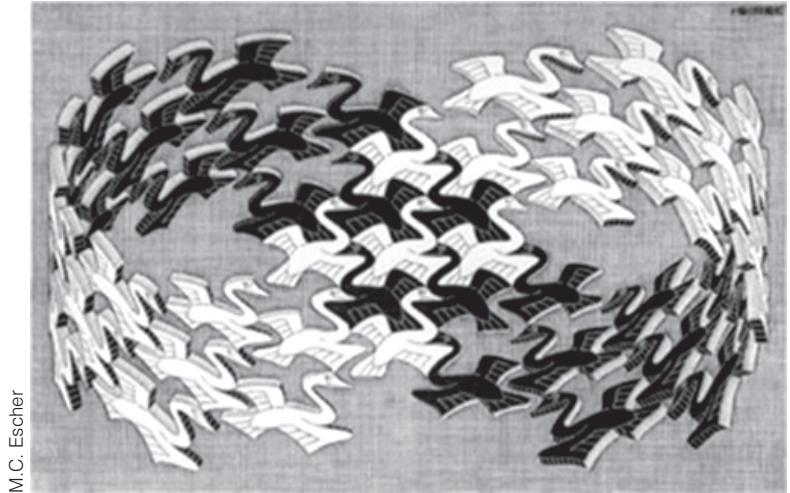
21 In that regard, see Roberts (2001:95).

22 In this vein, see Wouters and Ryngaert (2009:112-114); also Hannikainen (2006: 128-129)

23 *Nicaragua* (n8), para. 186.

24 Prosecutor v. Tadic [1995] ICTY-94-1-AR72, para. 99.

quently played down inconsistent state practice, notably on the battlefield, in the face of more verbal state practice and *opinio iuris*.²⁵ Moreover, in *Fisheries*,²⁶ the ICJ argued that too much importance need not be attached to contradictions in practice relating to a rule of customary international law.



Considerable discussion over such issues has arisen, not only in each extreme of the stance but also assuming an intermediate position. Along these lines, Kirgis rationalizes the divergence between ‘traditional’ and ‘modern custom’ by analyzing the requirements of state practice and *opinio iuris* on a sliding scale. In his view, at one end, highly consistent state practice can establish a customary rule without requiring *opinio iuris*; however, as the frequency and consistency of state practice decline, a stronger showing of *opinio iuris* will be required; the exact trade-off between both elements would depend on the importance of the activity in question and the reasonableness of the rule involved. Such stance has been criticized in the sense that it seems to reinterpret the concept of custom so as to produce the ‘right’ answers.²⁷

However, Tasioulas proposed that the sliding scale can be rationalized on the basis of Dworkin’s interpretive theory of law, which balances a description of what the law has been, with normative considerations about what the law should be. Thus, the courts may be less exacting in requiring state practice and *opinio iuris* in cases that deal with important moral issues (Roberts, 2001:760).

On that basis, Roberts seeks to reconcile the traditional and modern approaches. She rejects the approach of custom on a sliding scale basically because it does not accurately describe the process of identifying customary rules. Hen-

25 Further analysis in: Wouters And Ryngaert (n23), 116.

26 *Anglo-Norwegian Fisheries* (n11), para 87.

27 For further detail, see Roberts (2001: 759, 760 ,n21,)

ce, she presents an alternative vision of Dworkin's interpretive theory of law applied to custom.

Roberts explains that the best balance between the justifications of 'descriptive' accuracy (what the law is) and 'normative' appeal (what the law should be) depends, in turn, on the 'facilitative' or 'moral' content of the custom involved. International law has expanded to include many moral issues such as human rights, the use of force, and environmental protection. That is, for instance, why the normative and moral law of the prohibition of torture remains regardless the contrary practice. The core of Roberts proposal is embodied in the reflective interpretive approach which aims to reach a reflective equilibrium in light of new state practice, *opinio iuris* and moral considerations (Roberts, 2001:761-791).

Moreover, based on *Nicaragua*²⁸, Roberts suggests that state practice is not an automatic operation but is open to interpretation. Hence, inconsistent state practice can be interpreted both as a breach of an existing custom, or a seed of a new custom, then we do not need the sliding scale to trade-off state practice and *opinio iuris*.

An interesting historical landmark regarding the somehow 'differentiated role' of *opinio iuris* and practice was first discussed in the humanitarian law of armed conflict, in reference to the so-called Martens Clause inserted in the 1899 Hague Convention II containing the Regulations on the Laws and Customs of War on Land. Writers properly note then, that the Clause puts the 'laws of humanity' and 'the dictates of public conscience' on the same footing as State practice.²⁹ The justification would be that humanitarian demands, require to keep a balance between military activities and their devastating impact, even before such demands have been translated into practice. Such Clause was subsequently taken up in treaties, including the 1949 Geneva Conventions, and it was also referred by the ICJ as an effective means of addressing the rapid evolution of military technology.³⁰

28 *Nicaragua* (n8), para186.

29 In that vein, Cassese (2005:160, n22)

30 *Legality of the Threat or use of nuclear weapons (Advisory opinion)* [1996] ICJ Rep, para 78.

5.2. Soft law and international organizations influencing the making of customary law

The term soft-law is a description for a variety of non-legally binding instruments used in contemporary international relations. It encompasses, *inter alia*, inter-state conference declarations, interpretive guidance adopted by human rights treaty bodies, non-treaty inter-state agreements, and, also potentially, common international standards adopted by transnational networks of regulatory bodies (Boyle & Chinkin, 2007: 213).

Furthermore, aside from the increase of the number of States, the 21st century is characterised by the increasing role of intergovernmental organizations in the development as well in the supervision of international law.

Hannikainen (2006) notes that article 38 of the ICJ Statute does not speak of state practice but of general state practice, for it can be interpreted as the practice by the full subjects of international law. For the author, the affirmative voting of resolutions of international organs constitute not only relevant state practice but also *opinio iuris* of States, they also constitute relevant practice of international organizations and what could be couched as *opinio iuris communis*.³¹ Moreover, such assertion is reinforced because of the difficulties faced currently to reach agreements within a world community deeply divided economically and politically.

The ICJ has in a number of cases utilised resolutions of the General Assembly (GA) of the United Nations (UN) as confirming the existence of *opinio iuris* focusing on the content of the resolution and the conditions of their adoption. For instance in the Advisory Opinion on the *Legality of the Threat or use of nuclear weapons*³², the ICJ asserted that GA resolutions may have 'normative value' and in particular may: (i) provide evidence for establishing the existence of a rule or the emergence of an *opinio iuris*, (ii) series of resolutions can show the gradual evolution of the *opinio iuris* required for the establishment of the new rule.

31 Hannikainen includes more examples of International Organizations contributing substantially to the creation of customary law, including the UNGA, the status-of forces-agreements (SOFAs) in peacekeeping operations, the Red Cross and Customary International Law, and the establishment of international standards within the European Commission against racism and intolerance of the Council of Europe (133-138).

32 *Legality of the Threat or use of nuclear weapons* (n34), paras 226-254.

The ICJ has also noted in *Construction of a Wall in the Occupied Palestinian Territory*, that evidence of the existence of rules and principles may be found in resolutions adopted by the GA and the Security Council of the UN.³³

In *Gabcikovo-Nagymaros*,³⁴ the ICJ has referred for the same purpose the work of the International Law Commission (ILC), which was established by the GA aiming to promote the progressive development of international law and its codification.

Moreover, the ILC pointed out that ‘records’ of the cumulative practice of international organisations may be regarded as evidence of customary law with reference to States’ relations to the organisations.³⁵

5.2.1. Particularly relevant features of soft law

Overall, it can be said that the intention of the parties as inferred from all the relevant circumstances is determinative as to whether they intended to create binding legal relationships between themselves. Along these lines the ICJ stated in *Nicaragua* that *opinio iuris* may be deduced from the attitude of States towards certain GA’s resolutions.³⁶ Moreover, as Roberts notes, in *Nicaragua*, the ICJ has relied on resolutions couched in both mandatory and non-mandatory language.³⁷

Interestingly, in *Legality of the Threat or use of nuclear weapons*, the Court found that there was no evidence of a customary rule prohibiting the use of nuclear weapons, based on the fact, among others, that those resolutions have been adopted with ‘substantial numbers of negative votes and abstentions.’³⁸

6. Human rights as part of customary law

Resolutions and declarations passed by the UNGA appear to express rules of law adopted by large majorities, among others: the Nuremberg Principles, the Declaration of Genocide as a crime under international law, or the resolutions condemning South Africa for apartheid. Although, this apparently new procedure of law making can be deemed controversial considering that the UN

33 *Construction of a Wall in the Occupied Palestinian Territory* (136-171)

34 *Gabcikovo-Nagymaros* par 38-42, 46.

35 International Law Commission (1950: 368-372)

36 *Nicaragua* (n8) 433, 444.

37 *Nicaragua* (n8) 203-204.

38 *Legality of the Threat or use of nuclear weapons* (n34), paras 226-254.

Charter does not set forth explicit authority to the GA to designate conduct as illegal, neither to assert obligations and rights applicable in particular cases.³⁹ Moreover, the instruments passed in these fora constitute 'soft law'.

UNGA's resolutions have also fostered a political discourse (via statements of national officials) condemning human rights violations resorting to the Universal Declaration of Human Rights (UDHR) as a key authoritative instrument. Moreover, human rights provisions are persistently incorporated in national constitutions and national laws. In that sense, human rights are demanded as basic whether or not they are set out in treaties (Steiner & Alston, 2000:228-230).

Overall, a general perception exists that -irrespective of the existence of treaty law- some rights are recognized as mandatory for all countries, namely, slavery, genocide, torture. In this vein, Steiner and Alston consider studies carried out for the UN Commission on Human Rights examining national laws on a global scale, as well as governmental and scholarly statements revealing that some rights are invoked as principles of general international law, including: The rights to self-determination, the individual right to leave and return to one's country; the principle of *non-refoulement* for refugees threatened by persecution (230). In all these cases, the main point is that the rights are now demanded as basic and essential whether or not they are listed in treaties.

None of the foregoing elements of evidence conform to the traditional criteria; their weight proving custom's existence cannot be assessed without considering the negative practice. Nonetheless, the verbal affirmations are treated as the most persuasive evidence.

This reasoning can be extrapolated to other fields of international law e.g. human rights law and the humanitarian norms. These fields share as a particular feature: strong *opinio iuris*, enshrinement in international conventions, and they are characterized by inconsistent state practice. In that sense, for instance, customary law that prohibits genocide remains intact, notwithstanding the multitude of examples of non-compliance, because *opinio iuris* regarding the duty of compliance continues to exist.

In that vein, Condorelli expresses that while hard law -that is always enforced- may be preferable to soft law, the choice in areas such as human rights is often between hard law and no law. Giving these aspirations some legal force may be preferable to giving them no legal status (Roberts, 2001:790).

39 In this sense see Steiner and Alston (2000:228-230)



M.C. Escher

It is true that States may have different reasons to vote for a resolution, including political expediency and the desire not to be pointed out as a dissenter. Although, one may say that if a State consistently votes for such resolutions, it cannot rely on the assumption that this affirmative expression has no legal consequences.

Another theory is premised on Article 56 of the UN Charter which pledges members to take action to achieve certain ends of the Charter, including human rights. It is suggested that the UDHR- by authoritatively spelling out the recognized human rights- gives specific content to the obligation.

6.1. Towards a new category of source of international law?

For Jennigs, the phrases ‘modern’ ‘new’ ‘instant’ custom appear inherently contradictory to the nature of customary law. On the other hand, authors as Charney, Bodansky, and Chodosh, conclude that modern custom is really a new species of ‘universal declaratory law’ because it is based on authoritative statements about practice rather than observable regularities of behaviour.⁴⁰

Schachter argues that international rules are not all equal. Some are more important because they express convictions as to the unacceptability of a conduct; that is why contrary and inconsistent practice should not defeat their claims as customary law. Similar is the case of *ius cogens* norms that do not require conformity of practice, and do not admit objectors. Moreover, he suggests to consider human right norms as a species of ‘higher law’ which constitute strongly supported prohibitions of State conduct and important to international order and human value (Steiner & Alston, 2000: 15).

Some others suggest that human rights are now part of a sort of ‘universal international law’. In that sense, in *Barcelona Traction* the ICJ expressed:

⁴⁰ Further analysis in Roberts (2001:759, n21)

An essential distinction should be drawn between the obligations of a state towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature, the former are the concern of all states. In view of the importance of all rights involved, all States can be held to have a legal interest in their protection; they are obligations '*erga omnes*'.⁴¹

Such obligations would comprise, for example, the outlawing of acts of aggression, and of genocide, the basic rights of the human person including protection from slavery and racial discrimination.

In turn, Henkin deems that such law is 'constitutional' in a new sense, in a radical derogation from the axiom of sovereignty, that law is not based on consent, it does not accept dissent, it may have sneaked into the law on the back of another idea, *ius cogens* that has not been built by state practice either (cited in Steiner & Alston, 2000: 235).

For Boyle and Chinkin (2007), whether one should call the product of this process 'general international law', or retain the terminology of 'custom' is largely a matter of choice rather than doctrine, although, 'general international law' seems to reflect more accurately this product of complex and subtle interaction of norm and process (262).

7. Conclusions

Considering all the above, it seems pretty accurate to assert that soft law cannot be dismissed on the ground that it is not part of the traditional categories of international law. As it has been analysed, soft law can become into binding treaties. The UDHR constitutes the most prominent example of such assertion, since the Declaration rules have been acknowledged in countless international instruments, such as the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, just to name the most paramount, given all the machinery to promote, support and monitor the compliance with human rights obligations that have resulted from them.

In this regard, one cannot fail to note the major role of international organisations, such as the UN and other regional bodies, in the current international scenario for two particular reasons: (i) the soft law agreed in the international fora of this organizations, has proved to constitute the normative core of

41 *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* [1951] ICJ Rep, paras 33-34.

subsequent practice which can be regarded, at some point, as customary law; (ii) such rules are frequently incorporated as major inputs for the drafting of treaties.

Furthermore, contrary to the belief that the role of customary international law would decline, favouring instead the predominance of treaty law, the former still plays an essential role in global affairs. Although the means in which this happens, differ from the traditional perspective of custom as a source of law. In this regard, there is still an active debate between different positions, on the one hand, the 'traditional positivism' which serves best the sovereign interests of States requiring the consent expressed in binding instruments, and, on the other hand, a 'modern custom' approach which best serves the protection of human rights and the globalization of universal values, in particular when tackling the problematic of broad reservations to treaties, e.g. the Convention to Eliminate all forms of Discrimination Against Women. The author leans towards the latter given that it shields a paramount common interest to protect human dignity.

Whether a new category of customary law is coming into being, still remains controversial, although, the international judgments, state practice and academic views offer strong basis for a possible agreement towards the acknowledgement of such assertion; or at least, an agreement regarding the existence of discernible variants with regards to the current process of generation of rules in the human rights field.

References

1. Boyle, A. and C. Chinkin. *The making of international law*. New York: Oxford University Press, 2007.
2. Cassese, A., *International Law*, 2nd edn., Oxford, 2005.
3. Hannikainen, L. "Customary Law: Are Rumours of Its Death Exaggerated?" *Baltic Yearbook of International Law*, 6: 125-141, 2006.
4. International Law Commission. *Yearbook of the ILC*. Vol. II: 368-372, 1950.
5. Pronto, A. "Some thoughts on the Making of International Law." *European Journal of International Law*, 19 (3):601-616, 2008.
<<http://www.ejil.org/pdfs/19/3/1629.pdf>>.
6. Roberts, A. "Traditional and Modern Approaches to Customary International Law: A Reconciliation." *American Journal of International Law*, 95 (4): 757-791, 2001
<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1514331>
7. Shaw, M. *International Law*. 6th edn, Cambridge, 2008.
8. Steiner, H. and P. Alston. *International Human Rights in Context: Law, Politics, Morals*. 2nd edn, Oxford, 2000.
9. Wouters, J. and C. Ryngaert. "Impact on the Process of the Formation of Customary International Law". In: M. T. Kamminga and M. Scheinin (eds.), *The Impact of Human Rights Law on General International Law*, Oxford, 2009.

Table of Case Law

International Court of Justice

Anglo-Norwegian Fisheries (United Kingdom v UK) [1951] ICJ Rep 11.

Asylum Colombia/Perú [1950] ICJ Rep.

Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) [1951] ICJ Rep.

Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits) [1986] ICJ Rep 14.

Gabcikovo-Nagymaros [1997] ICJ Rep.

Legality of the Threat or use of nuclear weapons (Advisory opinion) [1996] ICJ Rep.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory opinion) [2004] ICJ Rep.

Libya/Malta [1985] ICJ Rep.

North Continental Shelf Cases [1969] ICJ Rep.

International Tribunal for the former Yugoslavia

Prosecutor v Tadic [1995] ICTY-94-1-AR72

Permanent Court of International Justice

The Lotus Case (France v Turkey) PCIJ Series A N° 10

Table of legislation/international instruments

Estatute of the International Court of Justice (entry into force 24 October 1945) 993 UNTS.

Vienna Convention on the Law of Treaties (entry into force 27 January 1980) 1155 UNTS, p. 331.

Vienna Convention on the Law of Treaties between States and International Organizations (entry into force 12 March 1986) 1155 UNTS, p. 331.