
Softness in International Law: A Self-Serving Quest for New Legal Materials

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Abstract

The concept of soft law which rests on the idea that the binary nature of law is ill suited to accommodate the growing complexity of contemporary international relations has been endorsed by a large number of scholars. It has however remained under the attack of those who are commonly portrayed as positivists. Although it does not seek to rehabilitate positivism as a whole, this article will try to offer a refreshed and modernized account of the positivist objection to soft law. It will accordingly distinguish several types of softness. Such a dichotomy will help to unravel the underlying agenda of some of the staunchest supporters of the concept of soft law. The article will ultimately expound on the proneness of international legal scholars to stretch the limit of their object of study by constantly seizing materials outside the realm of international law in order to alleviate the strain inherent in the contemporary proliferation of international legal thinking.

Introduction

The theory of the softness of international law has been gaining significant currency in international legal scholarship over recent decades. Its proponents have argued that not only has law proven soft, but so have governance,¹ law-making,² international organizations,³ enforcement,⁴ and even – in a critical legal perspective – international

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¹ Abbott and Snidal, 'Hard and Soft Law in International Governance', 54 *International Organization* (2000) 421.

² Dupuy, 'Soft Law and the International Law of the Environment', 12 *Mich J Int'l L* (1990–1991) 420, especially at 424.

³ Klabbers, 'Institutional Ambivalence by Design: Soft Organizations in International Law', 70 *Nordic J Int'l L* (2001) 403.

⁴ Yoshida, 'Soft Enforcement of Treaties: The Montreal Protocol's Noncompliance Procedure and the Functions of Internal International Institutions', 95 *Colorado J Environmental L & Policy* (1999) 95; Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law', 48 *ICLQ* (1999)b 901, especially at 909.

legal arguments.⁵ The general idea of softness commonly rests on the presupposition that the binary nature of law is ill suited to accommodate the growing complexity of contemporary international relations, and that complementary normative instruments are needed to regulate the multi-dimensioned problems of the modern world.

It is no surprise that such a vision of international law has raised the hackles of those who are commonly portrayed as positivists.⁶ These scholars have generally been drawing on the idea that law is either hard or not law at all.⁷ It is true, as the proponents of softness contend, that positivists have sometimes failed to grasp the full extent of the evolutions affecting the regulatory tools which are used in contemporary international relations. It must be acknowledged, however, that the positivist criticisms of the softness of international law have been overly played down and scarcely addressed. This article tries to unravel the reasons why the fundamental flaws of the softness theory on which positivist lawyers have shed some light have been so widely ignored. It will be submitted that the careful eschewing of the flaws of the softness theory spotted by positivists reflects the unease felt by contemporary legal scholars as to the limits of their field of study. In particular, it will be argued that the quest for softness amounts to an endeavour by scholars to broaden the international law discipline beyond its original ambit with a view to expanding the potential objects that they can seize and study. Drawing on this critical argument, this article will ultimately seek to offer a refreshed and modernized version of international legal positivism.

Although the theory of the softness of international law has gained ground with respect to various mechanisms of the international legal order, as is alluded to above, this article zeroes in on the softness of *law* itself, first because it has attracted most of the attention of legal scholars. Moreover, focusing on the softness of law proves more illuminating because the debates revolving round the concept of 'soft law' provide better hints at the underlying motivations which drive those who seek to stretch the limits of law beyond its classic 'frontiers'.⁸ The lessons learnt as regards the underlying doctrinal agenda of the proponents of the soft law theory which this article attempts to lay bare will nonetheless remain transposable to the other components of the softness theory.

This article starts by recalling the premises of the positivist objection to soft law. More precisely, it will draw upon the classical theory of legal act to which positivists resort and which allows us to distinguish two types of soft law, each of them having been the object of different criticisms. It will then be explained that, while one dimension

⁵ Kennedy, 'The Sources of International Law', 2 *American U J Int'l L and Policy* (1987) 1, especially at 20–21.

⁶ On the history of some strands of positivism see A. Truyol Y Serra, *Doctrines sur le fondement du droit des gens* (ed. R. Kolb, 2007). For a discussion about a leading figure of positivism see Gaja, 'Positivism and Dualism in Dionisio Anzilotti', 3 *EJIL* (1992) 123. See also Nolte, 'From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-state Relations', 13 *EJIL* (2002) 1083.

⁷ The strongest criticism has been levelled by Weil, 'Towards Relative Normativity in International Law?', 77 *AJIL* (1983) 413.

⁸ The expression is from G. Schwarzenberger, *The Frontiers of International Law* (1962).

of soft law proves to be inextricably flawed from a positivist standpoint, positivism preserves the validity of the other aspect of soft law (part 1 below). The argument that the positivist objections to soft law do not invalidate soft law in its entirety will help to elucidate the motives for shunning the positivist criticism and provide inklings on how the limits of international law and the role of international legal scholars are perceived today (part 2 below).

1 The Positivist Criticisms of Soft Law

The entire positivist critique of the softness of international rests on a two-fold classification, which is a distinction between legal acts and legal facts (see A below) and one between the *instrumentum* and the *negotium* (see B below). This taxonomy needs to be briefly recalled here as it contributes to the understanding of the positivist objections to soft law.

A The Premises of the Positivist Objection to Soft Law

Subject to some exceptions,⁹ positivist scholars generally reject the idea of softness on the basis of their theory of the legal act, that is a coherent and systematic set of analytical principles that allows one to capture those state behaviours which fall within the realm of law.¹⁰ In this respect, it is particularly bewildering that those scholars who have wholeheartedly supported the theory of the softness of law have shied away from disclosing their own understanding of the concept of legal act.¹¹ This has been particularly true for Anglo-Saxon scholars, in sharp contrast to French legal scholars.¹² Why so little attention has been paid to the theory of the legal act by some strands of legal scholarship may be explained by reasons pertaining to the legal tradition of each author. Indeed, one must acknowledge that theories of the international legal act are, to a large extent, a mere transposition of domestic theories.¹³ The inclination

⁹ See the functional positivism of Ago, 'Positive Law and International Law', 51 *AJIL* (1957) 691. Such a functionalist approach of positivism should not be conflated with the realist objection to positivism which was also denoted as 'functional': see Morgenthau, 'Positivism, Functionalism and International Law', 34 *AJIL* (1940) 260.

¹⁰ For the first fully-fledged theories of the legal act see D. Anzilotti, *Cours de droit international, premier volume: introduction – theories générales* (trans. Gidel, 1929), especially at 333–456. See also G. Scelle, *Précis de droit des gens. Principes et Systématique* (1934–1936), 2 vols; Basdevant, 'Règles générales du droit de la Paix' 58 *Collected Courses* (1936–IV) 475, especially at 638–655.

¹¹ On the scarcity of theories of the legal act in Anglo-Saxon legal scholarship see Cot, 'Tableau de la pensée juridique américaine', 110 *Revue générale de droit international public* (2006) 537; Jacqué, 'Acte et norme en droit international public', 227 *Collected Courses* (1992–VI) 367.

¹² One of the most illuminating theories of the international legal act has been offered by Reuter, 'Principes de droit international public', 103 *Collected Courses* (1961–II) 425.

¹³ For an illustration see Jacqué, *Elements pour une théorie de l'acte juridique en Droit international public* (1972), at 37–42. On the analogies with domestic law in international law see generally H. Lauterpacht, *Private Law Sources and Analogies in International Law* (1927).

of French scholars to devise a fully-fledged theory of the legal act is probably not surprising, given the overarching importance that it has in the civilist legal tradition.¹⁴

Short of a sound theory of the legal act, one can hardly grasp the basic canons of the positivist attack on the softness theory, which is why some of them must be recalled here. As a starting point, positivist scholars classically highlight the fact that many state behaviours ignite specific consequences in the legal order. These consequences usually boil down to the effects generated by the application of existing legal rules. For instance, a behaviour which contradicts an international norm will trigger an obligation to cease the wrongful act¹⁵ and the obligation to compensate any injury that more or less directly arises from it.¹⁶ Likewise, the behaviour of a state which constitutes a practice in line with similar prior practice by other states will partake in the emergence, the generation, or the consolidation of a customary rule.¹⁷ On the contrary, the behaviour which is at odds with a fledgling customary rule may dampen its existence or permit the state concerned to circumvent the rule once it has been consolidated.¹⁸ By the same token, the recognition by a state of a new entity will help such entity bolster its *effectivité* and eventually qualify for statehood.¹⁹ The foregoing are thus illustrations of behaviours which yield some legal consequences in the legal order. Even though legal consequences are attached to these behaviours and even though they take the form of an act, they are not necessarily, in the eyes of positivist lawyers, *legal acts* in the strict sense.

To enable it to qualify as a legal act, the legal effect of the act in question must *directly* originate in the will of the legal subject to whom the behaviour is attributed and not to any pre-existing rule in the system.²⁰ In that sense, the legal act is what usually allows legal subjects to create new rules,²¹ although the creation of rights and

¹⁴ See in general, Aubry and Rau, *Cours de droit civil français* (5th edn, 1897), iv, at 104. For an insightful picture of the French international legal scholarship see generally Jouannet, 'Regards sur un siècle de doctrine française de droit international' [2001] *Annuaire français de droit international* 1.

¹⁵ Art. 30 of the ILC Articles on State responsibility (2001), *Official Records of the General Assembly*, 56th session, Supp. No. 10 (A/56/10), chap. IV.E.1.

¹⁶ See Arts 28 and 31 of *ibid.*

¹⁷ *North Sea Continental Shelf case* [1969] ICJ Rep 3, at 44.

¹⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 14, at para. 186. See on this point Kammerhofer, 'The Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems', 15 *EJIL* (2004) 523, at 531–532.

¹⁹ d'Aspremont, 'Regulating Statehood: The Kosovo Status Settlement', 20 *LJIL* (2007) 649; see also from the same author on this topic 'La création internationale d'Etats démocratiques', 109 *Revue Générale de Droit International Public* (2005) 889 and *L'Etat non démocratique en droit international. Etude critique du droit international positif et de la pratique contemporaine* (2008).

²⁰ Jacqué, *supra* note 11, at 374 and 381. Jacqué, *supra* note 13, at 187–188; M. Virally, *La pensée juridique* (1960), at 93. Anzilotti, *supra* note 10, at 333–334; Reuter, *supra* note 12, at 531; F. von Liszt, *Le Droit international: exposé systématique* (trans. Gidel, 1928), at 173–174.

²¹ Virally, *supra* note 20, at 95: 'L'acte juridique ... permet surtout aux titulaires de droits-pouvoirs de poser des normes vraiment nouvelles par leur contenu au lieu de se limiter à l'application pure et simple des dispositions figurant dans les règles existantes. Grâce à cet instrument, l'ordre juridique dispose du moyen d'engendrer lui-même et de déterminer les conditions de sa création par une activité volontaire.'

obligation is not a constitutive element of legal acts, as is explained below.²² The will to create rights and obligations which is embedded in the legal act is naturally subject to the few rules pertaining to international public order²³ and which may impinge on the validity of the act itself.²⁴ It remains true, however, that despite the existence of rules regulating the expression of the intention of the parties, the act concerned *directly* originates in the will of its authors.

On the contrary, those acts which yield legal effects but which are not a *direct* consequence of the will of legal persons cannot be considered legal acts. Their legal effects originate in the legal system itself, which provides for such an effect prior to the adoption of the act.²⁵ Their fallout in the legal order is usually envisaged by what are called secondary rules of this system.²⁶ Because these legal effects are not the direct consequence of the will of the state but stem from a pre-existing secondary rule of the system, the acts generating them cannot be construed as legal acts in the strict sense. From a positivist vantage point, they are *legal facts* ('*faits juridiques*'), even though they take the form of an act.²⁷

It could be objected to this mainstream positivist premise that legal persons are aware of the pre-existing secondary rules of international law which attach a given legal effect to a given behaviour. A state may thus seek to set off the former by adopting the latter. This objection is classically countered by positivists by recalling that, in this hypothesis, the legal effects are not the *direct* consequence of the will of the state. They are directly caused by the secondary rules in question, the will of a state wishing to trigger these consequences being only their indirect cause. It may also be objected to the aforementioned conception of the legal act that the production of legal effects is never linked to the will of the subject, but to a pre-existing rule in the legal system which provides that such will generates legal effects like, for instance, the *pacta sunt servanda* rule in the case of bilateral or multilateral legal acts.²⁸ This, however, does not suffice, according to positivists, to demote a treaty to a legal fact as described

²² See *infra*, at B.2.

²³ See the insightful lessons from Kennedy's criticisms on the contractual character of public order in positivist theories: Kennedy, 'International Law and the Nineteenth Century. History of an Illusion', 65 *Nordic J Int'l L* (1996) 385, especially at 398 and Kennedy, 'A New World Order: Yesterday, Today, and Tomorrow', 4 *Transnational Legal and Contemporary Problems* (1994) 329, especially at 370.

²⁴ As regards the validity of conventional legal acts see the VCLT 1969 and VCLT 1986. As regards the validity of unilateral acts see the unsuccessful work of the International Law Commission, *Proposal for Eleven Draft Guiding Principles on Unilateral Acts of States – Ninth Report of the Special Rapporteur* (Mr Víctor Rodríguez Cedeño), 58th session, UN Doc A/CN.4/569. See the comments of d'Aspremont, 'Les travaux de la Commission du droit international relatifs aux actes unilatéraux des Etats', 109 *Revue générale de droit international public* (2005) 163. See more generally Verhoeven, 'Les nullités du droit des gens', in P. Weil (ed.), *Droit International* (1981), i, at 1.

²⁵ See Anzilotti, *supra* note 10, at 333–334: '*un fait n'est pas juridique par lui-même, mais bien à raison de la relation dans laquelle il se trouve avec cet ordre donné*', Reuter, *supra* note 12, at 531.

²⁶ Combacau and Alland, 'Primary and Secondary Rules in the Law of State Responsibility: Categorizing International Obligations', 16 *Netherlands Yrbk Int'l L* (1985) 81.

²⁷ For an early systematization of the distinction between legal acts and legal facts see Anzilotti, *supra* note 10. See also Morelli, 'Cours général de droit international public', 89 *Collected Courses* (1957–I) 589. Jacqué, *supra* note 11, at 372. Virally, *supra* note 20, at 93

²⁸ In this sense see Anzilotti, *supra* note 10, at 333 and 339.

above. Through the application of the *pacta sunt servanda* rule – or through any equivalent principle pertaining to the effects of unilateral acts²⁹ – the authors of the legal act determine, subject to a few curtailments relating to public order,³⁰ the entire extent of the rights and obligations they wish to create, whereas those at the origin of a legal fact can only decide whether or not to trigger those consequences which have been pre-defined by the international legal order.³¹

One must acknowledge that such a distinction between *legal fact* (*fait juridique*) and *legal acts* is not always easy to fathom, especially when legal facts take the form of an act. Some strands of international scholarship are unfamiliar with it. This is well illustrated by the rules on State Responsibility devised by the International Law Commission. The English text understands responsibility as the rules which apply following the commission of a wrongful *act*, while the French text refers to those rules which apply to the commission of a '*fait internationalement illicite*' (internationally wrongful fact). It is worthy of mention that the commentary on the Articles on State Responsibility does recognize that the English translation is inadequate and that, conceptually speaking, rules of state responsibility deals with the consequences of a legal fact, and not those of a legal act:

The French term '*fait internationalement illicite*' is better than '*acte internationalement illicite*', since wrongfulness often results from omissions which are hardly indicated by the term '*acte*'. Moreover, the latter term appears to imply that the legal consequences are intended by its author. For the same reasons, the term '*hecho internacionalmente ilícito*' is adopted in the Spanish text. In the English text, it is necessary to maintain the expression '*internationally wrongful act*', since the French '*fait*' has no exact equivalent; nonetheless, the term '*act*' is intended to encompass omissions, and this is made clear in article 2.³²

Although difficult to grasp and occasionally ignored in certain legal traditions, this distinction between legal acts and legal facts helps one to understand the various dimensions of the softness thesis as well as their respective criticisms. Drawing on the distinction between legal acts and legal facts, it can solidly be argued from a positivist standpoint that the claim of the softness of international law does not pertain to those behaviours which create legal effects irrespective of the will of the state (*fait juridique*). There is no such thing as a *soft international legal fact*. In a positivist logic, although contested, softness can be envisaged only in connection with legal acts in the strict sense, as it is necessarily the outcome of the intention of the subjects, not the result of a pre-existing rule of the international legal system. In other words, softness is not programmed by the international legal order but is simply determined by its subjects and, for that reason, only legal acts can prove soft.

Because softness results from the will of the subjects of the international legal order (and therefore concerns only legal acts), a distinction can be drawn between two types

²⁹ See d'Aspremont, *supra* note 24, at 179–180.

³⁰ See Art. 53 of the 1969 VCLT.

³¹ Jacqué, *supra* note 13, at 188.

³² Commentaries, *ILC Annual Report* (2001), Ch IV in *Official Records of the General Assembly*, 56th Session, Supp. No. 10 (A/56/10), at 68.

of softness. Indeed, when devising a legal act, international legal persons must determine two elements, to each of which corresponds a type of softness. First and by definition, a legal act contains what its author(s) have/has wished. This is classically called the *negotium*. This will is usually recorded in a document or an instrument which is classically called the *instrumentum*. The *instrumentum* is the 'container'.³³ The authors of the legal act have full control of both the *negotium* and the *instrumentum*. In that sense, they determine both the content and the container. This distinction between *negotium* and *instrumentum* thus leads one to distinguish two sorts of softness. It will be shown that one of them is beset by fundamental conceptual flaws and inconsistencies in a positivist logic. The reasons for the continuous and deliberate overlooking of these fundamental flaws by the supporters of the soft law theory will help unravel the doctrinal project of some of the staunchest supporters of soft law.

B A Fragmented Criticism: Soft Instrumentum and Soft Negotium

Drawing on the distinction between the *negotium* and the *instrumentum*, one can ascribe two meanings to the term soft law. It must be noted that these two meanings seem rather estranged from the understanding that its alleged inventor had in mind when he coined the expression 'soft law'. Indeed, many seem to trace the term soft law back to Lord McNair³⁴ even though it is not entirely certain that Lord McNair contemplated anything like a soft *negotium* or a soft *instrumentum*. It may be that he simply alluded to the dichotomy between *lex lata* and *lex ferenda*.³⁵ But whatever these squabbles about paternity, only their current meaning should matter here. In contemporary international law either the *instrumentum* or the *negotium* can be softened. The softness of the *instrumentum* pertains to the choice made by the legal subjects of an instrument which lies outside the realm of law (see section 1). When it concerns the content of their agreement, that is the *negotium*, it refers to a legal act

³³ Such a distinction was already made by Kelsen, 'Theorie du droit international public' 84 *Collected Courses* (1953–III) 136. This distinction was also made by special rapporteur Brieryly of the ILC on the Law of Treaties: '[a] certain linguistic difficulty must ... inevitably pervade the framing of rules for the conclusion of treaties. This is especially the case when the term "treaty" is used primarily to connote the instrument or document embodying a binding agreement rather than the agreement itself... It is innocuous provided that it does not obscure the real nature of treaty, which is a legal act or transaction, rather than a document': A/CN.4/32, [1950] *Yrbk Int'l Law Commission*, ii, para. 30. See also the report of Fitzmaurice, A/CN.4/101, [1956] *Yrbk Int'l Law Commission*, ii, Art. 14 and commentary No. 24. Some authors have preferred the words *actum* and *actus* to draw such a distinction between the content of the act and the instrument to which it is consigned: see Dehaussy, cited by Jacqu e, *supra* note 13, at 52.

³⁴ See Dupuy, 'Declaratory Law and Programmatic Law: From Revolutionary Custom to "Soft Law"', in R. Akkerman *et al.* (eds), *Declarations of Principles. A Quest for Universal Peace* (1977), at 252. See also Abi-Saab, 'Eloge du "droit assourdi" – Quelques réflexions sur le rôle de la soft law en droit international contemporain', in *Nouveaux itinéraires en droit: Hommage à François Rigaux* (1993), at 60. Abi-Saab, 'Cours général de droit international public', 207 *Collected Courses* (1987–II) 206.

³⁵ McNair does not hint at the expression soft law in his seminal work on the Law of Treaties. Jennings, as a former student of McNair, explains that McNair was using the distinction Soft Law and Hard Law as synonymous with the distinction between *lex lata* and *lex ferenda*: see Jennings, 'An International Lawyer Takes Stock', 39 *ICLQ* (1990) 513, at 516. See also Klabbbers, 'The Redundancy of Soft Law', 65 *Nordic J Int'l L* (1996) 173, especially at n. 32. See also Abi-Saab, 'Cours général de droit international public', *supra* note 34, at 206.

cast in non-normative terms which do not, as such, fetter the freedom of their authors (see section 2). A few words must be formulated about each of these types of softness.

1 *Soft instrumentum*

The *instrumentum* is soft when parties decide to resort to an instrument other than a formal treaty or a binding unilateral declaration. This does not offer much difficulty when their will is recorded in the non-binding resolution of an international organization or the final declaration of a conference. The choice of any of these instruments generally suffices to indicate the intention of the parties not legally to commit themselves. It is slightly more uncertain when they choose a gentlemen's agreement,³⁶ as informal agreements do not classically indicate whether the parties wished to be bound by law.³⁷ Leaving aside the controversies about the methods of identifying the will of the parties,³⁸ legal subjects can thus agree to live up to a certain behaviour but decide not to include their agreement in a treaty or a unilaterally binding act, thereby making use of the various types of soft *instrumentum*. It is undisputed, even by positivists, that acts with a soft *instrumentum* still produce legal effects. For instance, they can play a role in the *internationalization of the subject-matter*,³⁹ provide guidelines for the interpretation of other legal acts,⁴⁰ or pave the way for further subsequent practice which may one day be taken into account for the emergence of customary international norm.⁴¹ It is precisely because they yield these legal effects that many scholars continue to qualify these acts as 'law' despite their soft *instrumentum*.⁴²

³⁶ Aust, 'The Theory and Practice of Informal International Instruments', 35 *ICLQ* (1986) 787; Lipson, 'Why are Some International Agreements Informal?', 45 *Int'l Org* (1991) 495. See also Guzman, 'The Design of International Agreements', 16 *EJIL* (2005) 579; Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law', 48 *ICLQ* (1999) 901.

³⁷ Widdows, 'What is an Agreement in International Law?', 50 *BYBIL* (1979) 117.

³⁸ Hillgenberg, 'A Fresh Look at Soft Law', 10 *EJIL* (1999) 499, especially at 500.

³⁹ On this question see Verhoeven, 'Non-intervention: affaires intérieures ou "vie privée"?', in *Mélanges en hommages à Michel Virally* (1991), at 493; Kolb, 'Du domaine réservé – Réflexion sur la théorie de la compétence nationale', 110 *RGDIP* (2006) 597, especially at 609–610; Sloan, 'General Assembly Resolutions Revisited (Forty Years Later)', 58 *BYIL* (1987) 124.

⁴⁰ See Aust, *supra* note 36, at 787–812; Dupuy, *supra* note 34, at 255. See Schachter, 'The Twilight Existence of Non-binding International Agreements', 71 *AJIL* (1977) 296.

⁴¹ This is, for instance, the intention of Art. 19 of the ILC Articles on Diplomatic Protection on the 'recommended practice' by states, *Official Records of the General Assembly*, 61st Session, Supp. No. 10 (A/61/10).

⁴² A. Boyle and C. Chinkin, *The Making of International Law* (2007), at 211–229; V. Lowe, *International Law* (2007), at 96–97; Guzman, 'The Design of International Agreements', 16 *EJIL* (2005) 579; Pellet has hinted at the idea of 'dégradé normatif': Pellet, 'Le "bon droit" et l'ivraie – plaidoyer pour l'ivraie', in *Mélanges offerts à Charles Chaumont. Le droit des peuples à disposer d'eux-mêmes. Méthodes d'analyse du droit international* (1984), at 465–493, especially at 488. See also Abi-Saab, 'Eloge du "droit assourdi"', *supra* note 34, at 62–63; Baxter, 'International Law in "Her Infinite Variety"', 29 *ICLQ* (2980) 549; Ida, 'Formation des normes internationales dans un monde en mutation. Critique de la notion de Soft Law', in *Mélanges en hommage à Michel Virally* (1991), at 336; Virally, 'La distinction entre textes internationaux de portée juridique et textes internationaux dépourvus de portée juridique, Rapport provisoire à l'Institut de droit international', 60-I *Annuaire de L'Institut de Droit International* (1983), at 244; Elias and Lim, 'General Principles of Law, "Soft" Law and the Identification of International Law', 28 *Netherlands Yrbk Int'lL* (1997) 45.

It is the qualification of those acts with a soft *instrumentum* as soft law which has attracted most of the positivist attack. The criticisms levelled against this understanding of soft law draws upon the belief that law can accommodate a large range of grey without losing its binary character and, in this sense, remain a sufficiently well-equipped normative table to enshrine the rules which states deemed necessary to tackle modern problems.⁴³ More particularly, positivist critics of soft law, in the light of the theory of the legal act depicted above, contend that the legal effects which these soft instruments generate do not suffice to upgrade them to any sort of legal act. The legal effects which they create result from their being a *legal fact* and not a *legal act*. Being merely a fact generating legal effects irrespective of the will of their authors, they cannot qualify as legal acts, and thus as law.⁴⁴ They simply remain, from a positivist vantage point, *facts* to which some legal effects are attached. Positivist scholars further argue that soft law is a redundant concept since, if applied to any specific set of circumstances, it turns into either hard law or no law at all.⁴⁵ In that sense, one of the most serious weaknesses of the soft *instrumentum* theory relates to its self-contained character in the sense that it inextricably falls back on the binary structure of law.⁴⁶ Eventually, positivists bemoaned the confusion that such a qualification brings about which, in turn, can weaken the general authority of law.⁴⁷ All in all, as long as soft law means a rule with a soft *instrumentum*, there is no place for such a concept in the international legal order from a positivist standpoint.

Against the backdrop of the aforementioned theory of the legal act, it is submitted here that the positivist criticisms of the softness theory, although they may be exaggerated in a few respects, rest on solid arguments. One can hardly see the added value of soft law understood as a legal act with a soft *instrumentum*, leaving aside the useful label that it can constitute to describe the legal effects of a given kind of legal *facts*. It is of particular interest to note that the supporters of the soft law theory have hardly taken pains to rebuff or challenge the above-mentioned positivist attacks. They have usually preferred to fend them off through a general attack on the fustiness of positivism⁴⁸ or simply to keep on referring to the effects which the fact concerned may generate but which – as has been explained above – do not suffice to make that fact a legal act.⁴⁹ This article argued earlier that one of the reasons why the supporters of soft law have failed properly to address the positivist criticisms pertains to unfamiliarity with

⁴³ Klabbers, *supra* note 35, at 180; Weil, *supra* note 7, at 413–442; Virally, *supra* note 42, at 246. On the simplifying capacity of law and for a non-positivist account of law see in general Koskeniemi, 'International Law in a Post-realist Era', 16 *Austrian Yrbk Int'lL* (1995) 1.

⁴⁴ Virally, *supra* note 43, at 246. See also d'Aspremont, 'Les dispositions non-normatives des actes juridiques conventionnels', 36 *Belgian Rev Int'lL* (2003) 492, especially at 518–519.

⁴⁵ J. Klabbers, *The Concept of Treaty in International Law* (1996), at 158–159.

⁴⁶ Klabbers, *supra* note 35, at 179 and 'The Undesirability of Soft Law', 67 *Nordic J Int'lL* (1998) 381, especially at 382.

⁴⁷ See Virally, *supra* note 42, at 246; Abi-Saab, 'Cours général', *supra* note 34, at 209.

⁴⁸ Chinkin, 'The Challenge to Soft Law, Development and Change in International Law', 38 *ICLQ* (1989) 850, at 865.

⁴⁹ Boyle and Chinkin, *supra* note 42, at 211–229.

the theories of the legal act on which the positivist criticisms rely, and particularly the extent to which they confuse legal acts and legal facts – a confusion pointed out by Crawford in his commentary on the ILC Articles on State Responsibility.⁵⁰ It is added here that this may not be the sole reason. This article argues that the all-out defence in which some supporters of the soft *instrumentum* thesis have engaged may, more fundamentally, be explained by their understanding of the limits of international law and their role herewith. Such an agenda emerges even more clearly once it is shown that, from a positivist viewpoint, the soft law thesis is not entirely flawed, as the *negotium* of a legal act can be softened without invalidating the *legal act* or demoting it to a *legal fact*.

2 Soft Negotium

As was explained above, the authors of a legal act have an absolute mastery over the law-making process. They can thus choose to soften the instrument to which their agreement is consigned. But they can also decide to resort to a fully-fledged formal legal instrument while softening its content. More precisely, they can adopt a legal instrument which is non-normative, that is, an act which fails to provide any precise directive as to which behaviour its authors are committed to. It is true that the soft content of an instrument may be interpreted as an intention to exclude resort to a hard *instrumentum*.⁵¹ But this is not necessarily the case. Legal persons can choose to resort to a binding legal instrument but soften its content by ensuring that it does not lay down any specific obligation and design it in such a way that the addressee retains a right to opt out or to define its scope of application. This is what has been called by some authors the adoption of ‘conventional resolutions’⁵² or that of instruments with a ‘soft formulation’.⁵³ According to the positivist schema described above, those instruments – or those parts of instruments – which do not lay down any precise directive as to conduct and which are not cast in normative terms can be deemed to constitute another type of soft law because of the softness of their *negotium*.⁵⁴

While soft law understood as an act with a soft instrument proves deeply flawed in the light of the above-mentioned distinction between *legal act* and *legal facts*, the same distinction does not bring about a similar rejection of this second category of soft law. The compatibility of legal acts endowed with a soft *instrumentum* with the premises mentioned above, however, presupposes that the formulation of clear obligations is not a *constitutive element* of any legal act. Accepting that there may be legal acts with a soft *negotium* means that the normative character of an act is not the prerequisite of its

⁵⁰ Cf *supra* note 32.

⁵¹ Widdows, *supra* note 37, at 124.

⁵² Dupuy, *supra* note 34, at 252.

⁵³ Boyle and Chinkin, *supra* note 42, at 220.

⁵⁴ Baxter is probably the first author to have interpreted soft law in this sense: see his ‘International Law in “Her Infinite Variety”’, 29 *ICLQ* (1980) 549; Hillgenberg, *supra* note 38, at 500; Gruchalla-Wesierski, ‘A Framework for Understanding “Soft Law”’, 30 *McGill LJ* (1984) 37, at 39; Boyle, ‘Some Reflections on the Relationship of Treaties and Soft Law’, 48 *ICLQ* (1999) 901; Abi-Saab, ‘Eloge du “droit assourdi”’, *supra* note 34, at 61. More recently, see Boyle and Chinkin, *supra* note 42, at 220. See, however, Lowe, *supra* note 42, at 96 (who rejects the use of soft law to refer to legal acts with a soft content).

legal character. Some scholars – the most famous of them being Hersch Lauterpacht⁵⁵ – have supported the contrary, although a few of them subsequently back-tracked on their position.⁵⁶ It seems to be commonly agreed today that a legal act ought not to be normative to be legal.⁵⁷ Likewise, the positivist acceptance that soft law may refer to those acts whose *negotium* is soft rests on the assumption that the normative character of a legal act is not a *condition of its validity*. This does not seem to be disputed, as the Vienna Convention on the Law of Treaties does not elevate the normative character of a conventional act into a condition of its validity.⁵⁸ It is bewildering that those who have construed the formulation of clear obligations as a constitutive element of any legal act have simultaneously hinted at the idea that a legal act which is not normative is invalid.⁵⁹

It must be noted that the consistency of this second category of soft law with the positivist premises is in line with practice in this respect. Indeed, numerous treaties nowadays enshrine such a soft *negotium*. One of the most obvious examples is provided by the 1995 Council of Europe Framework convention on the protection of national minorities, which deliberately falls short of defining the concept of minorities, leaving it to the parties to determine whether there are national minorities on their territory.⁶⁰ Such (parts of) conventions the (scope of) application of which is to be determined by the parties are said to be ‘potestative’. They have no normative character, as they fail to provide any directive as to which behaviour the parties should adopt irrespective of their own will.

The International Court of Justice has already been called upon to grapple with a rule which was deemed non-normative in this sense. In the *North Sea Continental Shelf case*, the Court assessed the customary character of the equidistance principle enshrined in Article 6 of the 1958 Convention on the Continental Shelf. On this occasion it asserted that the norm at stake had first to be of a ‘fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law’.⁶¹ The Court drew on the idea that any conventional rule must contain a directive for it to be able one day to crystallize into a customary international rule. The Court

⁵⁵ Separate Opinion of Judge Lauterpacht to the Decision of 6 July 1957 in the *Certain Norwegian Loans case* [1957] ICJ Rep. at 48: ‘[a]n instrument in which a party is entitled to determine the existence of its obligation is not a valid and enforceable legal instrument of which a court of law can take cognizance. It is not a legal instrument. It is a declaration of a political principle and purpose.’ See also his dissenting opinion to the Decision of 21 Mar. 1959 in the *Interhandel case* [1959] ICJ Rep. 6, at 116.

⁵⁶ Compare Jacqué, *supra* note 13, at 69–70 and Jacqué, *supra* note 11, at 383.

⁵⁷ See Art. 2 of the 1969 VCLT, 1155 UNTS 331.

⁵⁸ See pt. V, sect. I of *ibid.*

⁵⁹ See the aforementioned Opinion of Judge Lauterpacht to the *Norwegian Loans* Decision, *supra* note 55, at 48.

⁶⁰ Explanatory Report of the Convention, at para. 12, available at: <http://conventions.coe.int>. See also the declaration of 11 May 1995 by Germany and that of 23 March 1998 by Slovenia, available at: <http://conventions.coe.int>. On the legal problems generated by this convention instruments see generally d’Aspremont, ‘Les réserves aux traités. Observations à la lumière de la Convention-cadre du Conseil de l’Europe pour la protection des minorités nationales’, in *Les Minorités, Recueil des travaux de l’Association Henri Capitant*, vol. LII/2002, at 487–514.

⁶¹ [1969] ICJ Rep. 1, at para. 72.

took mainly into account in particular the profound indeterminacy of the concept of ‘special circumstances’ which determines the qualification to the equidistance principle and deemed that the principle of equidistance enshrined in the 1958 Convention was not normative. Because the principle of equidistance did not provide for a given behaviour to be adopted by the parties, the Court concluded that it could not crystallize or generate a rule of customary international law.⁶²

Provisions which are purely indicative or suggestive, and which therefore do not formulate any obligations, should also be considered to be endowed with a soft *negotium*.⁶³ Such provisions have sometimes been portrayed as ‘emotional’ provisions⁶⁴ or ‘empty shells’.⁶⁵ Preambles to international treaties usually constitute a relevant illustration. But operational provisions can also be of a soft character when they merely proclaim a few guiding principles, or ‘peace’, ‘amity’, ‘friendship’ between the parties. These provisions constitute soft *negotiums*. This was made clear by the International Court of Justice in the case pertaining to the *Military and paramilitary activities in Nicaragua* where it concluded that Article 3(d) of the Charter of the American States⁶⁶ did not provide for any sort of obligation on the parties.⁶⁷ Likewise, in its judgment on the preliminary objections in the *Oil Platforms* case, the International Court of Justice considered that Article I of the 1955 Treaty of Amity, Economic Relations and Consular Rights between Iran and the United States, according to which ‘there shall be firm and enduring peace and sincere friendship’, did not contain any obligation. It was only meant, according to the Court, to ‘stress that peace and friendship constituted the precondition for a harmonious development of the commercial, financial and consular relations between the parties and that such a development would in turn reinforce that peace and that friendship’.⁶⁸

A third form of instrument with a soft *negotium* is provided by those agreements which are not self-sufficient in the sense that they require complementary instruments for their scope to be fully defined.⁶⁹ This is commonly the case of framework conventions which abound in the field of environmental law⁷⁰ or non-proliferation.⁷¹

⁶² *Ibid.*, at para 72. For a analysis of this aspect of the case see d’Aspremont, *supra* note 44, at 518. See also Boyle and Chinkin, *supra* note 42, at 221.

⁶³ Fitzmaurice’s report [1956] II *Yrbk Int’l Law Commission*, at 120; Widdows, *supra* note 37, at 132.

⁶⁴ Wengler, ‘Les Conventions “non juridiques” comme nouvelle voie à côté des conventions en droit’, in *Mélanges en hommage à François Rigaux* (1993), at 647.

⁶⁵ V.D. Degan, *Sources of International Law* (1997), at 501.

⁶⁶ ‘The Solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy.’

⁶⁷ [1986] ICJ Rep. 14, at paras 259–261. For an analysis of this aspect of the case see d’Aspremont, *supra* note 44, at 518.

⁶⁸ [1996] ICJ Rep. 803, at paras 28 and 31.

⁶⁹ Verhoeven, ‘La notion d’applicabilité directe du droit international’, 15 *Belgian Rev Int’l L* (1980) 248; Virally, *supra* note 42, at 250.

⁷⁰ See the illustrations provided by Kiss, ‘Les traités-cadres : une technique juridique caractéristique du droit international de l’environnement’, 39 *Annuaire français de droit international* (1993) 792. See also Dupuy, ‘Declaratory Law and Programmatic Law: From Revolutionary Custom to “Soft Law”’, *supra* note 34, at 254.

⁷¹ Art. III of the 1968 Treaty on the non-proliferation of nuclear weapons, 728 UNTS 169.

These types of soft *negotium* usually come together with provisions which require the parties to adopt complementary instruments (*pacta de contrahendo* or *de negociando*)⁷² which will flesh out the directives contained in the original instrument.

Even though contemporary practice has thus shown the growing adoption of instruments with a (partly) soft *negotium*, such softness should be carefully gauged and should not be exaggerated. For instance, those conventions which provide for a given obligation to be abided by 'where necessary',⁷³ 'to the extent possible',⁷⁴ 'as far as possible',⁷⁵ 'as appropriate',⁷⁶ 'in accordance with its capabilities',⁷⁷ 'within available resources'⁷⁸ are not potestative, as a third party could objectively determine, *in concreto*, the behaviour which is hereby required.

As is explained above, the use of the expression 'soft law' to designate these norms which are not cast in normative terms naturally presupposes, of course, that the existence of specific obligations is neither a constitutive element of any legal act nor a condition of the validity of any legal act. Because these acts are legal acts which are entirely valid, they can, even from the positivist vantage point described above, be considered to be law. The absence of normative character, however, requires that their legal character be qualified. The adjective 'soft' may play such a qualifying role. It is therefore not surprising that, although they bemoan the developments of such norms,⁷⁹ positivists seem to accept the concept of soft law to single out those instruments the *negotium* of which is soft.⁸⁰

The partial endorsement of the soft law thesis by positivist scholars makes the steadfastness and determination of those who support the theory of softness in all its dimensions even more suspect. Indeed, it is baffling that supporters of softness have generally ignored the positivist attack on the qualification of acts with a soft *instrumentum* as soft law and failed to recognize the merits of the restriction of the soft law concept to those acts which are endowed with a soft *negotium*. Against that backdrop, the following section comments on the possible motives driving those who wholeheartedly endorse the soft law thesis in all its dimensions with the aim of identifying their conception of the limits of international law and the way in which they construe the role of international legal scholars.

⁷² For an example of this sort of provisions see, for instance, Art. III.4 of *ibid.* See also the advisory opinion of the ICJ on the *International Status of South-West Africa*, 11 July 1950 [1950] ICJ Rep. 128, at 140.

⁷³ Arts 4 and 12 of the 1995 Framework Convention for the Protection of National Minorities, ETS No. 157.

⁷⁴ Art. 5 of the Convention on the Rights of the Child, 1577 UNTS 3; Art. 10 on the 1992 European Charter for Minority and Regional Languages, ETS No. 48; Arts 5, 6, 7, 8, 9, 10, and 14 of the Convention on Biological Diversity, 1001 UNTS 4; Art. XXXVII of GATT 1995, 1867 UNTS 187.

⁷⁵ Convention on Biological Diversity, *supra* note 74, Art. 5.

⁷⁶ *Ibid.*, Art. 16.3.

⁷⁷ *Ibid.*, Arts 6 and 20.

⁷⁸ Art. 6.3 of the 1994 Energy Charter Treaty, 34 ILM (1999) 381.

⁷⁹ Weil, *supra* note 7, at 414–415.

⁸⁰ Abi-Saab, 'Cours general de droit international public', *supra* note 34, at 209–213; d'Aspremont, *supra* note 44, at 520; Gruchalla-Wesierski, *supra* note 54, at 39–40.

2 The Scholarly Quest for New Legal Materials

In the first section it was explained that, in a positivist perspective, qualifying acts with a soft instrument as soft law amounts to conflating *legal facts* and *legal acts*. The second part of this article argues that the eschewal by the unconditional proponents of the soft law thesis of its fundamental weaknesses is symptomatic of the unease currently felt by many international legal scholars. This embarrassment drives many scholars to stretch the limits of their field of study. Indeed, in trying to capture acts which are, from a positivist perspective, intrinsically outside the realm of law, they basically seek to enlarge the object of their science and consider international law as anything with an international dimension.⁸¹ It is the aim of the second part of this article to explore the reasons underlying such a proclivity.

One mundane explanation of this attempt to secure new fields of study pertains to the assumption that law is necessarily good. There is indeed a widespread propensity among lawyers to consider that any legal instrument is better than no instrument at all, as if the development of law necessarily constituted an improvement. Seen in this light, law is thus conceived as an essential condition of any systematized form of community⁸² and as the only alternative in the *Hobbesian* brutal state of nature.⁸³ Any new legal regulation is a step towards the greater integration of the community away from the anarchical state of nature. This all-out enthusiasm for the ‘international’⁸⁴ is probably rife among contemporary advocates of the soft *instrumentum* thesis.⁸⁵ Emboldened by the feeling that law is necessarily good, the soft *instrumentum* thesis brings about the impression that the more the world is regulated by law, the better it is. In this sense, bestowing legal value on intrinsically non-legal instruments comes down to extending the sphere of ‘goodness’ of law.

The author of this article believes that such a basic assumption is oversimplifying. Many recent developments – like networks among governmental officials or

⁸¹ On this tendency see Bederman, ‘What is Wrong with International Law Scholarship’, 1 *Chicago J Int’l L* (2000) 81.

⁸² See, e.g., Fitzmaurice, ‘The General Principles of International Law Considered from the Standpoint of the Rule of Law’ 92 *Collected Courses* (1957–II) 1, at 38; Abi-Saab, ‘Cours général des droit international public’, *supra* note 34, at 45.

⁸³ Hobbes has classically been interpreted as having offered the best depiction of the international state of nature. See the radical realist interpretation of Hobbes by H. Morgenthau, *Politics Among Nations* (4th edn, 1967), at 113. Cf. the more subtle interpretation offered by the Rationalist School: see H. Bull, *The Anarchical Society* (1977), at 4–5. On the appeal held by Grotius for Hedley Bull and the discrepancies between the former and the latter see Kingsbury, ‘A Grotian Tradition of Theory and Practice?: Grotius, Law and Moral Skepticism in the Thought of Hedley Bull’, 17 *Quinnipiac LR* (1997–1998) 3. For a neo-Hobbesian account of international law see more recently d’Aspremont, ‘International Law in Asia: the Limits to the Constitutionalist and Liberal Doctrines’, 13 *Asian Yrbk Int’l L* (2008) 89 or d’Aspremont, ‘The Foundations of the International Legal Order’, 12 *Finnish Yearbook of International Law* (2007).

⁸⁴ On the various dimensions of this enthusiasm for the international see Kennedy, ‘A New World Order: Yesterday, Today and Tomorrow’, *supra* note 23, at 336; see also S. Marks, *The Riddle of All Constitutions* (2003), at 146.

⁸⁵ This was insightfully highlighted by Klabbers, *supra* note 46, at 383.

transnational law⁸⁶ – have shown that non-legal instruments may prove more adapted to the speed and complexity of modern international relations and are more and more resorted to in practice.⁸⁷ Non-legal instruments can be at least as integrative for a community as legal ones.⁸⁸ This means that the use of non-legal *instrumentum* is not a sign of the disintegration of a community. It simply shows that the members of a community have found more practical and convenient means to regulate their relationships with one another. The presupposition that law is good thus does not suffice to explain the tendency of legal scholars to stretch the boundaries of their field of study.

It is submitted here that, by extending the frontiers of international law and by likening *legal facts* and *legal acts*, the supporters of the soft *instrumentum* doctrine aim to alleviate the unease that has followed the sweeping development of international legal scholarship. Indeed, there is no doubt today that international law has acquired an unprecedented importance in legal discourse and has proven to be a paramount component of legal studies. Hence, universities and research institutes have significantly increased the number of staff in charge of teaching and research in the field of international law. At the same time, many people have ‘discovered’ their calling for international law. International law has accordingly turned out to be studied as never before. As a result, international legal scholarship has mushroomed and the number of research projects and publications on international law has been soaring.⁸⁹ These mutations have paved the way for a proliferation of international legal thinking.⁹⁰

Although the foregoing may be seen, in some respects, as an encouraging and cheering development,⁹¹ it has not come without its problems. Because scholars are so numerous today, each of them endures much greater difficulties in finding his *niche* and distinguishing himself. Against the backdrop of an ever-growing community of scholars, there are fewer untouched fields and less room for the original findings which are sometime commanded by incongruous institutional constraints⁹² when

⁸⁶ See Jessup’s concept of *Transnational Law* (1956); McDougal, ‘International Law, Power and Policy: A Contemporary Conception’, 82 *Collected Courses* (1953–I) 137. For more recent developments see Zaring ‘Informal Procedure, Hard and Soft, in International Administration’, 5 *Chicago J Int’l L* (2005) 547; Kingsbury, ‘Sovereignty and Equality’, 9 *EJIL* (1998) 611; and Slaughter, ‘Global Government Networks, Global Information Agencies, and Disaggregated Democracy’, 24 *Michigan J Int’l L* (2002–2003) 1041, ‘Accountability of Government Networks’, 8 *Ind. J Global Legal Stud* (2000–2001) 347 and ‘The Real New World Order’, 76 *Foreign Aff* (1997) 183.

⁸⁷ Klabbers, *supra* note 45, at 121.

⁸⁸ See Boyle and Chinkin, *supra* note 42, at 229 who rightly highlight that non-binding instruments do not necessarily have less weight than unratified or poorly ratified treaties. As is argued here, this does not underpin in any manner the need for the concept of ‘soft law’.

⁸⁹ For an illustration of one of the most recent journals created in this field see *Human Rights and International Legal Discourse*, available at: www.hrild.org.

⁹⁰ d’Aspremont, ‘La doctrine du droit internationale face à la tentation de la “juridicisation” sans limites’, 118 *Revue générale de droit international public* (2008) (forthcoming).

⁹¹ The variety and richness of scholarly opinions is often seen as one positive consequence of the unforeseen development of legal scholarship. See Stephens’ remarks to the panel on ‘Scholars in the Construction and Critique of International Law’ held on the occasion of the 2000 ASIL meeting, 94 *ASIL Proceedings* (2000) 317, at 318.

⁹² Jennings, ‘International Reform and Progressive Development’, in G. Hafner *et al.* (eds), *Liber Amicorum Professor Seidl-Hohenveldern – in honor of his 80th Birthday* (1988), at 333, 333–334

not driven by mere vanity.⁹³ This makes it far less easy to win one's marks today than it was at the time when international legal thinking was still in its infancy. The greater difficulty in finding a niche has pushed scholars into fiercer competition and ignited a feeling of constriction, as if their field of study had grown too narrow to accommodate all of them.

Scholars have usually been ingenious in securing ways to distinguish themselves, especially against the backdrop of the unease spawned by a blossoming international legal scholarship. One mundane way of achieving distinction has been to perpetuate the *call for reform* of international law and portray oneself as an adamant reformist of the system.⁹⁴ Advocating fundamental upheaval of the system and overthrowing one's predecessors⁹⁵ has sometimes helped one to foster one's identity.⁹⁶ Given the widespread and unabated bent for constant reform of many international legal scholars, this identification method has nonetheless proven to be of little avail over the past decades.⁹⁷ Scholars have accordingly pursued other paths in their quest for distinction. Many of them have engaged in a reorientation of their expertise towards parallel, already existing, or more specialized fields of study.⁹⁸ This has been of little help when this reorientation or specialization has subsequently proven to correspond to some 'fashion'.⁹⁹ Many others have chosen to give their research a more theoretical perspective, borrowing from non-legal social sciences like international relations theories¹⁰⁰ or economics.¹⁰¹ In so doing, these scholars have tried to retain some specificity and preserved the originality of their contribution to international legal thinking. Eventually, scholars have tried to secure their fame by dousing the discipline with multiple versions of each of their original pieces of work, engaging in what Bederman calls the 'intellectual equivalent of gluttony'.¹⁰²

⁹³ See contra Kennedy, 'A New World Order: Yesterday, Today and Tomorrow', *supra* note 23, at 370.

⁹⁴ For a recent example see Spiermann, 'Twentieth Century Internationalism in Law', 18 *EJIL* (2007) 785.

⁹⁵ See Cass, 'Navigating the Newstream: Recent Critical Scholarship in International Law', 65 *Nordic J Int'l L* (1996) 341. See also Jouannet, 'Le même et l'autre', in E. Jouannet, H. Ruiz Fabri, and J.-M. Sorel, *Regards d'une génération sur le Droit International* (2008), at 210.

⁹⁶ See generally Piper, 'On Changing or Rejecting the International Legal Order', 12 *Int'l Lawyer* (1978) 293. Such a claim has very often been directed at the reform of the UN charter order. On this specific question see more recently Chesterman, 'Reforming the United Nations: Legitimacy, Effectiveness and Power After Iraq', 10 *Singapore Yrbk Int'l L* (2006) 59.

⁹⁷ Kennedy, 'A New World Order: Yesterday, Today and Tomorrow', *supra* note 23, especially at 338 and 343. See also Gattini, 'Les phénomènes de mode en droit international', in *Le droit international et le temps, Proceedings of the Société française pour le droit international* (2001), at 49.

⁹⁸ On this point see Bianchi, 'Une generation de "communautaristes"', in Jouannet *et al.*, *supra* note 95, at 97; for a criticisms of over-specialization in international legal scholarship see Dunoff, 'International Legal Scholarship at the Millenium', 1 *Chicago J Int'l L* (2000) 85.

⁹⁹ See, for instance, the craze for WTO Law in the second part of the 1990s.

¹⁰⁰ Slaughter, 'International Law and International Relations Theory: A Dual Agenda', 87 *AJIL* (1993) 205; Arend, 'Do Legal Rules Matter: International Law and International Politics', 38 *Virginia J Int'l L* (1998) 107.

¹⁰¹ Dunoff and Trachtman, 'The Law and Economics of Humanitarian Law Violations in Internal Conflicts', 93 *AJIL* (1999) 394; Stephan, 'Barbarians Inside the Gate: Public Choice Theory and International Economic Law', 10 *Am U J Int'l L & Politics* (1995) 745.

¹⁰² Bederman, *supra* note 81, at 79.

It is posited here that the aforementioned moves are not the only means used by scholars to allay the difficulties following the proliferation of legal thinking. Although less visible, many scholars have chosen to advocate an extension of the limits of classical international law by legalizing objects which intrinsically lie outside the limits of international law. This is precisely what the unconditional proponents of the concept of soft law are – consciously or unconsciously – aiming at. It is argued here that, in capturing non-legal acts and importing them into the international legal order, these scholars strive to provide themselves with extra raw material to work with, and therefore reduce the number of scholars focusing on the same object of study. They thus extend the topics which qualify for legal study, thereby easing the strain on all legal scholars. In this sense, extending the frontiers of international law constitutes an artful move to accommodate an ever-growing legal scholarship.

Although these tendencies may be seen as serving a lofty purpose because they help international legal scholars to create a niche, they convey the impression that, nowadays, it is the *scholarship that makes the law* and no longer *the law that makes the legal scholarship*. As is illustrated by the underlying agenda of the soft *instrumentum* thesis, the law, in this sense, exists for the sake of the scholarship. Law is demoted to a pure foil for international legal scholars and merely serves their ambitions, their vanity, and their need for distinction. This instrumentalization of law, whereby the limits of law are determined in accordance with the needs of the legal scholarship (and not the other way round), is probably at odds with the classical picture of a scholarship entirely devoted to the analysis, clarification, systematization, and explanation of international law irrespective of any self-worship. The rejection of this rosy image of the legal scholarship inherent in the argument made here is not ground-breaking. The ‘new’ or ‘post-modern’ approaches of international law have long undermined this objective vision of scholarship and singled out the self-serving motives which permeate legal discourse.¹⁰³ In exploring these motives, this article argues that the self-serving attempt to stretch the boundaries of our discipline boils down to an instinctive quest for ‘survival’ for many legal scholars, as they feel constricted in a science which has proven too narrow to accommodate all of us and are enticed to look beyond the classical limits of the international legal order.¹⁰⁴

It is posited here that artificially extending our field of study is probably not the most appropriate way to alleviate the pressure fuelled by the proliferation of legal thinking and ease the difficulties in securing distinction; first because, as is demonstrated by positivists and explained above, such a strategy may come at the expense of the consistency of the system.¹⁰⁵ More fundamentally, the capture of new legal materials

¹⁰³ On the new approaches of law see the special issue of 65 *Nordic J Int'l L* (1996), at 341–595. See also the interesting account by Marks, *supra* note 84, at ch. 6. For a criticism of the ‘post-modern’ character of these developments see Jouannet, *supra* note 95, at 221–222.

¹⁰⁴ See Wengler, *supra* note 63, at 639: ‘[d]’un point de vue psychologique, il est cependant ... compréhensible que les juristes cherchent sans cesse a “rejuridifier” de quelque manière des conventions qui, dans l’intention des parties, n’auraient pourtant pas été conclues en droit’.

¹⁰⁵ On the systematic character of International Law see Combacau, ‘Le droit international: bric-à-brac ou système?’ [1986] *Archives de philosophie du droit* at 85.

offers only a temporary respite as any new ‘discovered’ raw material rapidly becomes the centre of attention. With a view to circumscribing the strain inherent in an ever-growing legal scholarship, it seems more astute to reconsider the role that one, as a scholar, wants to play. It is particularly argued here that international legal scholars should operate an upheaval of their vision of the *addressees of their discourse*. This means that they should devote most of their energy to clarifying and explaining the law¹⁰⁶ for those who are effectively using it, and not just for those who study it in a purely academic perspective.¹⁰⁷ In other words, we should read, think, and write not only for ourselves and our peers but also for those who are actually in need of a clearer and more systematized picture of the international legal order, its mechanisms, and the articulation between its growing sub-fields. Such a shift of addressees seems even more necessary against the backdrop of the burgeoning of the sub-fields of international law and the so-called ‘fragmentation’¹⁰⁸ which accompanies it, as the latter inescapably compounds the interaction between the various parts of the system,¹⁰⁹ thereby calling for more problem-solving expertise. This understanding of the role of scholars, which does not rule out any public role or participation in public affairs,¹¹⁰ naturally brings back a more *problem-solving* approach of international legal scholarship and turns the spotlight on topics which, in the post-modern era of international legal thought, have incrementally taken a back seat. It means a return to a (pre-)modern and more traditional conception of the scholarship, that is a scholarship which, through testing hypotheses, aims at describing, explaining, and predicting the (ir-)regularities for those who actually use international law.

Such a return to a problem-solving concept of the role of scholars in order to alleviate the strain spawned by the proliferation of international legal thinking no doubt

¹⁰⁶ On the traditional role of the scholar see the illuminating account given by Virally, *supra* note 20, at p. xxii. See also the enlightening and famous interpretation of the role of scholars by Reuter, *supra* note 12, at 459: ‘[l]e droit n’est pas seulement un produit de la vie sociale, il est également le fruit d’un effort de pensée, s’efforçant d’agencer les données ainsi recueillies dans un ensemble cohérent et aussi logique que possible. C’est l’aspect systématique du droit international, il est à la fois plus important et plus délicat que celui des droits nationaux. Il est plus important parce que les sociétés nationales, du fait qu’elles sont profondément centralisées par l’autorité étatique, engendrent un droit déjà systématisé par ses conditions d’élaboration. Au contraire, la “décentralisation du pouvoir politique” qui règne dans la société internationale rejette sur le juriste un fardeau plus lourd. Il est plus délicat parce que le désordre de la société internationale n’est pas tant désordre de la pensée que désordre du pouvoir; certes le juriste peut se laisser aller à la systématisation, mais s’agit-il de systématiser seulement ses pensées ou de systématiser aussi la réalité? Certes, de par sa nature même, le droit est avide d’ordre mais à quoi servirait-il, par excès de rigueur dans la pensée, de poursuivre une systématisation en dehors du cadre des solutions admises.’

¹⁰⁷ Jennings, *supra* note 92, at 336. This was already expressed in very blunt terms by Fred Rossel as early as 1936 in a very provocative article, ‘Goodbye Law Reviews’, 23 *Virginia L Rev* (1936–1937) 42.

¹⁰⁸ See generally Koskenniemi, ‘Fragmentation of International Law? Postmodern Anxieties’, 15 *Leiden J Int’l L* (2002) 553.

¹⁰⁹ O. Schachter, *International Law in Theory and Practice* (1995); Dunoff, *supra* note 98, at 86.

¹¹⁰ For an illustration of the public role that scholars may play according to the conception submitted here see Craven, Marks, Simpson, and Wilde, ‘We Are Teachers of International Law’, 17 *Leiden J Int’l L* (2004) 363; see also the ‘appel de juristes de droit international concernant le recours à la force contre l’Irak’ initiated by the Centre de droit international of the Free University of Brussels (ULB) in Jan. 2003, available at: www.ridi.org/adi/special/index.htm.

conflicts with militant doctrines of international law.¹¹¹ It may be that some will also perceive it as a rebuke to critical legal approaches.¹¹² While the conception of the role of legal scholars advocated in this article is definitely at odds with scholarships aimed at the promotion of given political causes,¹¹³ it should not be seen as a scolding of critical legal scholarship. This 'new' stream in international legal scholarship – which has logically followed the earlier encroachment of post-modernism and deconstructivism in other social sciences – has proven a refreshing and invigorating¹¹⁴ advent and the benefits of the lessons which it carries have been very valuable for international legal scholars.¹¹⁵ This said, it is contended here that we can simply not all afford to be critical in that sense. There is basically no demand for it, except perhaps from international legal scholars themselves. But even international legal scholars should understand that critical legal scholarship does little to allay the above-mentioned tensions inherent in the burgeoning of legal thinking. Only a more modest and pragmatic understanding of the role of scholars can help to justify the fact that we are so many studying a not very broad subject and can lessen the inclination of scholars towards an artificial extension of the frontiers of international law.

Conclusion

International legal scholarship has never been so flourishing. This has not come without its problems, as this has increased the strain on international legal scholars. International legal scholarship is currently teeming with people devoting their entire careers to it, while it remains uncertain whether this discipline can still accommodate all of them. Drawing on the debate regarding the softness of international law and, in particular, the objections levelled by positivist legal scholars against the concept of soft law, this article has sought to demonstrate that the difficulties inherent in the proliferation of international legal thinking have buoyed many lawyers to stretch the limits of their field of study by capturing objects which are intrinsically alien to it. Indeed, many theories of softness boil down to an attempt to extend the material studied by scholars with a view to providing more room for international legal scholarship. It has ultimately been explained that such a strategy is of little avail and that only a more modest and pragmatic understanding of the role of scholars could help us feel less constricted in our field of study, thereby making it unnecessary to artificially extend the limits of international law.

¹¹¹ See, for instance, the Third World Approaches to International Law (TWAAIL): Anghie and Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts', 2 *Chinese J Int'l L* (2003) 77; Chimni, 'Alternative Visions of Just World Order: Six Tales from India', 46 *Harvard Int'l LJ* (2005) 389.

¹¹² See in general the criticisms raised against such a traditional conception of scholarship by Horkheimer and Cox. On this question see Marks, *supra* note 84, at 121–146.

¹¹³ See the comments of Goldsmith on the current normative trends in international legal scholarship, 94 *ASIL Proceedings* (2000) 317, at 319.

¹¹⁴ See Cass, *supra* note 95, at 342.

¹¹⁵ See d'Aspremont, 'Uniting Pragmatism and Theory in International Legal Scholarship: Koskenniemi's From Apology to Utopia revisited', 19 *Revue québécoise de droit international* (2007) 353. See also d'Aspremont, 'International Law as a Grammar' (2006), available at: www.globallawbooks.org.