The Value of a Soft Law Approach on the Right to Peace

Claudia Pividori*

Introduction

Commonly understood to include non-binding instruments incorporating an expectation of legal relevance, soft law has proved to «exercise a complex and potentially large impact in the development of international law»[1].

While not binding *per se*, soft law instruments may not only deploy important legal consequences, but also be as effective as «hard law». Indeed, as state practice demonstrate, the potential of a given instrument to generate compliance, rather than be solely dependent on its hardness or softness, is conditioned by the authoritativeness of its content.

This paper argues that, far from being purely rhetorical as some may believe, a declaration on the right to peace may not only be vested of legal significance, but actually represent the most appropriate approach to deal with this particular topic.

* *Junior researcher at the Human Rights Centre of the University of Padua.*

1. Roles of Soft Law in International Law

While commonly used to refer to any written international instrument other than a treaty, in international legal literature the term «soft law» is used to connote a much more specific category of non-binding agreements.

Although its definition is still subject to debate, there is a shared understanding that soft law refers to instruments that, while non-binding *per se*, incorporate some form of expectation of legal relevance[2]. Understood in this sense, what distinguishes soft law instruments from mere political statements «is an expectation that the states accepting these instruments will take their content seriously and will give them some measure of respect»[3].

[1] D. Shelton, *Non-Law and the Problem of «Soft Law»*, in Id. (ed.), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System*, Oxford, Oxford University Press, 2000, p. 18.

[2] M.G. Desta, *Soft Law in International Law: An Overview*, in A.K. Bjorklund, A. Reinisch (eds.), *International Investment Law and Soft Law*, Northampton, Edward Elgar Publishing, 2012, p. 41.

[3] J. Gold, *Strengthening the Soft International Law of Exchange Arrangements*, in «American Journal of International Law», vol. 77, no. 3, 1983, p. 443.

With specific reference to non-binding agreements adopted under the aegis of the United Nations, for example, a 1967 Memorandum of the Office of Legal Affairs of the UN Secretariat stated that a declaration is to be considered «a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated»[4].

With this in mind, it comes as no surprise that in order to assess the impact of a given instrument in the realm of international law, the classic dichotomies «law and not-law» and «binding and non-binding» may not be as significant as expected[5]. Indeed, regardless of their nature, soft law instruments have often demonstrated to play a number of important roles in connection to the development of international law.

The first consideration to be made in this regard is that soft law is increasingly relevant in connection to both the two main sources of international legal obligations, that is customs and treaties.

As for the former, the potential effects of soft law is twofold. On the side of state practice, the first constitutive element of this source of international law, it may stimulate or aggregate state behaviour and thus contribute to the formation or development of a new customary international norm. Indeed, the very process of drafting and casting a vote in the context of negotiations for a soft-law instrument may confirm compliance with a given customary, or, conversely, shed light on the need to develop new norms[6].

On the side of *opinio iuris*, on the other hand, while some soft law texts are no more than a mere reaffirmation of the state's belief in the binding character of a given provision, others may assist in establishing or identifying new international customs by providing the necessary statement of legal obligation. In truth, over time, soft law instruments themselves may acquire an authority that was not foreseen at the time of their adoption and subsequently become statements of general international law[7]. The most obvious example is the Universal Declaration of Human Rights which, formally a non-binding declaration adopted by the General Assembly, is now held to have universal application.

As previously anticipated, though, besides catalysing the creation of customary law, soft law has also proved to play an increasingly significant role in connection to the development

4 Memorandum of the Office of Legal Affairs, UN Secretariat, 34 UN ESCOR, Supp. (no. 8), UN Doc. E/CN.4/1/610, 1962.

5 D. Shelton, *Soft Law*, Legal Studies Research Paper no. 322, The George Washington University Law School, Public Law and Legal Theory, 2008, p. 1.

6 *Ibidem*, p. 8.

7 International Council of Human Rights Policy, *Human Rights Standards: Learning from Experience*, Geneva, ICHRP, 2006, p. 16.

of treaty law. Indeed, it is not rare that soft law becomes the beginning of a gradual process leading to the adoption of hard commitments and thus the first step towards a treaty-making process. The role of soft law as normative precursor of treaties is particularly evident in the field of international human rights law where a considerable number of multilateral conventions have been preceded by the adoption of a non-binding declaration. Evocatively defined as «sparks of formal gestation»[8], the list of pioneer declarations in this area of international law is indeed impressive[9].

Interestingly, the main reason why soft law so often pave the way for the adoption of a binding instrument is that it presents the «advantage of allowing states to gradually become familiar with the proposed standards before they are confronted with the adoption of enforceable rules»[10]. This gradual procedure, offering states a more flexible forum in which to develop and acquiesce to norms and principles, is evidently apt to aggregate state consensus on issues that are particularly controversial or politically sensitive.

These observations seem particularly relevant for the process leading to the formal recognition of the right to peace, in the context of which a number of states have proven to be reluctant to subscribe legally binding obligations. Indeed, taking into consideration the far-reaching implications that the recognition of the right to peace purports in terms of both international order and «form» of statehood, a soft law declaration may prove to be a first significant, albeit interlocutory, step. Furthermore, besides being considered an almost necessary intermediate stage in the process of *positivisation* of the right, a soft law instrument on the right to peace may prove to be as effective as a treaty.

2. Soft Law Potential to Generate State Compliance

Besides the recognition of the complex and potentially large impact in the development of international law of soft law (precursor of new treaties and formation of customary law), legal literature has recognised that, despite their non-binding character, soft law texts can be as effective as treaties.

As state practice demonstrate, indeed, the potential of a given instrument to affect state behaviour does not necessarily depend

[8] C. Joyner, *UN General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation*, in «California Western International Law Journal», vol. 11, 1981, p. 470.

[9] See, for example, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975; the Declaration on the Protection of All Persons from Enforced Disappearance adopted by the General Assembly of the United Nations in its Resolution 47/133 of 18 December 1992; the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959.

[10] R. Andorno, *The Invaluable Role of Soft Law in the Development of Universal Norms in Bioethics*, 2007, available at http://www.unesco.de/1507.html?&L=0 (accessed 20 February 2014).

from its hardness or softness. Far from being a simple question of form, the potential of a soft law instrument to influence state conduct depends on a number of factors such as the content and the context surrounding the adoption[11].

By evidence, in the case of the draft Declaration on the Right to Peace, the first significant indicator of its authoritativeness is represented by its content. Albeit provisional, the content of the draft declaration is deeply grounded on principles and norms that not only are legally binding, but that in many instances enjoy customary or even *ius cogens* status. Moreover, even if at the international level states are manifesting a certain discomfort with the idea to ascribe the right to peace in the catalogue of internationally recognised human rights, at the regional level the right to peace has already been incardinated in a number of legal instruments, the African Charter on Human and Peoples' Rights being the most eminent example.

Indeed, the uncontested moral force of the declaration is combined with a strong normative content whose origins are, first and foremost, the binding provisions of the Charter of the United Nations, the Universal Declaration on Human Rights and the core international human rights treaties.

Hence, far from being detached from legal reality as some of its opponents argue, the draft Declaration represents a point of convergence of existing international standards and principles having a bearing on the right to peace, both in its negative and positive dimensions: peace and security, disarmament, human security, education and training, environment, development.

The legal relevance of the draft Declaration, however, cannot simply derive from the extensive references to well-established international principles or norms. Rather, in the case at hand, the potential of the draft declaration to affect state behaviour rests on the fact that it frames the right to peace as the supreme synthesis of those very fundamental principles and values on which the international community is based, against which no state could meaningfully show opposition.

The second criterion offering interesting insights on the future effectiveness of a soft-law instrument, and then its potential to be conductive of conforming behaviour, is the context surrounding the adoption of the text. As a matter of fact, the degree of consensus as well as the level of endorsement of the text manifested by relevant stakeholders often are important

[11] M. Barelli, *The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous People*, in «International and Comparative Law Quarterly», vol. 58, 2009, pp. 958-983.

indicators of the future authoritativeness and legitimacy of a given instrument[12].

As for the right to peace, history tells us that the adoption of the draft declaration is the culmination of a long political and legal process which, along the years, has involved a number of relevant actors, from the international, national and local levels. In this regards, the numerous declarations and documents adopted under the aegis of the United Nations which approached, from different angles and perspectives, the issue of the right to peace, together with the unanimous voice of the global civil society and the growing number of inputs coming from local and regional actors, suggest the existence of a strong convergence on the underlying principles and rationale of the draft declaration.

3. The Enhanced Value of Soft Law

The analysis on the content and context surrounding the adoption of the draft Declaration on the Right to Peace has shown that the soft law nature of the instrument does not deprive it neither of legal significance nor of the potential to affect state behaviour. Rather, it is submitted that, with specific regards to the right to peace, the choice of soft law may actually enhance the value of the instrument in a number of respects[13].

First of all, it is submitted that soft law allows a more active participation of non-state actors. Normally excluded from crucial stages of treaty negotiations, non-state actors contributions may indeed be particularly valuable. Vesting the role of *vox populi*, they can orient the state agenda towards unheard claims as well as challenge the logic of trade-off in multilateral negotiations. In the context of the draft Declaration on the Right to Peace, the openness to non-state actors, and to local governments in particular, is especially relevant. Indeed, sharing with states the «responsibility to protect» those living in their territory, local governments are not only entitled to contribute to the recognition of the right to peace, but, being in the front line of human rights, they probably are the most relevant public stakeholders.

Finally, another advantage deriving from the use of soft law is that, as it does not require formal ratification or adoption, a declaration on the right to peace may provide for more

[12] *Ibidem*.

[13] R. Andorno, *The Invaluable Role of Soft Law...*, cit.

immediate evidence of international support than a treaty[14]. As soft law instruments, regardless of their nature, are frequently referred to in national legislation as well as in national and international jurisprudence, it is foreseeable that a declaration on the right to peace may have direct and rapid influence on state practice[15]. In this regards, even if not technically binding at the international level, a declaration on the right to peace may become a powerful point of reference that all relevant stakeholders at all levels may use to promote the realisation of the peaceful world order preconised by Article 28 of Universal Declaration of Human Rights.

Conclusion

Regardless of its nature, the value of a soft law instrument on the right to peace may not be aprioristically dismissed. Indeed, the legal significance and potential to affect state behaviour of a given instrument, rather than be solely dependent on its hardness or softness, should be measured against a number of factors.

As for the draft Declaration on the Right to Peace, both the content, representing a point of convergence and synthesis of existing international standards and principles having a bearing on the right to peace, and the context, indicating a strong convergence on the declaration underlying principles, strongly suggest its relevance and authoritativeness.

Moreover, the soft law approach, providing for a more active participation of non-state actors and for a more immediate evidence of international support, may actually enhance the overall value of a declaration on the right to peace.

[14] M. Barelli, *The Role of Soft Law...*, cit.

[15] A. Boyle, C. Chinkin, *The Making of International Law*, Oxford, Oxford University Press, 2007, p. 212.