AGORA: THE END OF TREATIES

THE EXPANSION OF INTERNATIONAL LAW BEYOND TREATIES

*Humberto Cantú-Rivera**

International law is going through a period of change and, potentially, expansion. At a point in history during the past millennium, the main sources of inter-State law were custom and general principles of law recognized by civilized nations. This came to an end with the Westphalian era when an international order slowly began to establish and a treaty system was developed. Thus, such international law sources as custom and general principles of law gave way to an era of treaties: carefully designed instruments at the international level that codified every single aspect of agreements and transactions between nations. This phenomenon was not exclusive to the universal level; it also took place at a regional scale during the twentieth century, which saw the emergence of regional organizations and agreements that would enable the development of a reasonably stable international or regional society.

Codification of international law has also appeared in areas where no agreement between nations is easy to reach, leading to the adoption of international instruments of a soft nature. In particular, this "soft codification" (soft law) has taken place in areas where the legal subject matter is not purely inter-State. That is, the subject matter is horizontal in nature but involves a vertical—or perhaps transversal[1]—relationship between the State and other subjects and non-subjects of international law. Expansion in the adoption of these instruments is more indicative of a transformation in the way that States continue to work together on different issues that may affect them and their populations, rather than of the demise of the conventional form of international law. In this sense, a practical enlargement of the accepted forms (as opposed to sources) of international law has taken place, despite their lack of formal recognition as a "source" of law.

This essay explores what advantages result from expanding international law to include soft law and how, despite the appearance of soft law and the denunciation of some treaties by some States, the treaty system likely will not disappear but will converge with other forms of international law to continue the evolutionary process of the international legal order.

The Advantages of "Soft Codification"

Soft law[2] has established itself as a form of international law that serves as a driving vehicle to adopt standards, resolutions, and principles that might not be ripe enough for adoption as a conventional text, that is, of a formally binding nature for the ratifying States. Widely used at the international level by multilateral organizations—particularly, but not exclusively, by UN bodies—soft codification has served as guidance for

* *Associate Researcher for the Research Center on Human Rights and Humanitarian Law of Université Panthéon-Assas Paris II (France).*

Originally published online 9 May 2014.

[1] ANTÔNIO AUGUSTO CANCADO TRINDADE, INTERNATIONAL LAW FOR HUMANKIND: TOWARDS A NEW *JUS GENTIUM* (2010).

[2] International Environmental Law Research Guide, Georgetown Law Library.

States on what the *opinio juris* of the international community is regarding a specific topic or area of law at a given moment in time. The use of soft norms itself has evolved over time, from being merely enunciative[3] to constituting operative measures (referred to as "Guiding Principles,"[4] "Good Practices,"[5] or "Guidelines"[6]) on how to implement certain sets of standards in specific fields of international law.

While some soft codification efforts are discussed and adopted by States, an important number of processes nowadays do not necessarily involve the participation of the classic subjects of international law, being largely discussed and driven by independent experts at the international level. While theoretically this could diminish the authority of the outcome document, recent practice has shown that States may support such initiatives[7] for their intrinsic value and largely independent content. Therefore, such initiatives may benefit content-wise from having a "neutral" character that is not politically driven (e.g., as would have been the case in discussions at the former Commission on Human Rights[8] and sometimes, at its replacement, the Human Rights Council[9]), which could also enhance their credibility and status beyond the confines of international organizations' discussion rooms.

In this regard, soft norms and their development process also allow for the participation of other non-subjects under the classical lens of international law, but who increasingly have a more profound presence and impact within it. From this standpoint, the participation of stakeholders other than States and multilateral organizations, such as non-governmental organizations, victims of abuses, or transnational enterprises, allows for a deeper insight while discussing and adopting international texts and resolutions. Their participation provides a diverse perspective that is not necessarily present when the only participants are diplomats. Of course, the participation of some powerful stakeholders may lead to a lack of balance in negotiations and the resulting outcome documents, but it may give credit to a changing reality at the international horizon: that not only States and multilateral organizations have an active participation at the international level in the twenty-first century. Another interesting advantage of the use of soft norms to construct international law is that, normally, they require less time to be developed and agreed upon than conventions and treaties require to be drafted, agreed upon, and entered into force. Soft norms may be faster to develop and agree upon due to their lack of a formally binding nature, which allows participants to explore lege ferenda possibilities without compromising their national sovereignty or international responsibility by entering into a treaty they may not be fully prepared to implement at the domestic level.

Moreover, soft norms or soft codification can prepare the ground for the development of legally binding initiatives that are normally constructed on their foundations. An example that attests to this is the International Convention for the Protection of All Persons from Enforced Disappearance, which took three years to

[3] UN Conference on the Human Environment, June 5-16, 1972, *Declaration of the United Nations Conference on the Human Environment*, UN Doc. A/CONF.48/14/Rev/1 (June 16, 1972).

[4] United Nations Human Rights Office of the High Commissioner, Guiding Principles on Extreme Poverty and Human Rights (Sept. 27, 2012).

[5] Human Rights Council, Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Catarina de Albuquerque, UN Doc. A/HRC/18/33/Add.1 (June 29, 2011).

[6] Secretary-General of the OECD, *OECD Guidelines for Multinational Enterprises* (2011).

[7] Human Rights Council, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UN Doc. A/HRC/17/31 (Mar. 21, 2011).

[8] Economic & Social Council, Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights, Decision 2004/279 (July 22, 2004).

[9] Statement on behalf of a Group of Countries at the 24th Sess. of the Human Rights Council, "Transnational Corporations and Human Rights," General Debate Item 3, Geneva, Sept. 2013.

develop[10] and, as reflected in the Commission on Human Rights' resolution 2011/46,[11] took into account other soft codification developments, such as the UN Declaration on the Protection of All Persons from Enforced Disappearance. However, caution is advised: just as some treaties and conventions have been concluded in a relatively efficient manner after being grown from soft codification efforts, some initiatives, such as the UN Declaration on the Rights of Indigenous Peoples[12] (which took twenty-six years to adopt) will not necessarily take the treaty route for its establishment as "hard" law, which could be particularly complicated given the topic. Rather, its binding nature derives from the regional interpretation made by the Inter-American Court of Human Rights, which has developed an interesting case law in this regard, giving some contents of this UN Declaration a force contraignante character that is binding for States that have accepted the jurisdiction of the Court.

While most of the previous arguments seek to briefly explain the benefits to the international system of relying on informal processes of law-making, they are complementary to the work developed through treaty processes. The next paragraphs will argue why the treaty era is not on the verge of oblivion, and is actually thriving in many respects, despite the apparent cracks that seem to be appearing on its structure.

The Permanence of the Treaty Era

The exponential rise in the development of, reference to, and use of soft law instruments—and the fact that some countries have started to denounce binding conventional agreements by failing to uphold their legal commitments and their resulting sanctions (such as Venezuela and Trinidad and Tobago in the human rights field, or Ecuador and Argentina in the investment area)—could appear to be an indication that the treaty era is coming to an end. Such apocalyptic claims, however, appear to be unfounded. Without being exhaustive, four arguments propose that the treaty era will continue to be present as a fundamental part of contemporary international law.

First, some States' denounciation of conventions or withdrawal from treaties is not sufficient to convincingly argue that treaties will cede their position to other forms of international commitment. Take Venezuela and the American Convention on Human Rights as an example: the denunciation of the regional human rights treaty, while regrettable, so far has not been followed by other countries in the region. Other States in Latin America that are parties to the convention, as well as the United Nations and the European Union, actually supported the Inter-American system and voiced their commitment to fight any weakening of its structure and functions. What this shows is that, despite one or two States walking away from a specific system or treaty, a vast majority of States normally prefers the stability of having a working system or treaty that more or less gives legal certainty to their actions under international law.

The other side of the coin suffers from the same fate: what about the most powerful States that only sign but never ratify[13] some of the major international instruments, such as the Rome Statute; the Kyoto Protocol; the International Covenant on Economic, Social, and Cultural Rights (ICESCR); or the Arms Trade Treaty?[14] What fate awaits the treaty regime if they are not supported by those States? The answer so far indicates that unless an atypical low number of ratifications takes place (such as what has happened so far, e.g., with the

[10] *Elaboration of the Convention*, Committee on Enforced Disappearances, UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS.

[11] Office of the High Commissioner for Human Rights, Question of enforced or involuntary disappearances, Comm. on Human Rights Res. 2001/46, UN Doc. E/CN.4/RES/2001/46 (Apr. 23, 2001).

[12] United Nations, Declaration on the Rights of Indigenous Peoples, GA Res. 61/295 (Sept. 13, 2007).

[13] Duncan Hollis, *The End of Treaties?*, OPINIO JURIS (Nov. 22, 2010).

[14] The Arms Trade Treaty, UNITED NATIONS OFFICE FOR DISARMAMENT AFFAIRS.

Optional Protocol to the ICESCR,[15] which has nevertheless entered into force), a majority of the developed and developing countries will continue adhering to the system, thereby legitimizing the existence and legally binding condition of those international instruments and confirming the permanence of the treaty regime. Thus, the fact that a few States decide either to denounce or not adhere to an international instrument will not necessarily impair or hinder its effectiveness, as long as the majority of the international community continue to support and believe in the purpose of said treaty.

Moreover, fields dealing mainly with inter-State relations, such as cooperation, commerce, or investment, don't appear to be shying away from the adoption of treaties to regulate the relations between them. This situation does not only take place at the international level, but also inter- and intra-regionally, that is, between one region and another or within regional blocks. The World Trade Organization 2013 Report confirms, for example, that bilateral investment agreements between developing countries[16] have increased in recent years, based on a new shift of economic sustainability that has enabled the countries to become capital exporters and investors. Mercosur, the European Union, and the Association of Southeast Asian Nations region also confirm this trend, which sees regional treaties define the boundaries of collective economical or political projects and even continue building upon existing conventional bases upon which their members have previously agreed.

In a sense, more than thinking of a "debacle" of the treaty era, what seems to be apparent is that the fear of external regulation or oversight by foreign mechanisms is still present to some extent. However, it also tends to indicate that, in some contexts, a more precise knowledge, respect, and commitment from certain States is necessary, at the time they conclude treaties with other States, in order to appropriately protect themselves from unnecessary oversight or claims against them on the basis of a default to a binding conventional obligation they adhered to voluntarily.

The current age of globalization and the rise to power of certain non-State actors has become a challenge to the traditional subject of international law. As newer dynamics and forms of international interaction appear as alternatives to traditional law-making methods, the treaty regime continues to be the basis upon which the international system rests, and will not lose its standing to other forms of international law that seem more ad hoc for our time. Instead, rather than making a case on why the treaty era is coming to an end, the accent must be set upon how other forms of international law are useful and necessary to complement the angular stone of the contemporary international law-regime.

[15] Ratification Status for CESCR-International Covenant on Economic, Social and Cultural Rights, UN Office of the High Commissioner for Human Rights.

[16] WORLD TRADE ORGANIZATION, *Prospects for Multilateral Trade Cooperation*, *in* WORLD TRADE REPORT 2013 267 (2013).

https://doi.org/10.1017/S2398772300001872 Published online by Cambridge University Press