Variations on the Theme of ‘Soft International Law’

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I. Introduction

I am delighted to have been invited to contribute to the Festschrift in honour of Gerhard Hafner, whom I have known since the 1960s when we were working as assistants at the Department of International Law and International Relations of the School of Law of the University of Vienna. I remember particularly well our trip to The Hague, where we attended the annual summer course at the Academy of International Law at that time. I have always admired his analytical skills and encyclopedical knowledge of international law, from Soviet legal doctrine to the law of the sea, from state responsibility to international criminal law. His record both as a scholar and practitioner speaks for itself: among other achievements, his membership of the International Law Commission and the Institut de droit international, as well as his function as consultant at the Austrian Federal Ministry for European and International Affairs.

Gerhard Hafner has always been interested in new developments and perspectives in our field. This is why I thought that he might appreciate my somewhat unorthodox thoughts on a phenomenon in international law and international relations which has intrigued me for a long time – the discrepancy between ‘legal rank’ and effectiveness in practice.1 In this essay, I intend to go beyond the traditional scope of the debate, which focuses on ‘hard’, in particular treaty law, vs. ‘soft’, at best politically binding rules.2 I would like to include two further areas: the responses to deviant behaviour, i.e.


the distinction between countermeasures, as reprisals are called today, vs. retorsions, and two examples from the field of peaceful dispute settlement, namely mediation vs. adjudication and arbitration, and binding judgments vs. advisory opinions with an emphasis on the ICJ as the most prominent judicial organ. In this short article I cannot provide an in-depth analysis, but only a few, necessarily sketchy remarks.

II. ‘Hard’ vs. ‘Soft’ Sources of International Law: Treaties vs. Non-binding International Agreements and Resolutions of International Organizations

International agreements that do not fall into the category of binding treaties, which are mentioned, above all, among the ‘primary’ sources of international law in Article 38 of the ICJ Statute, may nevertheless offer certain advantages to remedy the deficiencies of treaty law. Moreover, they may carry considerable weight in the eyes of decision makers so that they are likely to be implemented in practice. The same observation applies, albeit to a lesser extent, to non-binding resolutions adopted by the organs of international organizations, first and foremost the UN General Assembly.

Indeed, treaties frequently fail to meet five requirements for effective international law-making that are so urgently needed in a rapidly changing and globalised international system: speed, clarity, uniformity, wide participation, and adaptability.\(^3\)

1) More than ever, rapid solutions to new challenges are also necessary at the normative level before a problem gets out of control. However, already the first step on the road to a binding treaty, the adoption of its text, may take a long time. This problem is particularly acute if negotiations take place in several stages. Further complications may arise if consensus among the negotiating parties is necessary according to the rules of procedure, or if a broad agreement is sought without this requirement in order to make the treaty as widely acceptable as possible, above all to those states without whose participation the goals of the treaty cannot be achieved.
