The European Journal of International Law Vol. 20 no. 3 © EJIL 2009; all rights reserved

Softness in International Law: A Self-Serving Quest for New Legal Materials: A Rejoinder to Tony D'Amato

Jean d'Aspremont*

1 Introduction

It is to the credit of this Journal and its Board to host debates on diverging conceptions of international law. Such a practice is particularly valuable, especially at a time when the fundamental postmodern critique of international law – although sometimes at the cost of some overgeneralizations – has brought an end to the belief that there is no need to question our understanding of international law and the tendency to take its theoretical foundations for granted. In the light of this current need to reevaluate and refine our conceptions of international law, exchanges of this kind are surely to be welcomed.

The article at the centre of the present debate is entitled 'Softness in International Law: A Self-Serving Quest for New Legal Materials' and was published last year in this Journal.[1] It aimed at refreshing and modernizing the positivist objections to the concept of soft law as well as singling out various agendas underlying it. This criticism of soft law was articulated on the basis of a (neo-) positivist theory of the legal act. In doing so, the article – which built on thoughts first broached in an earlier study[2] – drew a distinction between rules with a soft *instrumentum* – that is when the rule is enshrined in a non-legal instrument – and rules with a soft *negotium* – that is when the rule fails to impose a given conduct on the addressee.[3] While defending the fact that soft law only makes sense as regards the latter, the article argued that the former boiled down to a strategy of many international legal scholars, confronted with the difficulties inherent

* Associate Professor, Amsterdam Centre for International Law (ACIL), University of Amsterdam. Email: J.dAspremont@uva.nl.

1 19 *EJIL* (2008) 1075.

2 D'Aspremont, 'Les dispositions non normatives des actes juridiques conventionnels à la lumière de la jurisprudence de la Cour internationale de Justice', *Belgian Rev Int'l L* (2003) 496.

3 See d'Aspremont, *supra* note 1, at 1081. Although in different terms and for different purposes, the same distinction is used by Kal Raustiala in his very thought-provoking criticism of soft law: see Raustiala, 'Form and Substance in International Agreements', 99 *AJIL* (2005) 581.

EJIL (2009), Vol. 20 No. 3, 911–917 doi: 10.1093/ejil/chp059

Downloaded from https://academic.oup.com/ejil/article/20/3/911/402488 by guest on 10 April 2024

in the multifold institutional pressure to increase original scholarly output, to stretch the limits of their field of study by capturing objects which intrinsically are alien to it. The above-mentioned article simultaneously explained that this tendency of international legal scholars to expand their area of study by shrouding non-legal objects with a legal veil buoys what I have called the proliferation of international legal thinking.

The present reaction starts by making the probably unexpected claim that this rejoinder itself contributes to the phenomenon of proliferation which was bemoaned in the article at the origin of this debate (section 2). It subsequently singles out the uncertainties fuelled by Professor D'Amato's conception of soft law and, in doing so, demonstrates that the concept of legal act spelled out in my earlier contribution provides more satisfactory standards to a growing international community of scholars which finds it increasingly difficult to speak the same language (section 3). In a few concluding remarks, it is argued that the persistent doubts swirling around what qualifies as law confirm that, despite the postmodern attempts to demote international law to a mere discourse, it remains necessary to seek a scholarly consensus as to how we delineate international law and further the standardization on which the language of international law rests (section 4).

2 The Proliferation of International Legal Thinking: a Self-Explanatory Case

When writing the aforementioned criticism of soft law which is at the heart of this debate, I expected to be berated for what many would see as an overly positivistic account of law which constitutes a lingering vestige of an obsolete and anachronous vision of international law.[4] It accordingly came as a great surprise that the first public reaction to which the board of this Journal asked me to respond actually purports to concur with it. Indeed, the response written by Professor D'Amato is, at least on the surface, 'complementary' to my criticism of softness in international law.

While I can only rejoice at seeing my understanding of international law and its correlative theory of legal act being shared by some famous peers, especially by one who has so often taken pains to ponder the concept of international law and its limits,[5] my enthusiasm was short-lived. Indeed, this apparent support led me to question the relevance and the usefulness of the present rejoinder. I started to balk at engaging in an exchange which could only be a repetition of what I had earlier argued, for I have always been taught that ideas, if they are spelled out clearly, need to be told only once. In that sense, I felt that the avowed aim of Professor D'Amato to substantiate my

[4] The concept of law defended herein was nonetheless deemed overly 'absolute'. See the interesting contribution of Goldmann, 'Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority', 9 *German Yrbk Int'l L* (2009) 1865.

[5] See, among others, D'Amato, 'Is International Law Really Law', 79 *Northwestern U L Rev* (1985) 1293; d'Amato, 'What Counts as Law?', in N.G. Onuf (ed.), *Law-Making in the Global Community* (1982), at 83; d'Amato, 'It's a Bird, It's a Plane, It's Jus Cogens', 6 *Connecticut J Int'l L* (1990) 1.

Downloaded from https://academic.oup.com/ejil/article/20/3/911/402488 by guest on 10 April 2024

criticism of soft law simply stifles the need for a rejoinder: why should I react to an article which concurs with my views and which seems to underpin my demonstration that theories of soft law reflect the growing appetite of legal scholars for new legal materials? Once the relish of being invited by a prestigious journal to comment on my own scholarship and the reactions sparked by it ebbed away, I was thus left with the question whether writing this rejoinder would make any sense at all, apart from the vanity that such an undertaking can help satisfy. These doubts almost proved compelling. They originated in the exact underlying phenomenon which I had deplored at the end of the article at the centre of this debate, that is the proliferation of international legal scholarship. It is necessary to stress here that proliferation of international legal thinking is not limited to the resort to soft law – although I exclusively focused on that aspect in my earlier contribution. It can manifest itself in different ways.[6] Broadly speaking, some literature can be deemed prolific if it fails to clarify or add anything to the understanding of law, grapples with issues outside the realm of law, or is utterly tautological in the sense that it only revolves around itself. If this is true, by agreeing to engage in a debate with Professor D'Amato without any visible disagreement between us, I would myself contribute to this proliferation of international legal thinking.

This fear of participating in the proliferation of international legal thinking was further reinforced by the lack of any clear junction between the article discussed here and the reaction formulated by Professor D'Amato. Indeed, while voicing express support for my conception of international legal acts and my criticism of softness, Professor D'Amato's contribution proves, from the standpoint of its substance, very loosely connected to the article which it purports to support, for he shies away from engaging in any kind of discussion about the concept of legal act on which my own criticism of soft law was based, and pays only lip service to the criticism of soft law herein.[7] It is as if he simply took advantage of the opportunity offered to him to put the spotlight on his own – although enlightening – vision of international law[8] without really addressing the core subject matter of the article at the heart of this debate. Making use of the same spotlight by writing a rejoinder, especially in the absence of real debate or even connection between the two articles, would no doubt be the quintessence of the proliferation of international legal thinking.

Despite shuddering at the idea that I would do precisely what I had deplored earlier, I nonetheless accepted the invitation. Indeed, after giving it a second thought, I realized that by taking part

[6] Some additional thoughts on that phenomenon can be found in d'Aspremont, 'La Doctrine du Droit International face à la Tentation de la Juridicisation Sans Limites', 112 *Revue Générale de Droit International Public* (2008) 849.

[7] This is particularly surprising as D'Amato had elsewhere expressed strong criticisms of the positivistic approaches of scholars like H.L.A. Hart or N. MacCormick. See, e.g., D'Amato, 'The Neo-Positivist Concept of International Law', 59 *AJIL* (1965) 321 or 'The Moral Dilemma of Positivism', 20 *Valpariso U L Rev* (1985) 43.

[8] Some of the ideas expressed above can also be found in D'Amato, 'International Soft Law, Hard Law, and Coherence', *Northwestern University School of Law, Public Law and Legal Theories Series*, No. 08-01, available at: ssrn.com/abstract=1103915.

Downloaded from https://academic.oup.com/ejil/article/20/3/911/402488 by guest on 10 April 2024

in the proliferation of international legal scholarship I could strengthen my own argument, for this rejoinder would be the perfect *illustration of the very self-serving goals that animate legal scholars* and which I had attempted to describe in the article at the origin of this debate. It would not only support my earlier criticism, but it would allow me do so without having arbitrarily to pick up a few articles in the literature and run the risk of raising the hackles of some of my colleagues. It cannot be entirely ruled out that writing this rejoinder also equated to relenting in front of vanity. The greatest motivation however remained the fact that it could constitute the very embodiment of what the proliferation of international legal thinking can be. This is undoubtedly what this article has been so far.

3 A Return to the Concept of Legal Act: Persistent Uncertainties

It would be incorrect to say that my doubts about nurturing the proliferation of international legal thinking myself were totally alleviated by the fact that my response could be in itself the illustration of a phenomenon and would, in that sense, bolster my previous position. More was needed than the self-explanatory dimension of it to convince me to write a rejoinder to the allegedly 'concurring' views of Professor D'Amato. Fortunately, a more attentive reading of Professor D'Amato's supposedly like-minded position on soft law convinced me that his views do not actually entirely coincide with my criticism of softness in international law, for he still *contends that soft law remains law*, although stripped of its 'penalty' dimension. More precisely, the basic difference between soft law and hard law, according to Professor D'Amato, rests in the system's reaction to its violation. To him, soft law is 'a naked norm', that is a norm without 'penalty' attached to it. In that sense, soft law is fundamentally defined as law that generates no sanction. It is, as Professor D'Amato elsewhere qualified soft law, a 'mind without a body' or an 'incorporal rule'.[9]

While one can no doubt acquiesce with the idea that soft rules bear no consequences in terms of sanctions, Professor D'Amato's understanding of soft law remains bewildering because his understanding of soft law echoes the idea that the legal character of an act can be subject to several degrees. As was explained in the article published earlier in this journal, I contend that there is no variation in the legal character of an act. An act is a legal act or is not a legal act. It can well be a legal *fact*[10] but it cannot be a legal *act of a lesser legal quality*. In that sense, soft rules cannot be legal rules at all. They may well have some effects on the interpretation of other legal acts – in which sense they qualify as a legal fact[11] – but

[9] D'Amato, 'Why is International Law Binding?', *Northwestern University School of Law, Public Law and Legal Theories Series* No. 08-23, available at: ssrn.com/abstract = 1157400.

[10] As was explained in the article being commented on, the distinction between legal act and legal fact is commonly ignored in the English-speaking literature. This was pointed out by James Crawford in his commentaries on the articles of the International Law Commission on State Responsibility: *Commentaries*, ILC Annual Report 2001, Ch. IV in Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10), at 68.

[11] For a still valid systematization of the distinction between legal acts and legal facts see D. Anzilotti, *Cours de droit international, premier volume: introduction – theories générales, translated by G. Gidel (1929)*, esp. chap. III, at 333–456.

Downloaded from https://academic.oup.com/ejil/article/20/3/911/402488 by guest on 10 April 2024

they cannot be rules. The only softness which law can accommodate is the softness of the *negotium*, that is when a rule undoubtedly constitutes a legal rule but fails, because it lacks precision or hinges on the adoption of complementary legal instruments, to provide any precise directive as to which behaviours the addressees must live up to. Rules with a *soft negotium* remain legal rules, as 'normativity' is not a constitutive element of their legal character.[12] They nonetheless do not curtail the freedom of those obliged by it. It is true that rules with a soft *instrumentum* and rules with a soft *negotium* lead to the same result: the unfettered freedom of the addressee(s). However, it is of the utmost importance to realize that the cause of the absence of any obligatory directive is not the same. In the case of a rule with a soft *instrumentum* it is because the instrument is not a legal act, whereas in the case of a rule with a soft *negotium* it is because the legal act fails to lay down any specific obligation.

Professor D'Amato does not just identify softness of law as the absence of sanction. Although in terms which are not always very clear, he also seems to construe the softness of a norm from the vantage point of the *goal* that it seeks to fulfil. Drawing on the work of H. Tasioulas, he seemingly espouses the idea that soft law is directed at 'laudable goals' like democracy, morality, justice, whilst hard law is entirely dedicated to the self-interest or collective interests of states themselves (self-preservation and self-perpetuation). This article argues that delineating international law along the lines of the interests that are served is hardly convincing. Law is not hard because it is made in the interest of states. Law is hard simply because it is made by states whatever the ultimate goal pursued by them really is. It is true that consent of states – without which there cannot be law – can usually only be secured if the rule at stake dovetails with their own self-interest.[13] However, it cannot be excluded, as exemplified by the emergence of rules deemed in the interest of the international community,[14] that 'hard' law be dedicated to these laudable goals that D'Amato seems to regard as being a constitutive feature of soft rules. Hence, the goal served by a rule is an insufficient yardstick to identify hard law and soft law.

[12] See the interesting contention – although unproven in practice so far – made by B. Kingsbury according to whom 'publicness' – i.e. the claim that law has been wrought by the whole society, by the public, and the connected claim that law addresses matters of concerns to the society as such – is a constitutive element of law: see generally Kingsbury, 'The Concept of "Law" in Global Administrative Law', 20 *EJIL* (2009) 23, esp. at 31.

[13] Acknowledging the central role played by self-interest does not necessarily lead to a neo-realist understanding of international law. For an understanding of international law accommodating the central role played by self-interests see d'Aspremont, 'The Foundations of the International Legal Order', 18 *Finnish Yrbk Int'l L* (2007) 261.

[14] For an example see the fledging obligations pertaining to the adoption of democratic procedures for the designation of the effective leaders of a state which, despite serving the self-interest of states of a perceived reinforcement of global stability are also directed at some general interest. See generally J. d'Aspremont, *L'Etat non démocratique en droit international. Etude du droit positif et de la pratique Contemporaine* (2008), esp. at 263–293. Some additional thoughts can be found in d'Aspremont, 'Post-Conflict Administrations as Democracy-Building Instruments', 9 *Chicago J Int'l L* (2008) 1.

Downloaded from https://academic.oup.com/ejil/article/20/3/911/402488 by guest on 10 April 2024

4 The Need for Elementary Standardization: the Prerequisite for a Universal Language

The uncertainties spawned by Professor D'Amato's conception of soft law (and correlatively by his concept of legal act) remind us that international legal scholars have lost sense of the most common standards on which they need to agree if they are to understand each other. Indeed, contemporary legal scholarship bespeaks a lack of consensus on what constitutes a legal act despite it being one of the most basic grammatical rules of the language of international law. Professor D'Amato himself in earlier writing has called for a theory of international law.[15] It is argued here that, more than a 'theory' of international law, what is needed is a universally shared concept of international legal act. Scholarly debate would yield nothing more than a ceremonious cacophony – and would simultaneously fuel the above-mentioned proliferation of international legal thinking – if we did not manage to agree on what constitutes a legal act. The concept of international legal act is one of those tools which allow us to determine whether a given instrument has 'linguistic' relevance for the sake of international law and whether a legal effect must be associated with it.

Searching a consensus about what constitutes a legal act undoubtedly boils down to a quest for elementary *standardization*. It is well know that standardization – especially through the doctrine of sources – and the formalization which accompanies it have been castigated by critical legal scholars for artificially closing the system, doing away with 'high theory', stripping international law of natural law theories, and eventually legitimizing the current distribution of powers in the international system.[16] This is absolutely true. Pursuing standardization is, however, the only means to allow international law to remain a universal language understood by all and to prevent it from becoming this 'discourse' which critical legal scholars have been calling for.[17] Failing to ensure elementary standardization would condemn international legal scholarship to become a henhouse and would eventually turn it into a tower of Babel.

It must be acknowledged that standardization through a common concept of legal act, as is advocated here, does not come without a cost. The drawbacks of standardization and formalism are well known, and it is probably of no avail to expound on them here.[18] However, it is important to stress that the downsides of standardization remain rather modest and insignificant,

[15] D'Amato, 'The Need for a Theory of International Law', *Northwestern University School of Law, Public Law and Legal Theory Research Paper Series*, available at: ssrn.com/abstract=.

[16] See T. Skouteris, *The Notion of Progress in the International Law Discourse* (forthcoming, 2009).

[17] M. Koskenniemi, *From Apology to Utopia* (2005), at 565–583. It is worth stressing that when describing their understanding of international law, critical legal scholars have been prone to use the words 'language' and 'discourse' as interchangeable despite the entirely opposite project that each of these words conveys.

[18] See Pildes, 'Conflicts Between American and European Views: The Dark Side of Legalism', 44 *Virginia J Int'l L* (2003–2004) 145, at 154; Mälksoo, 'The Science of International Law and The Concept of Politics', 76 *British Yrbk Int'l L* (2005) 383, at 500; see also Jouannet, 'French and American Perspectives on International Law: Legal Cultures and International Law', 58 *Maine L Rev* (2006) 292.

Downloaded from https://academic.oup.com/ejil/article/20/3/911/402488 by guest on 10 April 2024

especially when compared with the serious hazards inherent in the cacophony caused by the absence of consensus on a concept of legal act. Short of common standards, international law would be demoted to a mere platform for political debate where concepts have no meaning but that given by their users. Even the legal pluralism advocated by the opponents of standardization remains an elusive aspiration in the absence of an elementary standardization, for without common elementary standards there is eventually little that we can exchange, and thus little that we can learn from one another.

These modest remarks will probably not suffice to redeem the prolific character of this rejoinder and prevent it from being an illustration of the proliferation of international legal thinking which was bemoaned in the article at the origin of this debate. After all, the foregoing could have been expressed in much simpler wording. The above-mentioned – somewhat esoteric – considerations only meant that we, scholars, must not lose sight of the fact that, whenever we venture into some arcane discussions about ourselves and the meaning of our work, even under the auspices of a prestigious law journal, we should remain centred on the tangible object that we are expert in, that is law. It is hoped that succumbing here to the sin that I have deplored elsewhere will help demonstrate the need for an elementary standardization in international law without which international legal scholarship can hardly avoid the pitfall of cacophony. It has been argued here that such an elementary standardization can only be achieved through a consensus about what constitutes an international legal act. The persisting disagreement among scholars averse to the idea of the softness of law about what is wrong with soft law – as is illustrated by the debate between Professor D'Amato and myself – shows that such a consensus is not yet within reach. Such a scholarly consensus on what constitutes an international legal act not only is necessary to allow us usefully to discuss the meaning and the content of international law. It is simultaneously needed to help rein in the proliferation of international legal thinking in which I have consciously indulged here.

Downloaded from https://academic.oup.com/ejil/article/20/3/911/402488 by guest on 10 April 2024