II. SOFT LAW: TERMINOLOGY AND LOCALISATION

1. Origins and concepts: a theoretical account of 'soft law'

1.1. Origins, ideas and challenges: a *tour d'horizon*

1.1.1. Terminology, recognition and occurrence in practice: an approximation

> 'THE matter of jurisprudence is positive law: law, simply and strictly so called: or law set by political superiors to political inferiors. But positive law (or law, simply and strictly so called) is often confounded with objects to which it is related by *resemblance*, and with objects to which it is related in the way of *analogy*: with objects which are *also* signified, *properly* and *improperly*, by the large and vague expression *law*' (emphasis in original).[11]

These words of *Austin*, first published in 1832, address well the indetermination of the notion of law, which is why they are quoted here. Whoever wants to use it (in an academic context) has to provide his or her own definition in order not to be misunderstood.[12] The works on different theories and concepts of law – which fill libraries – bear witness of that fact. Nevertheless, the expediency of the term 'law' in common as well as in specific (scientific) parlance is largely undisputed, and its use – in a more or in a less conscious way – almost inescapable.[13]

'Soft law' describes a vague and malleable concept, as well.[14] Having realised that one of its literal components, namely the term 'law', itself is

11 Austin, Province 18. To avoid misunderstandings which may result from the above quotation, it ought to be stressed that *Austin* understood 'law set by political superiors to political inferiors' as a synonym of 'law, simply and strictly so called', that is positive law; see also Rumble, Positivism 991.

12 See eg Fastenrath, Normativity 331; Peters, Typology 411; Rill, Fragen 1.

13 This terminology has existed for many centuries (in various languages), before a truly scientific approach towards law had started only in the 12th century (AD); see Arndt, Sinn 32.

14 See eg Bast, Handlungsformen 515 f; Shelton, Introduction 2; von Arnauld, Völkerrecht, para 282; see also *Zeitler*, who pointedly describes 'soft law' as 'geräumige Schublade für alle rechtsähnlichen Erscheinungen' [spacious drawer for all law-like

unclear, this finding hardly comes as a surprise. Considering other (fundamental) ideas used in legal scholarship, 'law' and 'soft law', however, do not appear to be exceptional in this respect. The commonly used terms 'norm', 'separation of powers' or 'accountability' – to name just examples – as such do not convey an entirely clear concept, either. A norm can be written or unwritten, national or international, legal, customary, or moral etc. The separation of powers conveys a picture of State powers being shared between certain branches, normally the legislative, the executive and the judiciary. The term as such, first coined by *Locke* and *Montesquieu*, does not, however, say anything about *how* these powers are (to be) shared. Accountability again can be used as a synonym for responsibility, but can also be used to describe the mechanisms set in place for ensuring this responsibility which again may consist of anything between light supervision and strict control. These terms or concepts (intentionally) convey a lot of different meanings, each of which requires further specification when dealt with on a scientific level. Thus, the ubiquity of terminological vagueness in legal discourse in principle is neither new nor inexpedient.[15]

The concept of 'soft law' may be considered unnecessary by those who think that the phenomenon usually addressed by it can be covered entirely by the traditional distinction between law and non-law.[16] This is a conceptual critique. But those who agree that, in whichever legal order, there is a body of (legally non-binding) sovereign rules which needs to be categorically distinguished from other legally non-binding output of this very sovereign should accept the term for lack of an apparent better alternative.[17] This is why, in my view, the terminological dissatisfaction with the word 'soft law' – which is applied in order to grasp an actual phenomenon, not in order to complicate scholarly terminology – is unjustified. It is a 'trendy

phenomena]; Zeitler, Entwicklungen 1400; for further ascriptions see references in Ştefan, Soft Law 7 f.

15 For the (possible) expediency of vague terms not only in everyday parlance but also in legal language see Jakab/Kirchmair, Unterscheidung 354.

16 See eg Klabbers, International Law 38: 'misleading and unhelpful'.

17 For an attempt to establish an alternative terminology – 'informal law(making)' – see the legal/political science anthology by Pauwelyn/Wessel/Wouters, Informal International Lawmaking; for a definition of the term see Pauwelyn/Wessel/Wouters, Introduction 1–3; for the overlap with the term 'soft law' see Flückiger, Soft Law 409; see also the terminologies of Arndt, Sinn 155: 'alternative Steuerungsinstrumente' [alternative steering instruments] (see I.2. below) and Martin/Tourard/Loquin/Ravillon, Chronicle 94: 'supple and blur law'.

phrase',[18] it is true, but in a good art. It is widely used and it immediately conveys an idea of what it says, namely: something 'less' than law.[19] Thus, it may be described – in *Senden's* words – as 'a maybe not perfect, but at least reasonably satisfactory umbrella concept'.[20] Whoever wants to use the term in a *scientific context* first needs to define more closely what he or she understands with 'soft law', ie to explain his or her concept of 'soft law'.[21] This explanation the author will provide below (1.3.4.), and up until then the term shall be understood in its very general meaning just referred to: as describing norms which are something less than law.

Due to the multifacetedness of non-legal regulation, fleshing out one's understanding of 'soft law' is not an easy task.[22] While there are diverging concepts of 'soft law' in place (more often than not, however, even in scholarly literature it is dealt with only cursorily), the first one purportedly[23] stemming from *McNair*,[24] the term as such appears to be the dominant designation for legally non-binding acts.[25] In a legal context, it reputedly came in more widespread use in the 1970s.[26] A specificity of this term is that it makes use of a fundamental and advanced notion: law – and modifies its meaning by prefixing an adjective: soft. This combination makes it a

18 Brownlie, Extent 66. It is to be noted that *Brownlie* uses this term in the context of *lex ferenda*, which does not conform to the understanding of 'soft law' applied here. See d'Aspremont, Pluralization 194, with regard to a certain affinity in recent scholarship to term certain norms, institutions, processes or other phenomena 'soft'; Hofmann/Rowe/Türk, Administrative Law 567, to take another example, have described the term as an 'over-simplified (and arguably popular) notion'; Weber, Dichotomy 11, argues that 'the term soft law is now acknowledged as valuable notion'. For the gradual replacement of the term 'quasi-legislation' by 'soft law' in British legal scholarship since the 1980s see Rawlings, Soft law 220. On the mystery the term 'soft law' allegedly carries: Arndt, Sinn 89.

19 Sceptically as regards an undifferentiated use of the term: Arndt, Sinn 43; against a too restrictive approach: Wellens/Borchardt, Soft Law 273.

20 Senden, Soft Law 110.

21 See also Terpan, Soft Law (2013) 5.

22 With regard to the difficulty to make generally applicable statements on 'soft law' – a fact which strongly affects its definability – see eg Walter, Soft Law 28.

23 See, each with further references, Hillgenberg, Look 500; Wellens/Borchardt, Soft Law 268 (also on the role of *René-Jean Dupuy*).

24 McNair, Functions, in particular 110 ff; assuming that with the term 'soft law' *McNair* was actually referring only to acts (still) constituting a *lex ferenda*: d'Aspremont, Softness 1081 (fn 35), with further references; see also Jennings, Lawyer 515 f.

25 Similarly: Arndt, Sinn 90.

26 See Arndt, Sinn 36 f; Ştefan, Soft Law 8, both with further references.

catchy word, 'very revealing *precisely because* it is a contradiction in terms' (emphasis added), as *Hillgenberg* put it.[27]

The recognition of 'soft law' (as opposed to law and other categories of norms) requires the consideration of a variety of factors which are 'fluid, cumulative, and interlocking'.[28] It reflects on traditional methods of legal interpretation in an attempt to find out about the (real or at least the demonstrated) will of the rule-makers (in particular the wording of the act and its systematic/contextual assessment[29]), but may also encompass procedural questions such as: Have the procedural requirements – the form and the forum of conclusion – for law-making been met?[30] The assumed importance of the subject matter, on the contrary, can regularly not serve as an indicator, as it tends to be more confusing than enlightening.[31] Often it is

27 Hillgenberg, Look 500; von Bogdandy/Arndt/Bast, Instruments 111 call it a 'provocation' for a traditional concept of law.

28 Chinkin, Development 37.

29 For example: Does the originator use the term 'should' or 'shall'? Sceptically: Coman-Kund/Andone, Instruments 182; see also Andone/Greco, Burden 92; Dickschen, Empfehlungen 124; Ruiter/Wessel, Nature 178. The perspectives on the use of the terms 'should'/'shall' may differ, though; see eg the Opinion of the European Economic and Social Committee on the proposals for the adoption of Regulation 1092/2010 and Regulations 1093–1095/2010, 2010/C 339/08, 4.2.3.: 'The use of "should" means that these recommendations are more or less compulsory'. With regard to EU law more generally, *Hofmann*, *Rowe* and *Türk* generally identify a decrease of 'mandatory formulations, [EU bodies] preferring a style appearing to aid and persuade'; Hofmann/Rowe/Türk, Administrative Law 566. For other soft phrases see Weil, Normativity 414: 'seek to', 'make efforts to', 'promote', 'avoid', 'examine with understanding', 'act as swiftly as possible', 'take all due steps with a view to'; addressing this issue in the context of international accords on environmental and on migration matters: Weismann, Bestimmung 390 ff; with regard to the term 'may' (used in an Association Agreement) see case C-581/11P *Mugraby*, paras 70 f; for the systematic/contextual assessment see Wellens/Borchardt, Soft Law 277–279, with respect to public international law; with regard to EU law see case T-721/14 *Belgium v Commission*, para 18, with many references to the CJEU's case law.

30 See Wellens/Borchardt, Soft Law 300 f. For the relatively low formal requirements for treaties according to the VCLT 1969 see, eg, its Article 11 entitled 'means of expressing consent to be bound by a treaty'; see Klabbers, Courts 225 and 227 f, with regard to the pertinent case law of the ICJ; see also Pauwelyn, International Law 148 f and 151, who argues that at the level of public international law the legitimacy of law on the one hand and 'soft law' on the other hand may in some cases not differ greatly from each other; discussing the applicability of the VCLT – *per analogiam* – to international 'soft law': Seidl-Hohenveldern, Soft Law 224.

31 See Chinkin, Development 40; Terpan, Soft Law (2015) 89.

the issues considered important which are regulated in a legally non-binding way.[32] For the specific case of public international law see below.

With a view to distinguishing legally binding from legally non-binding international accords, *Klabbers* has proclaimed a 'presumption of legal force' – thereby repudiating the presumption of legal non-bindingness of international agreements proposed by others[33] – which can, as a matter of course, be rebutted.[34] In his view, this presumption is reflected in the International Court of Justice's (ICJ's),[35] but also in the CJEU's jurisprudence.

Having talked about terminological specificities of 'soft law' and the difficulties of its recognition, let us not forget to mention the practical occurrence and the reasons for its adoption, respectively. While it is true that legally non-binding but still authoritative rules in general can be traced far back in legal history – *Klabbers* describes them as 'a phenomenon of all times'[36] –, the more widespread use and its systematic appraisal as something related to but not yet law can be perceived only much later. In the specific case of public international law, the broader recognition of the existence of acts being something less than a 'perfect legal act',[37] goes back to the 19th century.[38] The pertinent scholarly discussion fully unfolded in the course of the 20th century.[39] Today its use is more common in some fields of public international law – for example environment, human rights,

32 See Knauff, Regelungsverbund 259 f.

33 First of all: Fawcett, Character 386 f; for the adherents of this view see references in Klabbers, Courts 224.

34 See Klabbers, Courts 224 f; see already Klabbers, Instruments 1019 ff.

35 This presumption may be facilitated by the general principle of public international law 'pacta sunt servanda' (see also Article 26 of the VCLT 1969).

36 Klabbers, Courts 223. Take the *senatus consultum* (the Senate's advice) in Ancient Rome as an example, which was legally non-binding, but nevertheless held high authority, especially in times of the Roman Republic; see Gehrke/Schneider, Geschichte 504; for the mere *auctoritas* of the Senate of Ancient Rome (as opposed to *potestas*) see Goldmann, Gewalt 349, with further references.

37 Tammes, Decisions 285.

38 See Klabbers, Courts 222 f; contrasting alternative instruments (mainly of the 20th century) with the modern international treaty: Goldmann, Gewalt 21 ff. For the long-lasting discussion on whether or not public international law is to be called law in the first place see eg J B Scott, Nature, and the references to a variety of scholars made therein. For examples from the early and mid-20th century see Bothe, Norms 71–75; see also Schwarze, Soft Law 231, with a further reference.

39 For the debate on the legal quality of the Universal Declaration of Human Rights as an early example of the 'soft law' discussion see eg Schwelb, Influence; for its role in paving the way for binding human rights covenants see Brown Weiss, Introduction 5; for its (at least partial) transformation into customary law see Malinverni, Effectivité

labour – than in others, eg trade and arms control.[40] The reasons for the adoption of such acts, initially primarily (bi- or multilateral) accords, have lain in the difficulty to reach the consent of all parties to a legally binding agreement. States have always been hesitant to legally bind themselves with regard to certain issues.[41] At the same time, most political representatives – after often wearing negotiations – consider preferable an agreement on something (eg a legally non-binding document) to no agreement at all or, as it is sometimes ironically described, to a mere agreement to disagree.[42] However, according to the contemporary international law literature, there are more purposes which the adoption of 'soft law' may serve. 'Soft law' acts may also be adopted, to name just a few, as a concretisation of (hard) legal norms,[43] as a preliminary commitment to adopt a legally binding act at a later stage of the negotiations,[44] to serve as a way around difficult ratification processes,[45] or to prove the existence of hard (customary) law.[46] With regard to the latter case, the ICJ expressed in its Advisory Opinion on the legality of nuclear weapons that 'soft law' – in this case: a resolution of the UN General Assembly – may 'show the gradual evolution of the

301; for the different phases of academic debate on 'soft law', starting in the 1970s, see Mörth, Introduction 4.

40 See Brown Weiss, Introduction 3.

41 See Chinkin, Development 21 f, with further references.

42 See Klabbers, Courts 239; Peters, Typology 420.

43 See Chinkin, Development 30; see examples in Pauwelyn, International Law 155; for different forms of concretisation/interpretation, authentic – non-authentic and authoritative – non-authoritative, see Fastenrath, Normativity 334 ff.

44 See Brownlie, Extent 66; for the sole purpose of internationalising a matter (by means of 'soft law'), making the adoption of countering rules at the national level less probable: Peters, Typology 411; also the hope that soft provisions may 'develop into something with bite' is an important *stimulus* for the adoption of 'soft law' (where the adoption of hard rules is just politically not feasible); see Hockin, World Trade Organization 256.

45 See Friedrich, Soft law 136; Pollack/Shaffer, Interaction 246; note § 72 para 1 of the Joint Rules of Procedure of the Federal Ministries of Germany (in their English translation; <https://www.bmi.bund.de/SharedDocs/downloads/EN/themen/moderne-verwaltung/ggo_en.pdf?__blob=publicationFile&v=1> accessed 28 March 2023: 'Before drawing up and concluding international treaties (intergovernmental treaties, intergovernmental instruments, interministerial agreements, exchange of notes, and correspondence), the lead Federal Ministry must always verify whether settlement under international law is unavoidable or whether the aim pursued can also be achieved by other means, and in particular by agreements below the level of an international treaty'.

46 See Chinkin, Development 30 f, with further purposes.

opinio juris required for the establishment of a new rule' and thereby 'have normative value'.[47] In other words, where States have made utterances on a certain issue in a legally non-binding way frequently or otherwise authoritatively enough, these utterances may be considered as an expression of a conviction that the rules at issue are legally binding. As we shall see, this seemingly paradox conclusion can be drawn also in other cases. Taking account of this multiple use of 'soft law' in international relations, Advocate General (AG) *Cruz Villalón* points out that 'the doctrine on sources of international law has increasingly sought to cover also the acts which, although legally non-binding, none the less exhibit a degree of relevance through references made to them, the reliance placed on them for the purposes of interpreting binding law or their practical effectiveness, all of this under the heading of "*soft law*" (emphasis in original).[48] Against this background, *Dehousse* and *Weiler* remarked, more than 30 years ago, that while '[l]awyers are naturally inclined to minimise the importance of international agreements deprived of binding force [...], agreements of that kind can have a crucial importance'.[49]

1.1.2. The challenges of using public international law as a starting point

Having prospered in opposition to a more or less fleshed-out *corpus* of law for well over a hundred years and still prominent in public international law,[50] meanwhile the phenomenon of 'soft law' has also gained ground in national legal orders on a larger scale.[51] Also in the EU legal order it has been used for a comparatively long time already. Irrespective of the legal

47 *Nuclear Weapons*, ICJ Reports 1996, para 70. Similarly already in *Nicaragua v United States of America*, ICJ Reports 1986, paras 188 f, and more recently again in *Chagos Archipelago*, ICJ Reports 2019, paras 150–153.

48 Opinion of AG *Cruz Villalón* in case C-399/12 *Germany v Council*, para 97. To limit the sources of public international law to those mentioned in Article 38 of the Statute of the ICJ is generally refused as overly formalistic and not doing justice to reality; see Koskenniemi, Utopia 181, with further references; Zemanek, Soft law 844; see also *Denmark v Norway*, PCIJ No 53 Ser A/B 1933, 69–71, and *Australia v France*, ICJ Reports 1974, para 51.

49 Dehousse/Weiler, Single Act 129.

50 On exemplary categories of 'soft law' in public international law see Knauff, Regelungsverbund 262 ff and 270 ff; see also Bothe, Norms 70 ff.

51 For a selection of cases from domestic jurisdictions see Klabbers, Redundancy 174–177; for the long-lasting reluctance of national constitutions to accept non-binding acts as a legal phenomenon see von Bogdandy/Arndt/Bast, Instruments 111.

order in the context of which 'soft law' is discussed, the issues in many respects remain the same.[52] They address, *inter alia*, the questions how 'soft law' can be distinguished from law on the one hand, and from other legally non-binding behavioural guidance on the other hand; which legal effects 'soft law' may have; whether it is possible to design a categorisation of 'soft law' acts; whether and, if so, which legal protection is available against 'soft law'.[53] Against the background of these manifold questions, and due to the fact that the aspects of the creation, the form and the effects of 'soft law' are – arguably in all international or national legal orders – regulated less intensely than they are, respectively, in the case of law, the systematisation of the body of 'soft law', even if only in one legal order, is a demanding task.

Public international law appears to be the legal order where law and 'soft law' in practice are by tendency most difficult to distinguish. It is its scarce and fragmented regulatory frame which *Chinkin* refers to when she utters that 'the richness and texture of contemporary international law and the broad differences in its form, purpose, style, and participants make illusory attempts to construct any systematic framework for the analysis of soft law that is not interspersed with exceptions, or framed at such a high level of abstraction that its usefulness is diminished'.[54] Nevertheless – or maybe even therefore – a preoccupation with public international law promises the most generally applicable findings on 'soft law' as a 'legal' phenomenon. After all, general public international law – in spite of its diversified morphology – geographically speaking is the most universally applicable legal order in place.

Having said that, also the idiosyncrasies of public international law ought to be considered in order not to draw wrongful parallels to the EU or national legal orders.[55] This concerns, above all, the strongly heterarchical structure within which the actors of public international law – in particular States and international organisations – together make rules. These two

52 For the differences see references in Peters, Typology 406 f.

53 See Klabbers, Reflections 316, with regard to the limited responsibility for making/applying 'soft law'; see also von Bogdandy/Dann/Goldmann, Publicness 1389.

54 Chinkin, Development 25; for these and other particularities of public international law which are relevant here see Griller, Fragmentierungen 246–248, with further references on the diverging views on the character and the categorisation of public international law; for a categorisation of the different approaches towards public international law and an analysis of the way the 'modern international lawyer' (page 157) takes, see Koskenniemi, Utopia 155 ff, and the references made therein.

55 See generally Klabbers, Redundancy 170.

(inherently linked) elements – the heterarchy and the predominantly bi- or multilateral law-making – make the law *inter nationes* resemble the mechanisms of the (national) law *inter privatos* much more strongly than national and EU (public) law.[56] This is reflected in the predominant legal instruments of public international law, namely treaties or, more generally: agreements – which are just (in public international law more common) synonyms of the word 'contract'. With these legal instruments, their creators most of the time are identical to their addressees. In national and EU (public) law, on the contrary, most of the acts apply to the respective citizens, eg regulations made by the legislator or decisions taken by an administrative authority. What is more, in public international law – similarly to private law with its fundamental principle of private autonomy – the rule 'Everything which is not prohibited is permitted', as prominently expressed in the *Lotus* case of the Permanent Court of International Justice, applies.[57] Arguably it is not only the informality of 'soft law' as such, but also the relative freedom from legal restrictions which *Klabbers* refers to when describing informal international lawmaking[58] as manifestation of the popular slogan 'Just Do It'.[59] With respect to legally non-binding rules, however, public international law and private law strongly differ from each other: While the broad scope for 'soft law' is made use of abundantly in public international law,[60] in private law the creation of non-binding norms appears to be a relatively recent phenomenon[61] and in particular non-binding contracts among private actors are still a rare exception (see 1.3.3.2. below). Even the so-called *obligatio naturalis* – an only seemingly evident

56 Note the Austinian distinction between laws set by 'political superiors' and laws set by 'men to men'; Austin, Province 19.

57 Critically: Hertogen, Lotus, in particular 913; for the similarities between public international law and private law more generally see Lauterpacht, Sources.

58 This is a specific terminology underlying all contributions to the book Pauwelyn/Wessel/Wouters, Informal International Lawmaking. It is defined in the contribution of Pauwelyn, Informal International Lawmaking 22. It does not require acts to be legally non-binding, but it would certainly also encompass such acts ('output informality').

59 Klabbers, Courts 223.

60 See Rawlings, Soft law 215, who purports that '*official* business could not sensibly be carried on without [soft law]' (emphasis added).

61 For legally non-binding acts adopted by private actors take the example of the Corporate Governance Codes; with regard to the legal situation in Germany: Arndt, Sinn 60–68; M Weiß, Regulierungsinstrumente 37. According to the definition which will be presented below (1.3.), these Codes regularly do not qualify as 'soft law'.

example in this context – legally obliges the debtor (eg to pay a certain amount of money to the debtee).[62] What is more, its non-enforceability does not root in the contract as such, but is provided for by statutory law as a consequence eg of a lapse of time.

Summing up, public international law and its academic penetration seems to be a promising source of generally applicable findings with regard to the phenomenon of 'soft law'. Notwithstanding, the mentioned differences between public international law and national and also EU (public) law should constantly be borne in mind in order to avoid wrongful projections.

1.2. Different concepts of soft law

As was set out above (1.1.1.), the notion of 'soft law' is not accepted throughout legal scholarship and even those who accept it attach different meanings to it. A selection of these different meanings, as expressed in the literature, shall be outlined here. For those who outright neglect the idea of 'soft law', exemplarily *Klabbers*' words shall be quoted: 'Our binary law is well capable of handling all kinds of subtleties and sensitivities; within the binary mode, law can be more or less specific, more or less exact, more or less determinate, more or less serious, more or less far-reaching; the only thing it cannot be is more or less binding'.[63] *Klabbers* criticises that the notion of 'soft law' was lacking theoretical groundwork. Even more fundamentally, he claims that the concept is outright unnecessary, as the binary concept of law 'can accommodate various shades of grey without losing its binary character' and thus also the phenomena which are referred to as 'soft law'[64] – an understanding which certainly has adherents in the literature.[65] *Klabbers* discusses the scarce State practice on the one hand and on the other hand the international judicial practice, which, in his view, when dealing with 'soft law' recasts it into 'more accepted sources of international law', namely treaties and custom.[66] This practice he also finds

62 See *H René Laurer* and *Wolf-Dieter Arnold* in the discussion of Walter, Soft Law 29 f; see also Bodansky, Character 143, with further references.
63 Klabbers, Concept 181.
64 Klabbers, Redundancy 180.
65 See eg Jabloner/Okresek, Anmerkungen 221; see also references by Arndt, Sinn 39 f, and by Pauwelyn, International Law 128 (fn 16).
66 Klabbers, Redundancy 174.

confirmed in his selection of cases before domestic courts in which 'soft law' is at issue.[67]

Yet another scholar of public international law, *Weil*, concedes that the line between binding and non-binding provisions is sometimes difficult to draw,[68] and that non-binding provisions may 'create expectations and exert on the conduct of States an influence that in certain cases may be greater than that of [binding rules]'.[69] At the same time, he points out that a legal norm may also contain 'softly' worded provisions, without thereby losing its character as legal norm.[70] He refuses the assumption of different degrees of bindingness which, in his view, does not only affect the distinction between binding and non-binding provisions, but – eg due to the acknowledgement of the concept of *ius cogens* which is said to rank higher than the regular (public international) law – also creates a hierarchy of legally binding rules.[71] Thereby a scale 'from nonlaw to superlaw'[72] is created which *Weil* considers confusing and, in view of a certain degree of bindingness of all provisions on this scale, useless: 'A normativity subject to unlimited gradation is one doomed to flabbiness [...]'.[73]

Those scholars, who are, on the other hand, open to the idea of conceptualising a new category of norms in order to deal with the phenomenon at issue, in part differ significantly in their approach. *Abbott* and *Snidal* perceive 'soft law' as 'legal arrangements' which 'are weakened along one or more of the dimensions of obligation [ie bindingness], precision [of the normative wording], and delegation',[74] the latter meaning the latitude to interpret, apply and elaborate the provision at issue.[75] On the lower part of the spectrum, that is to say *not even* 'soft law' are 'purely political arrangements in which legalisation is largely absent'.[76] *Abbott* and *Snidal*

67 Klabbers, Redundancy 174–177.
68 See also Malinverni, Effectivité 301, speaking of a 'certaine porosité' of this line.
69 Weil, Normativity 415.
70 See Weil, Normativity 414.
71 See Weil, Normativity 421 f.
72 Weil, Normativity 430; see also ibid 427.
73 Weil, Normativity 429.
74 Abbott/Snidal, Hard and Soft Law 422; see Terpan, Soft Law (2015) 73, who – in contrast to *Abbott* and *Snidal* – emphasises the criteria 'obligation' and 'enforcement'.
75 For an in-depth discussion and partly development of these three dimensions see Schelkle, Governance 710 f; see also Mills, Biotechnology 329; critically: Mörth, Introduction 6.
76 Abbott/Snidal, Hard and Soft Law 422.

emphasise the 'continuous gradations of hardness and softness', a relativity of the normativity of law, and thereby refuse the binary model of law.[77]

Taking up on these three dimensions of law (obligation, precision and delegation), *Kirton* and *Trebilcock* define law as 'an international, or by extension an inter-actor, arrangement that has a very high value on each of those three dimensions'.[78] While law first and foremost relies on the authority and power of the State, 'soft law', by contrast, first and foremost relies 'on the participation and resources of nongovernmental actors in the construction, operation, and implementation of a governance arrangement', they say.[79] In 'soft law' regimes it is not the formal authority of governments which is relied upon, it is the voluntary participation which stays in the foreground, 'consensus-based decision making' serves 'as a source of institutional binding and legitimacy', and – due to this consensuality of 'soft law' – sanctioning powers of the States are absent.[80]

As a preliminary to his remarks on 'soft law', *Baxter* recalls that rules of public international law often cannot be enforced, but still it is generally accepted that they create rights and obligations. '[M]ore radical' than that, he deems the assertion that even legal norms which do not create rights or duties are part of public international law.[81] *Baxter* favours such an inclusive understanding of (public international) law. Among other instances of 'soft law', he lists examples of three categories of norms in international agreements which he considers to be soft, as they do not create legal obligations: *pacta de contrahendo*, non-self-executing norms (requiring further implementing measures in order to be applicable) and merely hortatory provisions.[82] By analysing these examples, he elaborates on the idea that

77 Abbott/Snidal, Hard and Soft Law 424; for further apologists of such a relativity of normativity see references in Wellens/Borchardt, Soft Law 272.

78 Kirton/Trebilcock, Introduction 8.

79 Kirton/Trebilcock, Introduction 9.

80 Kirton/Trebilcock, Introduction 9, with reference to Ikenberry, Victory. In legal regimes with more elaborate law-making procedures, eg many national legal orders or that of the EU, such an equivalence of legitimacy cannot be assumed, however. For the effect on the addressees' identity of voluntary compliance as opposed to mandatory compliance see Ahrne/Brunsson, Soft Regulation 188. For the concept of 'consensus' in international decision-making see Schmalenbach/Schreuer, Organisationen, paras 1032 f.

81 Baxter, International Law 549.

82 See Baxter, International Law 552–554; see also Wirth, Assistance 223.

there are different degrees of bindingness.[83] The traditional binary concept, that norms, legally speaking, are either binding or non-binding, he repudiates as 'excessively simplistic'.[84]

Fastenrath, in turn, essentially argues that the relative normativity inherent in the concept of 'soft law' can be proven even from a perspective of legal positivism. With regard to the words in which legal norms are expressed, *Fastenrath* highlights that 'the vagueness in content of living languages is indispensable', above all in multilingual norms of public international law.[85] Against this background, international 'soft law' such as resolutions of the UN General Assembly provides an interpretative input just as multilateral treaties not yet in force or even unsuccessful codification conferences may do. Thereby these measures contribute to what *Fastenrath* calls 'the development of law *intra legem*'.[86] In the case of unwritten law – in the given context: customary law and general principles of law – 'soft law' may, *Fastenrath* adds, serve as evidence of practice and thereby contribute to the flexibility of a norm of customary law over time.[87] With regard to general principles of law he writes: 'Here, hard law which truly earns its pre-fix "hard", may owe its very existence to soft law'.[88] Thus, certain 'soft law' acts may be regarded as 'concretisations of legal ideas'.[89] The lacking determination of the evidence required for confirming the existence of customary law or general principles of law leads *Fastenrath* to the conclusion that also in legal positivism the validity of a norm 'is always […] dependent upon contestable claims of varying degrees of authority' and that therefore 'legal positivism is unable to succeed in its attempt to exclude relative

83 With (unwritten) customary public international law, such a variety of degrees of bindingness is much more accepted among lawyers, he argues; Baxter, International Law 563.

84 Baxter, International Law 564; see also Chinkin, Development 23, taking up *Ingelse's* word of the 'gliding bindingness'; Peters, Typology 409: 'under-complex and too far away from reality'; critically as well: Thomas Müller, Soft Law 114.

85 Fastenrath, Normativity 311.

86 Fastenrath, Normativity 313 f.

87 See Fastenrath, Normativity 320; see also Friedrich, Soft law 155–157. On the written evidence of customary law see Weil, Normativity 427 f; for the influence the dynamics of customary law may have on (the interpretation of) international treaties see Article 31 para 3 lit b of the VCLT 1969.

88 Fastenrath, Normativity 321; emphasising the similarity between principles and 'soft law': Kovács/Tóth/Forgác, Effects 58.

89 Fastenrath, Normativity 321.

normativity from international law'.[90] Summing up, he argues in favour of accepting 'soft law' also from a legal positivist perspective as 'an instrument which provides, in as positivist a way as possible, understandings on the existence of rules, their formulation and interpretation'.[91] The relativity of normativity is, he concludes, not a problem of 'soft law' alone, but of law in general; and this he confirms for both positivist and natural law perspectives of law.[92]

Knauff perceives as constitutive elements of 'soft law' its regulatory character and its creation by bodies vested with public authority.[93] With respect to the (non-)bindingness of 'soft law', he advocates a slightly more flexible approach. In view of a trend towards extending law to new forms of regulation (in particular as regards so-called internal law), he deems impracticable a strict opposition of law and 'soft law'.[94] According to *Knauff*, 'soft law' unfolds binding effects which are different from legally binding effects traditionally understood. In other words: A legally non-binding norm may nevertheless entail (a different form of) bindingness. This other form of bindingness allows for a certain decisional leeway of those addressed. However, he emphasises, the multitude of 'pathologische[] Fälle' [pathological cases] in the sphere of (hard) law (that is to say the many breaches of law in everyday life as exemplified by the large number of court proceedings) shows that even law is not always applied strictly, which means that also legal bindingness allows for decisional leeway.[95] This, in his view, underpins the proximity of law and 'soft law'. In conclusion, *Knauff* defines 'soft law' as behavioural regulation adopted by bodies vested with public authority which is legally non-binding or legally binding only as regards the inner sphere of the regulator, but which has extra-legal steering effects.[96] Similarly and some years earlier, *Senden* has proposed the following definition of soft law: 'Rules of conduct that are laid down in instruments which have not

90 Fastenrath, Normativity 322.
91 Fastenrath, Normativity 324.
92 Fastenrath, Normativity 324 and 330.
93 Knauff, Regelungsverbund 216–220; *Knauff* thereby repudiates an understanding which also encompasses (soft) regulation by private actors, but accepts some forms of their mere contribution to the adoption of 'soft law'; ibid 218–220; similarly, with reference to *Knauff* and *Senden*: Wörner, Verhaltenssteuerungsformen 9; see also Kirton/Trebilcock, Introduction 10.
94 See Knauff, Regelungsverbund 223; on the phenomenon of internal law see eg T Schmidt, Geschäftsordnungen.
95 Knauff, Regelungsverbund 227.
96 See Knauff, Regelungsverbund 228.

been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects'.[97]

With a focus on the international level, *Goldmann* develops the concept of 'international public authority'.[98] It is a comparatively broad term, encompassing both legally binding and legally non-binding rules, but also other public output like information, as long as it qualifies as 'authority', that is to say as long as it has the law-based capacity to limit the addressees' individual or collective self-determination or to determine its use in a similar way.[99] The extrinsic motivation to behave in a certain way – by external regulation or introjections (that is to say the unconscious integration of somebody else's view into one's own mental sphere) – must eliminate or at least reduce significantly the risk of dissent,[100] that means in particular: of deviating behaviour. Against the backdrop of this concept, *Goldmann* fleshes out a regime of different forms of actions of international public authority, encompassing normative as well as non-normative output. The distinction in particular between law and 'soft law', according to him, can best be drawn with a view to the respective consequences of non-compliance.[101]

As well acknowledging the strong proximity of law and 'soft law', *Arndt* proposes his concept of adaptive sources of law.[102] In between the realms of law and 'soft law' – or, in his terminology: 'alternative Steuerungsinstrumente' [alternative steering instruments][103] – he conceptualises a third category encompassing, as it were, the overlap of law and 'soft law'. Norms

97 Senden, Soft Law 112; see also Snyder, Effectiveness 32; apparently, *Snyder* later, in 2007, added that 'soft law' may not only have practical but also legal effects (reported by Ştefan/Avbelj/Eliantonio/Hartlapp/Korkea-aho/Rubio, Soft Law 10 – footnote 58); Van Vooren, Study 700; see also Bothe, Soft Law 768, referring to 'pararechtliche' [para-legal] norms.

98 See Goldmann, Soft Law; for the further development of the term see also Goldmann, Gewalt 359 ff; for another legal concept of 'authority', also taking account of 'soft law', see Krisch, Authority.

99 See Goldmann, Gewalt 360.

100 Goldmann, Gewalt 362.

101 See Goldmann, Gewalt 391.

102 For the inspiration drawn from *Thomas Möllers* see in particular his works Rechtsquellen 649 and Standards 143.

103 Arndt, Sinn 155 f; for a more specific use made of the term 'steering instrument' see Senden, Soft Law 156, with further references.

of this category are not characterised as being both law and 'soft law',[104] but by the fact that they *can be* both (the unclear cases, as it were).[105] Within an adaptive system, he calls for a weighing of different criteria (eg the effectiveness or the social usefulness of a norm), according to which the direction and the strength of diffusion ('Diffusionsrichtung', 'Diffusionsstärke') to either law or alternative steering instruments shall be determined.[106] Where it turns out that a norm diffuses in the direction of law, it may trigger – depending on the strength of diffusion – a duty to take note of it, a duty to address it or a duty to comply with it.[107] *Arndt* does not call these effects different degrees of legal bindingness, but 'verschiedenste Nuancen einer rechtlichen Geltungswirkung' [various nuances of legal validity effects].[108]

As was set out above, it is the aim of this sub-chapter to introduce different ways of addressing the phenomenon of 'soft law'. The selection of approaches presented here mainly stems from the field of public international law and legal theory, respectively. There is a large number of further contributions on legally non-binding norms with sometimes very specific *foci*, eg sub-normative (ie sub-legal) regulation by private actors in the field of (national) private law,[109] which can only collectively be referred to here.[110]

1.3. Discussion and conclusions

1.3.1. Different schools of thought

Summing up the approaches towards legal bindingness presented above, different schools of thought can be distinguished. One, to which *Klabbers* and *Weil* belong, refuses the concept of 'soft law' as something in between law and non-law, claiming that the binary system distinguishing only (binding) law from (non-binding) non-law suffices to cover the phenomena

104 Note *Arndt's* wide understanding of 'soft law' which includes customs, fashion or the biblical Ten Commandments; Arndt, Sinn 129.
105 See Arndt, Sinn 127.
106 See Arndt, Sinn 131 f and 156 f.
107 See Arndt, Sinn 163–167.
108 Arndt, Sinn 163.
109 See eg Holliger-Hagmann, Gesetzgeber; Köndgen, Privatisierung; see also Peters, Typology 405.
110 See eg the approaches in the literature introduced and analysed by Arndt, Sinn 92–116.

usually addressed as 'soft law'.[111] In another approach something like a relativity of normativity, or, more explicitly, different degrees (that is: a scale) of legal normativity is/are accepted. It is, therefore, also referred to as the 'continuum view'.[112] This view is advocated, in detail of course with different arguments, by *Abbott* and *Snidal*, *Kirton* and *Trebilcock*, *Baxter*, and *Fastenrath*. Again different are the approaches of *Knauff* and *Senden*. They separate legal normativity from other forms of normativity, namely 'außerrechtlich[e]' [extra-legal][113] (*Knauff*) or 'practical'[114] (*Senden*) effects, and thereby avoid the slippery concept of different degrees of legal normativity. Nevertheless, they accept that these effects may be legally relevant in one or the other way. With his term 'international public authority' *Goldmann* conflates law, 'soft law' and other output limiting or determining in a similar way the addressee's freedom or self-determination. While he does acknowledge a difference between these categories, he asserts that the distinction is to be drawn through the respective consequences of non-compliance. *Arndt*, who appears to be discontent with the term 'soft law', but not the concept as such, with strong reference to the works of *Thomas Möllers* starts from a binary understanding which he slightly adjusts for the purposes of his adaptive system. By introducing a third category, namely the adaptive sources of law, he allows for a weighing of different criteria and eventually for a 'diffusion' of these acts in the direction of either of the two categories of the binary system. Those diffusing in the direction of law may, depending on the strength of diffusion, cause a duty to take note of them, a duty to address them or, as the strongest effect, a duty to comply with them.

1.3.2. On legal (non-)bindingness as distinctive feature

The purpose of a concept of norms, more particularly a concept of law/'soft law', is to provide a practicable model which allows to grasp the *corpus* of these norms. While too narrow a definition of this *corpus* would render futile this attempt, as no 'big picture' would be provided, too much

111 In other respects, in particular as regards the scope of law, these two concepts differ considerably from each other.
112 See Peters, Typology 408, with further references; see also summary in Ştefan/Avbelj/Eliantonio/Hartlapp/Korkea-aho/Rubio, Soft Law 13.
113 Knauff, Regelungsverbund 227.
114 Senden, Soft Law 112.

inclusivity, ie a pluralist concept,[115] could be harmful, as well.[116] In other words: the concept, as a model, needs to reduce the complexity of reality – otherwise it would be of no avail –, but must not be simplistic. As we have seen, there are different parameters according to which the phenomenon behind the term 'soft law' is determined by different authors. A wide scale of obligation may be appealing in theory, but its orientation value in practice is very limited. In *Thürer's* words: 'Eine Norm gilt, logisch gesehen, oder sie gilt nicht. Sie kann nicht leicht oder stark, mehr oder weniger gelten' [A norm is valid, logically speaking, or it is not. It cannot be slightly or strongly, more or less valid].[117] Inherent in the validity of a legal norm is its bindingness. The fundamental difference between law and 'soft law' is that law is legally binding and 'soft law' is legally non-binding. This is not to deny the various forms of 'soft law' (and law, for that matter) existing in practice, but it is a statement that the distinction between legal bindingness and legal non-bindingness ought to be upheld and kept in focus when approaching 'soft law'.

In other words, the conceptual coverage of 'soft law' can be provided for best by concentrating on the obligation criterion, and by assigning a kind of normativity to 'soft law' which is different from legal normativity (ie legal bindingness). As is well known, '[t]he universe of norms is larger than the universe of law'.[118] *Verdroß* has famously described this phenomenon as the 'normative[r] Teppich […], in welchem das Recht mit den anderen sozialen Normen verwoben ist' [normative carpet in which the law is interwoven with other social norms].[119] Also other regulatory concepts such as customs (eg international *courtoisie*) or morals unfold normativity (see 2.2. below), but not legal normativity. The same is true for 'soft law'. It exists between the unregulated free will on the one hand and legal restrictions on the other hand as a public authority's expression of desire for a certain action

115 See, as one of the most prominent representatives of pluralist constitutionalism, *Gunther Teubner* and, for example, his work Zivilverfassungen; for a critical account of further examples see d'Aspremont, Pluralization 190–197; see also Somek, Concept 989, referring to the so-called 'inclusive positivism', a concept of law which also accommodates moral principles.

116 According to *Arndt*, more conservative approaches – that is: approaches in principle moving within the traditional concept of legal sources – towards tackling the phenomenon 'soft law' are on the rise these days; Arndt, Sinn 116.

117 Thürer, Soft Law 440.

118 Pauwelyn, International Law 125; see already Wengler, Begriff 42.

119 Verdroß, Völkerrecht 26.

on part of those addressed.[120] An act of 'soft law' constitutes a (non-legal) norm of itself, an *argumentum ad verecundiam*, as it were.[121] From a legal perspective, law *must* be complied with, 'soft law' only *should*. It is the similarity with law and its strong interrelation with and even dependence on law which lead *Sereni* to suggest to locate 'soft law' in a 'twilight zone which is not yet law, but in which social and moral considerations are especially persuasive'.[122]

Whether or not we want to call it a 'twilight zone': In my view, the conception of a ('soft law') category of its own is worthwhile. The legal effects[123] of 'soft law', as opposed to the legal effects of law, are regularly related to the application of a separate legal act.[124] Often these effects even depend on this application, in the course of which reference is made to a specific act of 'soft law'.[125] *Fastenrath* takes the example of resolutions of the UN General Assembly which may determine the interpretation of binding acts of (UN) law.[126] Such resolutions are – as recommendations[127] – legally non-binding. That they may serve as a source of inspiration for the interpretation of a legally binding norm *qua* their *de facto* authority, and thereby entail legally relevant effects, does not contribute to any degree of legal bindingness of the resolution. Neither can the role assigned to 'soft law' (eg in the *Nuclear Weapons* case referred to under 1.1.1. above) when it comes to providing evidence for the existence of an *opinio iuris* as one constitutive element of customary law relativise its non-bindingness.[128] Although also here the legally relevant effects of 'soft law' are considerable,[129] it ought to be stressed that the 'soft law' acts at issue do not constitute the *opinio iuris*

120 See Gramm, Aufklärung 67.
121 This is well reflected in the words of *Gold* who says that on the part of the addressees of 'soft law' it is expected that they 'will take [its] content seriously and will give [it] some measure of respect'; Gold, Soft International Law 443.
122 Angelo P Sereni, quoted in Schwelb, Influence 229; see also Everling, Wirkung 134: '"Grauzone" zwischen Recht und Politik' ['grey zone' between law and politics].
123 See eg Bothe, Soft Law 768 f; Müller-Graff, Soft Law 22; see also the definitions provided by Knauff, Regelungsverbund 228, and Senden, Soft Law 112.
124 See d'Aspremont, Softness 1078 f.
125 See Pauwelyn, International Law 154, with further references.
126 See Fastenrath, Normativity 313 f.
127 See terminology in Article 13 of the UN-Charter; see also Shelton, Compliance 126 f, with reference to the case law of the US Court of Appeals.
128 See Zemanek, Soft law 858 f.
129 See Peters, Typology 420 f.

themselves[130]; they only serve as (principally replaceable) evidence of its existence, which is a significant difference. Neither does the role of 'soft law' with regard to the interpretation of law relativise the legal bindingness of law, as *Fastenrath* seems to argue. Either the interpretation is viable, or – to come back to the role of 'soft law' in the context of determining customary law – the attempt to prove the existence of (customary) law is successful, or not. *Tertium non datur*. That the result of such a legal analysis may be contested, does not result in a relativity of bindingness.

While the strict separation between law and 'soft law' ought to be maintained as a matter of conceptual purity, as it were,[131] this is not to be understood as an attempt to make legal reality fit into a concept 'at the price of distorting reality by discarding any variance'.[132] Legal bindingness is a singular form of bindingness, a conception which was created in order to separate legal norms from other norms.[133] Legal bindingness (a *must*) is assigned to a norm due to the will expressed by the norm-creators and due to certain procedural requirements being met.[134] In case of 'soft law', the will of the norm-creators – as established by applying the vari-

130 See Seidl-Hohenveldern, Soft Law 190; see also Knauff, Regelungsverbund 272, with regard to the fact that resolutions of the UN General Assembly (as such) do not become customary law, although *some of their content* may become legally binding. It is possible that the content of 'soft law' over time is transformed into customary law – as it is possible with the content of moral or religious norms; see Arndt, Sinn 45; Dalhuisen, Law 186; taking the example of international *courtoisie* which may become law or law which may degenerate to international *courtoisie:* Schweisfurth, Rechtsnatur 707, with further references.

131 See also Müller-Graff, Soft Law 20 f; also in the affirmative: Friedrich, Soft law 127 f; Pauwelyn, International Law 159. *Klabbers* has expressed this argument in the following words: 'By creating uncertainty at the edges of legal thinking, the concept of soft law contributes to the crumbling of the entire legal system. Once political or moral concerns are allowed to creep back into the law, the law loses its relative autonomy from politics or morality, and therewith becomes nothing else but a fig leaf for power […]. [W]e need to insist on a degree of formalism, because it is precisely this formalism that protects us from arbitrariness on the part of the powers that be'; Klabbers, Undesirability 387.

132 Bianchi, Butterfly 207, at 207–209 criticising the 'mainstream positivistic doctrine' in public international law.

133 *Kelsen* emphasises the 'Eigengesetzlichkeit' of law, according to which legal science shall be limited to positive law, bewaring of incorporating other influences; see Jestaedt, Postulat 7, with further references.

134 With regard to the procedural requirements see Mertens, Leges; mentioning three kinds of informality in the context of 'soft law' – 'output informality', 'process informality' and 'actor informality': Pauwelyn, Informal International Lawmaking 15–20.

ous methods of legal interpretation – was to create a legally non-binding instrument (a *should*), and normally the (regularly) enhanced procedural requirements for law-making have not been met.[135] This constitutes the decisive difference between the two regimes.[136] The author therefore argues that the formal status of a norm should be taken as a first point of reference. That a norm was created in the course of a law-making procedure (eg a legislative procedure), most strongly reflects the will of its creator to adopt law and justifies a congruous presumption.[137] Where a provision of a 'legal act' (eg a statute) lacks normative content, however, or where it is clear from its wording that the adoption of a *binding* norm was not intended (eg in the case of merely hortatory provisions), that provision does not qualify as (hard) law.[138] It is then either an entirely non-normative or a 'soft law' provision contained in a formal decision, statute, etc.[139] The presumption evoked by the legal form has then been rebutted. Where the

135 For the normally more limited formal requirements for the adoption of 'soft law' see Gentile, Review 467; Andone/Coman-Kund, EU soft law 4. That is not to say, however, that the creation of 'soft law' may not be subject to a detailed procedure: Pauwelyn, Informal International Lawmaking 17. Where the creation of 'soft law' is subject to a legal procedure, a breach of the procedure amounts to a breach of law – with effects for the status of the act at issue.

136 Stressing the importance of the will of the actors involved as 'necessary starting-point': Wellens/Borchardt, Soft Law 270 and 274; A Aust, Theory 787; Friedrich, Soft law 128 f; for the field of public international law see Article 2 para 1 lit a of the VCLT 1969: 'governed by international law', which refers – according to the *travaux préparatoires* of this provision – to the required 'intention [of the parties] to create obligations and rights under international law'; see Schweisfurth, Rechtsnatur 684 ff.

137 Also *Weil* stresses that from the wording of a provision as such deductions as to its normativity cannot necessarily be made: 'Whether a rule is "hard" or "soft" does not, of course, affect its normative character. A rule of treaty or customary law may be vague, "soft"; but […] it does not thereby cease to be a legal norm. In contrast, however definite the substance of a non-normative provision […] that will not turn it into a legal norm'; Weil, Normativity 414.

138 See Kanehara, Considerations 81; Schweisfurth, Rechtsnatur 697; Wengler, Rechtsvertrag 195; see also the early joined cases 42 and 49/59 *S.N.U.P.A.T.*, 72, according to which a 'statement [which] does not establish any general rule and does not conclusively affect any individual interest' cannot be called a decision (of the High Authority).

139 Where the legislator is adopting a statute to wish the emperor a happy birthday (such acts where purportedly adopted bei the *Reichsrat* in honour of the Austrian emperor *Franz Josef*), this act, even if it takes the form of legislation, does, for lack of any normative content, not qualify as law (or 'soft law'); for the question whether such a 'senseless' rule still belongs to the legal order see Thaler, Rechtsordnung.

procedural indicators are weak, that means: where the form of the act does not allow for a (rebuttable) presumption as to its legal bindingness or non-bindingness (that may in particular be the case with certain (informal) agreements concluded under public international law), immediately other indicators of the will of the creator(s) of the norm have to be examined, eg its wording, an express declaration of the norm-creators to the effect that the act is considered non-binding, or the available means of ensuring compliance, etc.[140] Where the latter constitute true enforcement – in particular: sanctions – this indicates legal bindingness (see also 2.1.1.1. below).[141] Where these means are weak (eg reporting duties[142]), that suggests the legal non-bindingness of the norm at issue. The line between enforcement and other means of ensuring compliance is sometimes difficult to draw. An example to illustrate this difficulty is what in German is referred to as *Obliegenheit*: a rule which is not binding, but if it is not complied with this may have negative consequences. It is also called a 'legal duty of a lower degree'. Such *Obliegenheiten* often occur in insurance contracts: In case of a damage, the insurance company is to be notified. If that is not done in due time, the insurance company may lawfully refuse to grant (full) coverage. If no notification is done, this is not a breach of contract, but it may have negative consequences (no coverage).[143]

1.3.3. The creators of soft law

1.3.3.1. On the difference between public and private legal action

When addressing the creators of 'soft law', it is worthwhile to first take a look at the creators of law. The latter shall be considered not only to get a broader picture of what all constitutes law in different legal orders, but also to outline some challenges for addressing non-binding norms, in particular

140 For further indicators see eg the Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation (2015), 2.3.3.: 'By contrast, in non-binding acts, imperative forms, or a structure or presentation too close to that of a binding act, must not be used'.

141 See eg Dehousse/Weiler, Single Act 132, describing sanctions as 'the criterion *par excellence* of the existence of legal obligations', while conceding that they are not a necessary condition.

142 Reporting may also be only voluntary, which further weakens this tool; see eg Friedrich, Soft law 140.

143 See eg Goldmann, Gewalt 200.

when developing a definition of 'soft law'. In public international law the creators of law are primarily the States and international organisations, in places with the involvement of private bodies, such as non-governmental organisations (NGOs) or multinational undertakings.[144] The widely used term private international law is confusing in that it does not refer to international law, but to national law on potential conflicts of norms of private law due to a foreign element of the underlying cases. Norms adopted by private actors – in particular: contracts – are (or may be) the subject of private international law of States, but they do not constitute the private international law themselves. In conclusion, this area of law is not relevant in our context.

EU law again is created by the institutions, bodies, offices and agencies of the EU and exceptionally – in particular: when its founding treaties are amended – by its MS. Private actors may create law on the basis of EU law (eg they may adopt the statutes of a *Societas Europaea* as provided for in Council Regulation 2157/2001), but they do not thereby create EU law themselves. Where exceptionally such power is delegated to them, in a functional perspective the output is – again – to be understood as law created by public bodies.[145]

At the level of national law, it is both the public actors (adopting regulations, judgements, administrative decisions, etc) and the private actors (concluding contracts, writing last wills etc) who create legal norms. As regards the legal bindingness of these norms, there is no difference between the two spheres.[146] There is, however, a difference regarding the scope of norms: Public actors adopt norms in the public interest and in all kinds of policy fields, frequently in a general-abstract way, thereby including all individuals or certain categories of individuals (eg all doctors or all entrepreneurs) of the State concerned. Private actors normally create law only concerning themselves (eg a purchase contract concluded with a car salesman), their family (parents sign an employment contract for their

144 See Friedrich, Soft law 136–138. For non-private individuals and working groups being empowered to adopt 'soft law' in public international law see Shelton, Compliance 125 f.

145 The (historical) example of CESR, CEBS and CEIOPS who adopted EU 'soft law' acts shows that in the EU such delegation is considered problematic: They were considered Union bodies, and only their respective secretariats where established as private persons under French/British/German law; see Weismann, Agencies 86 f.

146 For *Kelsen's* outright negation of a principal difference between the law emanating from these two spheres see references in Römer, Kritik 88; see also Jabloner, Rechtsetzung 2.

under-aged child), their property (owner puts up a sign barring pedestrians from using a private footpath), their company (adoption of a statute by the shareholders, legally speaking that means: by the company itself) etc.

As we can see, norms set by private actors regularly concern the creator's own affairs.[147] Only exceptionally the legal order vests these norms with a broader scope. This is the case where collective agreements on wages and other working conditions are concluded by representatives of employers, on the one hand, and of employees on the other hand, and where these agreements are then declared generally binding by the legislator. Another example is the legislator's reference to commercial customs (established by entrepreneurs) or industrial standards (set by private organisations; see in more detail 2.2.3. below). These cases can be explained by the interest-representing character or the expertise of the private actors concerned, and thus the involvement of private actors roots in considerations of content-wise legitimacy.[148] It ought to be stressed, though, that it is legislative acts (ie acts adopted by public actors) which declare these rules binding. Again another case is the legislative delegation to private bodies of the power to adopt norms binding on individuals (eg administrative decisions). Since it is the public authority which is conferred here, the acts adopted by the private delegates, functionally speaking, constitute law adopted by public actors.

Without specific legal provisions, the private actors in our examples would not have the power to regulate – *de facto* in the case of mere legislative references to the respective output of private bodies, *de iure* in the case of legislative delegations of power to private actors – in a binding way with such a broad (in particular territorial and personal) scope.

The so-called *lex sportiva*, eg the rules on sports competitions as set by the Fédération Internationale de Football Association (FIFA) or the International Olympic Committee (IOC), is often cited as another example

147 See eg Goldmann, Soft Law 374 f; Shelton, Compliance 128 (who does not exclude the use of the term 'soft law' in the context of private rule-making, though). That does not prevent these rules from being taken over as their own by others, if they are convincing; see Cloghesy, Perspective 327, taking the example of the chemical industry's Responsible Care programme, as developed by the Canadian Chemical Producers Association in 2003, which has spread on a worldwide scale; critically with regard to the distinction between a public and a private sphere: Jakab/Kirchmair, Unterscheidung 364.

148 Such content-wise legitimacy is related to ideas of common good – something in general *public* action is aimed at; see Arndt, Sinn 146–148.

of the enormous power private actors may have in making general-abstract rules.[149] While it is true that these rules constitute law created by private bodies (*in concreto*: associations established under Swiss private law) and while it is true that they are immensely important in the sports business, it ought to be emphasised that all sportspersons submit to these rules of their own accord, thereby making use of their respective private autonomy. That the large amount of power these bodies have makes it literally impossible to succeed as a sportsperson without submitting to the respective rules in a *de facto* perspective certainly relativises the voluntariness of this act. However, the FIFA or the IOC are still only regulating their respective 'own affairs' (see above): the rules related to football competitions or the rules related to the participation in and the performance of Olympic Games, respectively.[150] Thus, however problematic the rule-making power of single actors in the sports business may be, it does not principally challenge the above distinction between public and private rule-making.[151]

In summary, we can conclude, first, that the distinction between legal norms created by private actors and legal norms created by public actors is limited to the level of national law and, second, that the issues dealt with in either category of norms differ. There are important variances to this ideal-typical division, but they remain to be exceptions. The principle underlying this division is that private actors in general may not oblige third parties (of age[152]) without their respective consent (given eg at the end of negotiations on a contract) – and where they may, eg when they bar pedestrians from crossing their own premises, this obligation of third parties is strongly connected to the private actors' own affairs/rights (here: their property). Public actors have the power, more closely defined (and restricted) in the respective constitution and possibly also in sub-constitutional law, to oblige third parties without their consent: They may prohibit the sale of a certain

149 Also individuals may exceptionally adopt highly influential rules. For the example of the Sullivan Principles adopted in 1977 as a measure against the racist policy of the *Apartheid* regime see Shelton, Compliance 129; see also the new global Sullivan Principles proclaimed in 1999.

150 For the issues addressed in the context of the *lex sportiva* see Giegerich, Standards 123.

151 The similarity of the effects of such private rule-making as compared to public rule-making is acknowledged by the CJEU in particular in its case law on the freedom of workers; see above all case 36/74 *Walrave and Koch*, para 19; case C-415/93 *Bosman*, para 84.

152 Parents may – to a considerable extent – lawfully oblige their under-aged children, even without the latter's consent.

food product or they may fix its price with effect for the entire territory of the State(s) concerned.

1.3.3.2. Non-binding norms: public and private creators

While at least at the level of national law both public and private actors may create – in terms of content and scope very different, but still – law, they may also create non-binding norms: A public authority may publish guidelines to express legally non-binding norms its understanding/application of a certain piece of legislation (concretisation), a private company may adopt a Code of Conduct to suggest ethical decision-making on the part of its managers, a public ombudsman may set out his/her understanding of sound public administration, thereby attempting to steer the performance of the public service in a non-binding way, a private association may proclaim its definition of corporate social responsibility, thereby setting out concrete instructions for undertakings as to how to live up to this responsibility.[153] The idealtypical distinction between norms set by private actors and norms set by public actors appears to be less striking here, because both categories of actors may equally 'not-oblige' third parties without their respective consent. The private owner of property may put up a sign asking pedestrians to smile when crossing her premises. Those addressed may follow this plea, but they may as well not. In trying to influence human behaviour, private actors may also move beyond their own affairs (see 1.3.3.1. above). Hence they may, for example, disseminate their invitation not to buy in supermarket X because its owners are 'not likeable'. Non-binding norms may also be created by private actors at the international level, eg by NGOs *vis-à-vis* States.

There is a wide range of possible non-binding rules private actors may establish (beyond their own affairs), with only some restrictions (eg prohibition of libel) to be considered.[154] In the societal sphere (as opposed to the

153 For the connection of private corporate social responsibility and non-binding output of public bodies, namely the OECD Guidelines for Multinational Enterprises, see Friedrich, Soft law 138; Wilkie, Governance 291 and 295 f.

154 For the distinction between these two categories of non-binding norms adopted by private actors see, as an illustration, § 676 of the German Civil Law Code (BGB): 'Wer einem anderen einen Rat oder eine Empfehlung erteilt, ist, unbeschadet der sich aus einem Vertragsverhältnis oder einer unerlaubten Handlung ergebenden Verantwortlichkeit, zum Ersatz des aus der Befolgung des Rates oder der Empfeh-

sphere of public authority), as *Lepsius* put it, private power does not have to legally explain itself ('private Macht [muss sich] nicht rechtfertigen').[155] Public actors may attempt to steer human behaviour in a non-binding way, as well, but they are bound by their respective competences, which essentially limit their scope of action to actions in the public interest or to what is referred to as common good.

Considering what was said under 1.3.3.1. above about the power of private actors to regulate their own affairs in a binding way, also non-binding utterances of private actors are particularly authoritative where they concern their respective own affairs: An example would be the employer's right to give (binding) instructions to his/her employee. It is a right granted on the basis of the employment contract. Where the employer announces that all of his/her employees should follow an open office door policy, this non-binding norm is highly authoritative, not least because the employer (arguably) may give a binding instruction to this effect to his/her employees. Or: a farmer may kindly request walkers not to feed his/her cattle. This request carries a certain authority, not least because the farmer may otherwise legally prohibit any feedings by strangers. Thus, non-binding norms set by private actors may be highly authoritative, in particular where they are adopted 'in the shadow' of the power to adopt binding norms. In practice, in particular in oral conversation, the difference between a plea for help, a non-binding request and a binding command may become blurred, but in theory it must be upheld.[156]

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lung entstehenden Schadens nicht verpflichtet' [Whoever has provided advice or a recommendation to somebody else is, without prejudice to any responsibility emanating from a contractual relationship or an unlawful action, not obliged to replace a damage caused by following the advice or the recommendation]. Non-binding norms related to the private actor's own affairs (here: related to a contract) are highly relevant in that they may entail legal responsibility. Beyond that, non-binding norms set by a private actor do not entail any responsibility, as long as they do not emanate from or constitute themselves an unlawful action.

155 Lepsius, Funktion 54.

156 A high authority of a non-binding utterance may, of course, also be subject to a power of its originator other than the possibility to ask for the same action in a legally binding way. For example: Where the employer tells his/her employee that he/she should help him/her in a private affair, eg his/her moving house, this (non-binding) plea may be particularly authoritative because the employer has the possibility to act in a legally binding way by dismissing the employee – a right which he/she principally has under the employment contract. Even though, objectively speaking, there is no inherent link between the employer's request and his/her dismissing the employee, the request and the dismissal are arbitrarily linked by

It is a decisive difference between non-binding norms adopted by private actors and those adopted by public actors that the former are characterised by a high volatility of authority – sometimes compliance with them is not more than good manners (eg a teenager leaving the seat for an elderly person at the train station; a worker saying "good morning" to his colleagues when starting his morning shift; for custom and morals see 2.2.1. and 2.2.2. below), sometimes compliance is highly advisable because the norm is the final 'recommendation' before a legally binding act is adopted (eg dismissal from work or cancellation of membership eg to a sports club). What is more, one and the same non-binding norm may exert a different authority for different addressees: The non-binding command not to buy sweets proclaimed by the grandmother *vis-à-vis* her grandchild A and B, a friend of A, may be highly authoritative for A, but not for B – or *vice versa*. In general, the (oral, written, sign language) communication between private actors is particularly multi-faceted, as *Hart* has well illustrated,[157] and only a small portion of it is normative. In many cases it may be unclear whether an utterance is still non-normative or already normative (in a non-binding or in a binding way) – and where the respective addressee complies, this question regularly is not thought of any longer.

With utterances of public actors the situation is different: They are, as an expression of the accorded *imperium*, often normative and always exert a 'minimum authority' in the sense that they are never entirely irrelevant because they are most often linked – in one or the other way – to the power to make law (unilaterally). They are, on a whole, more formalised (than those of private actors) and mostly are provided for in writing. Very frequently they have a general-abstract scope. Exceptionally, public actors also act by means of private norms – eg when they buy office paraphernalia for their officials, thereby concluding a contract with a salesman.[158] It does not appear that non-binding output in this field – eg a municipality's plea not to feed the cattle on its premises (see the farmer's example above) – would entail the enhanced authority known from norms bearing public

the employer (or at least that is what the employee may think). This increases the authority of the request.

157 Hart, Concept 18–20.

158 It should be stressed that public actors are regularly more restricted in creating private rules (in the German-speaking literature referred to as *Privatwirtschaftsverwaltung*) than private actors. Unlike the latter, the former, for example, regularly have to comply with fundamental rights, even when entering the private sphere; see eg G Lehmkuhl, State-Building.

authority. In this case public actors, functionally speaking, act as private actors. Therefore we should specify: It is the public authority involved which increases the authority of non-binding norms.[159]

These particularities establish a principal difference between non-binding norms created by actors thereby exercising their public authority and non-binding norms created by actors thereby exercising their private authority. In my view, they justify detaching non-binding norms as an expression of public authority from the very inhomogeneous and legally hardly regulated set of non-binding norms adopted as an expression of private authority, and to classify and subsequently examine them as a category of their own.[160]

Therefore the term 'soft law' shall hereinafter be used to describe legally non-binding norms adopted by a body thereby making use of its public authority (*acta iure imperii*). Public authority is at issue when an entity, via its organs, is (limited to) exercising the powers assigned to it by (public) law.[161] It does not comprise the possibilities of legal action granted under private law, eg a labour contract, even if the employer is a public actor. Public authority retains its character also when delegated to other bodies, eg to NGOs or private persons.[162] That way also the recommendations of expert groups assembled by and attached to international organisations, eg the recommendations made by the International Law Commission which was created by the UN General Assembly,[163] fall within the exercise of pub-

159 See Friedrich, Soft law 135, referring to a resulting 'distinct claim to legitimacy and authority', and 379, stressing the prescriptive function of (international) 'soft law' (adopted by international organisations) and its qualification as an act of public authority, each with a further reference; for a broader understanding of the term 'Autorität' [authority] in this context see Schreuer, Haven 69.

160 See also Knauff, Regelungsverbund 217, with reference to the original use of the term 'soft law' in the context of public international law.

161 For the term public authority in the context of EU law see Braams, Koordinierung 140 f; for an institutional and functional understanding (definition) of 'public authority' (in the context of environmental law) see eg Article 2 para 2 of Directive 2003/4/EC.

162 See Kiss, Commentary 227.

163 See eg Articles 16 para 2 lit j and 18 para 2 of the Statute of the International Law Commission; for the General Assembly's task to 'initiate studies and make recommendations' in order to encourage the 'progressive development of international law and its codification' see Article 13 para 1 lit a of the UN-Charter; see Knauff, Regelungsverbund 276 f; with regard to the ILO's non-ratified *conventions*, *Knauff* negates their qualification as 'soft law', ibid 275 f; for similar bodies in the more narrowly-tailored setting of a specific international agreement see the NAAEC and

lic authority.[164] Other forms of involvement of private actors[165] – the case of a delegation of powers has just been addressed – in the decision-making process (eg as experts[166] or informants) does not harm, as long as the entity thereby exercising public authority is or, thereby outweighing private actors, belongs to the formal decision-maker.[167]

I.3.4. A concept of 'soft law'

The above elaborations have confirmed that, conceptually speaking, 'soft law' is to be placed in the vicinity of law (adopted by public actors), in most cases more than eg moral or religious norms. This is because 'soft law' is a creature of law. For one thing, because it is limited by the law, as it may only be adopted if and to the extent its respective legal framework so allows.[168] What is more, 'soft law' and law have in common many characteristics, such as their (mostly) written form or a certain degree of publicity,[169] similar (or even the same) norm-creators, at least similar creation processes, and there is a strong relationship of explicit or implicit cross-referencing.[170] The legal conditionality, together with the similarities just mentioned, characterises

its Council (within the Commission on Environmental Cooperation) which ought to adopt recommendations on elaborating on the NAAEC; see Article 10 *leg cit*.

164 See Möllers/Fekonja, Rechtsetzung 803, with regard to the German corporate governance code elaborated by an expert committee established by the government (*Regierungskommission*); critically of such state-centredness: Walker, Pluralism, in particular 321 f, with further references.

165 For the involvement of non-state actors in international decision-making more generally see C Binder, Einfluss; Haslinger, Potential 34–37.

166 See Friedrich, Soft law 394–397, also with regard to the delegation of decision-making tasks to experts.

167 Similarly: Knauff, Regelungsverbund 218–220, with examples. However, *Knauff* seems to be stricter when it comes to non-state actors merely mandated by state actors; see ibid 245. Doubtfully, but ultimately including 'norms adopted by non-state actors' in her definition: Shelton, Introduction 3 f; see also Boschetti/Poli, Study 27-35.

168 Against this background, Boyle, Reflections 901 describes 'soft law' as 'simply another tool in the professional lawyer's armoury'.

169 With regard to 'soft law' see Baxter, International Law 565; Everling, Wirkung 134 and 143; Wellens/Borchardt, Soft Law 271; see also Deumier, Droit souple 249 f.

170 See Friedrich, Soft law 152 and 182 ff; Knauff, Regelungsverbund 265 f and 295 f, both with further references; for references in the recitals of acts of EU secondary law to the then only soft CFR see Szczekalla, Grundrechte 1020; see also Grundmann, Inter-Instrumental-Interpretation 925 f; Opinion of AG *Cruz Villalón* in case C-399/12 *Germany v Council*, para 93.

'soft law' – and distinguishes it from other sets of norms, eg religious norms ('No meat on Good Friday!'), which in their normativity, if they do not themselves accept the superiority of law,[171] are not dependent on whether they are in compliance with the law. This suggests that we approach 'soft law' in consideration of the underlying legal framework and with the methodological tools known from legal science, in particular with a view to its interpretation and to cases of collision.[172] Due to this proximity, it may – in spite of the conceptually clearcut distinction between law and 'soft law' – be difficult in places to find out whether a concrete act belongs to the realm of law or to the realm of 'soft law' (see 2.1.2. and 2.1.3. below).[173] All in all, in the scholarly arena lawyers 'stay in business' also with regard to 'soft law',[174] although, of course, this phenomenon may be duly approached from eg a political science or – in the case of public international 'soft law' – an international relations perspective, as well.[175]

171 Whether such superiority is acknowledged by a religious regime depends. For the Christian religions see the famous passed-on words of *Jesus Christ*: 'Render therefore unto Caesar the things that are Caesar's; and unto God the things that are God's' (*Matthew* 22, 21).

172 Pointing at the risk of contradictions between different 'soft law' acts: Senden/van den Brink, Checks 65 f; Opinion of AG *Bobek* in case C-911/19 *FBF*, paras 88 f, pointing at the 'risk of a "crowded soft-law house"' where overlapping soft law mandates of different EU bodies exist, and admitting a certain absurdity ('singular nature') of the concern about a conflict between different legally non-binding acts. The most important collision rules are *lex specialis derogat legi generali*, *lex posterior derogat legi priori*, *lex superior derogat legi inferiori*. The latter rule, in the context of 'soft law', may apply only exceptionally, namely where a formal hierarchy of 'soft law' norms can be established. Different degrees of factual authority are common, though. For the influence factors like mandate, voting procedure etc have on the *authority* of 'soft law' adopted by international organisations see Shelton, Compliance 128; with regard to EU 'soft law' see V.3.5. below; for the principal applicability of the *lex specialis* and the *lex posterior* rules in the context of 'soft law' see also Goldmann, Gewalt 499.

173 See Deumier, Droit souple 250; see also Ballreich, Nachdenkliches 387; Hillgenberg, Soft Law 101; Kiegler, Anforderungen 266.

174 Pauwelyn/Wessel/Wouters, Introduction 5. For a critical account of tendencies to expand the field of public international law so as to provide for sufficient 'legal materials' for the lot of international lawyers to be preoccupied with see d'Aspremont, Softness 1088–1093. For the difficulty this entails for traditionally trained lawyers see eg Mertens, Leges 29 f.

175 See Bianchi, Butterfly 214 f; d'Aspremont, Pluralization 197-199; Müller-Graff, Einführung 142 f. In the political arena this may be different, and there 'soft law' may contribute to a 're-assertion of the political sphere': Dawson, Soft Law 2.

The legal framework for the creation both of norms of private authority and of norms of public authority is again set by public actors: in the constitution and in the *corpus* of sub-constitutional legislation. Thus, acts of public authority establish the basis for (further) norms of public authority on the one hand, and for norms of private authority, on the other hand. But while the conduct expressing private authority is principally governed by private autonomy, in some respects restricted by the law[176] and – in case of legal persons – by self-regulation, with entities exercising public authority we need to distinguish: While in public international law (State sovereignty) the rule 'Everything which is not prohibited is permitted' applies as well,[177] in EU law and national public law it is the way round: Public authority may be exercised only where it is allowed. Whichever conduct is not (explicitly or implicitly) allowed is prohibited. This scheme can be applied also to the respective legally non-binding output.

We have discussed above (1.3.3.2.) that the legally non-binding output of private actors has a particularly broad scale and, at its lower end, often merges into everyday communication with no normative content. Legally non-binding emanations of public authority are comparatively more distinct, especially where they are intended to be normative (but still legally non-binding). Since they always bear – as expressions of public authority – a minimum degree of authority, it is justified to examine them as a category of their own. The questions which may be raised in the context of this category of acts are often the same as those raised in the context of law adopted as an expression of public authority: Is there a material competence and is there a competence to adopt the act in the way the norm-creator chose to act (ie in a legally binding or in a legally non-binding way)? Are special thresholds met which are set in the context of exercising public authority: eg proportionality or protection of fundamental rights? How can the norm-creator make sure its acts are complied with by the respective addressees? Which legal remedies against the act at issue are available? With regard

176 For an explanation of the different meanings of the term 'private law' in this context see Goldmann, Perspective 57 f. In favour of private autonomy as a gateway for private rule-making: Köndgen, Privatisierung 520 f.

177 Explicitly: *France v Turkey*, PCIJ No 10 Ser A 1927, paras 96–98 (Dissenting Opinion by Judge *Loder* with reference to the Court's view). On the assumption that the adoption of 'soft law' in a certain field has implications for the competence to regulate this respective field (in public international law) see Baxter, International Law 565, with reference to pertinent case law; for the similarities of (and differences between) private law and public international law see already 1.1.2. above.

to the creation of private norms some of these questions would not be relevant, and the answers to the relevant questions would be very different to those given in the context of rule-making by entities exercising public authority.[178] Also the rules of interpretation of acts of public (international) law partly differ from those of acts of private law.[179]

This relatively strong similarity between public authority expressed in the form of law and in the form of 'soft law' entails the risk that 'soft law' is increasingly replacing law. The most important reason for such tendencies is that the adoption of 'soft law' is regularly less demanding (in terms of the procedure to be applied) for its creator than the adoption of law.[180] This can be illustrated with regard to the question of competence: While the competence to set norms legally binding upon citizens (or, in case of public international law, States) is essential for the creation of such norms, a sufficient competence is required also for the adoption of soft rules. However, competences to adopt 'soft law' are regularly granted more generously than competences to adopt law. Where the distinction between these two sets of norms – law and 'soft law' – is blurred, the competence requirements for the adoption of law are at risk of being assimilated to those for the adoption of 'soft law', that is to say of being alleviated. Distorting this limitation would work against the restriction, and also the foreseeability for that matter, of (the exercise of) public authority.

The unclear cases presented above shall not prevent us from attempting to give a definition of 'soft law'. After all, a resilient definition is a strong contribution to shaping the object of investigation and hence is a *conditio sine qua non* when working with a term as widely and differently used as 'soft law'. Such a definition should be broad enough to encompass the realms of public international law, EU law and arguably also that of national law – in spite of the differences these regulatory levels display in a more detailed perspective. It shall underlie the remainder of this work. In conclusion, we can define the term soft law (now and henceforth, due to its being

178 See Pollack/Shaffer, Interaction 246.

179 Take the *contra proferentem* doctrine as an example which, in many jurisdictions, is applicable in private law, but not in public international law; Articles 31 ff of the VCLT 1969; broadly referring to different effects: Knauff, Regelungsverbund 218, with numerous further references. This is not to say, however, that the language used in different areas of law and hence the methods of interpretation are *principally* different; see eg case 53/81 *Levin*, para 9, in which the Court refers to the 'generally recognized principles of interpretation'.

180 See eg Wirth, Assistance 222.

defined, without inverted commas) broadly as norms, enacted by entities thereby exercising public authority and thereby aiming at steering human behaviour,[181] which are legally non-binding according to the interpretatively established will of its creators (or, as an expression of self-obligation, legally binding only upon the creators themselves). The merit of such an encompassing definition or concept is the designation of a phenomenon occurring in different legal orders on the basis of which an exchange of views is facilitated. Establishing this concept, however, is only a first step. It cannot address, let alone bring in order, the idiosyncrasies of the variety of expressions of soft law in all kinds of legal orders. If such classifications are feasible at all, then only with respect to the one selected legal order. In this work, a classification of soft law is attempted with regard to the EU's legal order.

2. Delimitation of soft law

2.1. From law

2.1.1. Delimitation with a view to enforceability and effectiveness

2.1.1.1. On the issue of enforceability

Having provided for a definition of soft law, we shall now elaborate on some of the issues raised above, thereby making more explicit – but also pointing to the difficulties of – its distinction from other norms and non-normative output of public bodies. We shall start with a distinction from law.

According to a common (positivist) definition (which shall be taken as a basis here and which was already referred to under 1.3.2. above), law is described, with reference to *Kelsen*, *Hart* or *Raz*, as a system of norms adopted by human beings for human beings which are – *grosso modo* –

181 That includes 'institutional' behaviour, that is to say the behaviour of an institution in the broadest sense, eg a legal person, because here again it is human beings – as individual or collective organs – determining the legal person's behaviour.

enforceable[182] and effective.[183] Norms are defined as entailing a command, or they should at least be capable of being linked to a command.[184] The latter is the case eg with authorisations or permissions which are granted by a norm.[185] While also soft law, according to the above definition (see 1.3.4.), is composed of norms adopted by human beings for human beings, the *grosso modo* enforceability as the apparent (substantive) differentiator with a view to soft law shall be addressed more closely. A legal norm, where it is not obeyed, can be enforced, that is to say the extrinsic compliance – not: the (intrinsic) agreement with the content of the norm on the part of the person obliged – can be ensured by means of physical compulsion (execution or punishment[186]) which are laid down in advance.[187] Legal norms which by their very nature cannot be physically enforced, such as procedural rights (eg the right to be heard or the right to be represented by a lawyer) or the right to obtain a permission (eg to erect a building on one's premises), are pushed through otherwise, eg by an appeal to a court which repeats the procedure or grants the permission, or orders that this be done by the competent authority. Compliance with legal requirements to be met in order to be awarded a right or an authorisation (eg a concession to undertake a certain business) are ensured in that unless and until they are fulfilled, the authorisation – which is an act of public authority and which is required for the lawful undertaking of a certain business – shall not be granted. Running the business at issue nevertheless would then be considered unlawful and punishable. All in all, the non-compliance with a legal norm can – idealtypically – lead to physical enforcement, sanctions, or

182 Sceptically as regards the enforcement criterion: D'Amato, International Law 1–6; Klabbers, Instruments 999; Peters, Typology 412. *Peters* also uses the term 'effectiveness', but thereby seems to refer to the enforceability of an individual legal norm.

183 See eg Griller, Grundlagen (2015) 15; see also Conseil d'État, Droit souple 19. Also *Hart* does not outright refuse the importance of legal enforcement, but he takes a more nuanced approach than eg *Austin* (which he criticises): Hart, Concept 39; see also Noonan, Concept 170; Raz, Morality 7; for the three main theses of positivists distinguishing them from naturalists see Raz, Authority 37 ff; see also Engisch, Suche 10 ff and 56 ff.

184 For the category of 'imperatives' see Larenz/Canaris, Methodenlehre 74–78, with examples.

185 See Raschauer, Verwaltungsrecht, para 511; Rill, Fragen 7; Walter, Soft Law 23; see also Ruiter/Wessel, Nature 165, who would call such norms 'legally committing' as opposed to the narrower term 'legally obligating'.

186 See Walter, Soft Law 22.

187 See Kelsen, Law 76, see also Arroyo Jiménez, Bindingness 18.

at least to an authoritative emanation from a court or another public body that this non-compliance constitutes a violation of law.

Rules of soft law lack such 'enforceability in a broader sense'. This lack of enforceability in a broader sense again reflects their lack of legal bindingness (leaving the potential self-obligation caused by soft law apart[188]). Whereas law *must* be observed, on the basis of which it is generally enforceable,[189] soft law, according to the will of its creators, *should* be observed and hence is not enforceable. This is, as was already stated above (1.3.2.), the primary (substantial) difference between law and soft law, the *nervus rerum* of the discussion on the distinction between these two categories of norms.

With regard to public international law, its extensive (though by far not all-encompassing) lack of enforceability has been invoked with a view to challenging its legal quality altogether.[190] In a monistic perspective, this argument could be countered by claiming that national legal regimes and public international law form one legal order. In such a holistic perspective, non-enforceable rights/obligations of public international law can be counted to the exceptions of non-enforceable law (see in particular 2.1.3. below), but the large majority of rights/obligations of the legal order would remain enforceable (and hence the criterion of *grosso modo* enforceability in the definition above would be fulfilled).[191] In a dualistic perspective, public international law is perceived as one system of norms which makes construing non-enforceable rights/obligations as exceptional more difficult. Either way, public international law remains to be a special case. Here the enforceability is much less strongly connected to legal obligation than in national law.[192] It is not by chance that the intense discussion of the phenomenon of soft law has its origin in the literature on public international law.

Nevertheless, it ought to be emphasised that in many instances public international law does provide for enforcement measures, in particular

188 See III.4.2.2.2.4. and III.4.2.3.2.3. below.

189 For this unique feature of law see *Kelsen's* word of the 'Zwangsmoment […] [als] das entscheidende Kriterium' [element of force as the decisive criterion] of a legal order; Kelsen, Rechtslehre 78. However, exceptionally there may also be (hard) legal norms which cannot be enforced (see 2.1.3. below); for what *Koskenniemi* calls the 'skeptics', the existence of sanctions *stricto sensu* is a *conditio sine qua non* for the existence of law: Koskenniemi, Utopia 168 f, with further references.

190 Critically eg Kelsen, Principles 23–25.

191 Arguing in favour of such a monistic approach: Kelsen, Principles 403 f.

192 See Bodansky, Character 143.

within the regimes of the UN, the WTO, and other international organisations.[193] Enforcement by bodies belonging to other regulatory levels such as national courts additionally has to be taken into account.[194] Also general sanctioning mechanisms of public international law such as reprisal and retortion can be referred to here.[195] That in many cases they are not applied, is a different issue, and may be because frequently they are considered politically unattractive.[196]

Furthermore, it should not be forgotten that also in national private law – where the respective State regularly provides for means of enforcement – legal positions are often not enforced before courts, but pushed through otherwise (eg by means of alternative dispute resolution[197]), or are simply neglected. Civil courts are addressed far less often than they could be, especially where the potential claimant is economically less powerful than the potential defendant, where the risks involved are deemed too high, or where the opponents of a dispute will have to work together or live next to each other further on.[198]

193 For the (assumed) *grosso modo* effectiveness of public international law see Hongju Koh, Nations 2599 f and 2603, each time with further references; Kirgis, International Law; with regard to WTO law see Griller/Vranes, EC-Bananas, para 21; with regard to compliance with WTO dispute settlement output see Petersmann, Trends 21; critically: Haas, Hypotheses 23; Zemanek, Soft law 845 f; for the view that the legal regimes of international organisations constitute legal orders separate from the public international legal order see references in Schermers/Blokker, Institutional Law, § 1142; arguing in favour of a broader understanding of enforcement in public international law: Brunnée, Enforcement 3–5; see also Koskenniemi, Utopia 180 f.

194 See eg Nollkaemper, Role 168 ff.

195 For further means of ensuring compliance in public international law see Bothe, Norms 88 f; in case of non-compliance with international soft law, only retortion may be used as a means of reaction by another state: Schroeder/Karl, Quellen, para 514; Seidl-Hohenveldern, Soft Law 205; for the estoppel effect as a (contested) argument against non-compliance with UN soft law see Schweisfurth, Rechtsnatur 720 f; see also Bothe, Norms 87 and 95; Goldmann, Gewalt 200; Klabbers, Instruments 1003; Wengler, Rechtsvertrag 196 f.

196 See Hongju Koh, Nations 2635 f.

197 For the rise of such alternatives even in the framework of court proceedings see eg Roberts, Listing.

198 For the enforcement of fundamental workers' rights see Canetta/Kaltsouni/Busby, Enforcement 56–61; for private enforcement in the EU in the field of competition law see Waelbroeck/Slater/Even-Shoshan, Study 10 f.

2.1.1.2. On the issue of effectiveness

Effectiveness is the second element referred to in the above definition of law which we shall examine more closely. The effectiveness of a norm – measured in terms of compliance rates – is essentially a matter of fact (but not always a matter of course). In spite of being measurable only quantitatively, and hence not by applying traditional legal methodology, the degree of effectiveness is not irrelevant for legal norms.[199] The above definition requires that law, as a system of norms, is – *grosso modo* – effective. The system as a whole, not each and every norm of it,[200] needs to be effective in order to qualify as law. The phrase '*grosso modo*' makes clear that not a compliance rate of 100 percent is required, but that less than that may suffice.[201]

Doubtlessly, effectiveness is important also for other sets of norms, not only for law.[202] However, unwritten normative regimes such as customs develop in a more flexible way than (written) law. They continuously adapt to humans' actual behaviour. A single custom which is not applied simply ceases to exist. This on-going communication between norm and practice leads to the application of a norm resulting in its existence.[203] Where the effectiveness of norms cannot be scrutinised by third parties because compliance does not result in (visible) action,[204] eg the religious command 'You shall not covet your neighbour's house', it is not a relevant factor.

Which role does effectiveness play in the case of soft law? While, according to the understanding applied here, it is to be perceived as a regime with a different normativity than law – norms of soft law *should* be applied according to the will of its creators, but it is not a legal *must* –, it is nevertheless strongly coined by and attached to law. Its existence is conditional

199 See Arndt, Sinn 122; Bianchi, Butterfly 210 f, with regard to the – inherently related – people's belief that something is law.

200 See eg Griller, Grundlagen (2012) 15 f; ambiguously: Pöschl/Winkler, Grundlagen 44.

201 Sceptical of the indetermination, but at the same time conceding the necessity of the effectiveness criterion: Rill, Fragen 6 and 12 f; taking account of the indeterminedness of what (with *Austin*) he refers to as '"a general habit of obedience"': Hart, Concept 23 f.

202 See Jabloner, Rechtsbegriff 29.

203 In principle, this applies also to customary law as one branch of a legal order. It is the related *opinio iuris* which converts a custom into customary law.

204 There may be instruments to disclose (non-)compliance, though, like the hearing of confessions.

on its legality in the respective legal order. This justifies its analysis in legal terms (see 1.3.2. above).[205] The effectiveness of law is the practical counterpart to its claim of legal bindingness, the effectiveness of customs is the practical counterpart to its claim of customary bindingness etc. Soft law – perceived through legal glasses – is non-binding, hence it claims non-bindingness. Thus, requiring a degree of effectiveness for the existence of the soft law regime would be contradictory. Soft law creators hope to reach compliance by convincing the respective addressees, though. This may work out, in particular, because the suggested rules are reasonable and/or because of the addressees' respect of public authority. If the creators of soft law did not hope for compliance, they would not adopt the soft law act in the first place.[206]

While in conclusion law requires a certain degree of effectiveness and while soft law does not, in practice a norm of law can be ineffective, that means not applied regularly, and a norm of soft law can be very effective[207] – and *vice versa*.[208] Since there is no general causal link between (non-)effectiveness and (non-)bindingness, this criterion is of no use in distinguishing law from soft law.[209]

2.1.2. The recognition of law, soft law and other output of public authority: relevant indicators

Having dwelled on the issue of legal bindingness (as enshrined in the enforceability criterion) as the substantial differentiator, we shall now examine potential indicators in this respect. First of all, we need to revive a question which is not, or at least not explicitly, addressed in the above definition of law: the question of form. In complementation of what was brought up in sub-chapter 1 above, the following is to be said: When those addressed by

205 Note *Hillgenberg's* words, who described soft law as 'Quelle eines normativen Regimes, das juristischem Denken unterliegt' [source of a normative regime which underlies legal thinking]; Hillgenberg, Soft Law 101.

206 That law may set a framework which renders compliance with soft law more likely, is a different story, which shall be addressed when specifically dealing with EU soft law in Part III of this study; for the example of monitoring mechanisms in public international law see Kanehara, Considerations 93 f and 96.

207 On the reasons for compliance with non-legal norms in general see Brown Weiss, Conclusions 539.

208 See Cannizzaro/Rebasti, Soft law 212; see also case T-113/89 *Nefarma*, para 76.

209 See Cannizzaro/Rebasti, Soft law 217 f.

rules are entitled to have doubts as to whether a rule is legally binding or not (that is to say whether they *must* or only *should* act in a certain way), one of the core functions of law, the steering of human behaviour, will be hampered by creating or increasing an 'unclear state' of the relationship between rule-makers and the addressees of the rules.[210]

A positivist understanding of law must therefore strongly rely on formal requirements. Where an act of law was adopted in accordance with the formal (procedural) requirements, it qualifies as law even if it contains an unfair or immoral norm. It may later be annulled for non-compliance with higher-ranking law (eg fundamental rights), but up until then it is to be considered law. However, where an act of law contains non-binding norms (eg a recommendation) or where it does not have any determinable normative content at all (eg with merely programmatic provisions contained in many national constitutions), the legal form (which it may still maintain under the respective law: statute, regulation, etc) cannot prevent its material qualification as soft law or not even soft law, as non-law.[211] Conversely, a substantially speaking obligatory norm only entails (legally) binding effects if it formally qualifies as law (see also 1.3.2. above).

Formal (procedural) rules serve different purposes, among which may be the democratic legitimation of the decision-making process and hence also of the respective output (eg decision-making *quora*), their balancing of different interests (eg the requirement to consult interest groups during the deliberations) or ensuring that the decision-maker takes an informed decision (eg requirement to consult experts). Formal requirements such as signatures and promulgation contribute to informing the people of the existence of certain rules – eg a piece of legislation or a treaty concluded between two or more States (objectives of publicity and of legal certainty).[212] The higher these formal requirements to be met by the creator(s), the less

210 See Somek, Concept 994; see also Craig/de Búrca, EU Law 140; for the importance of 'highly certain normative knowledge' see Terpan, Soft Law (2013) 14, with further references.

211 See Ingelse, Soft Law 81 f, with further references; stressing the meaning of the substance of a provision: Chinkin, Development 25 f. With regard to EU legislation, the Council has held that 'provisions without legislative character should be avoided (wishes, political statements)'; Council Resolution of 8 June 1993 on the quality of drafting of Community legislation, 93/C 166/01. With regard to the normative requirements of decisions according to Article 288 TFEU see Geismann, Art. 288 AEUV, para 58, with many references to the case law.

212 In case of EU law also the express reference to the legal basis of a legally binding act is such a 'procedural' requirement; see case C-325/91 *France v Commission*, para 30.

likely it is that a norm is adopted 'by mistake' – for example when the creator(s), according to the outward appearance and the wording of the act, clearly set binding rules, even though they (eg the individual parliamentarians) actually intended to adopt a non-binding act (eg a resolution).[213] Thus, compliance with the respective formal requirements also contributes to disclosing the actual will of the creator(s) to adopt a legally binding (or a legally non-binding) act.[214] This applies in particular to legislation or to constitutional amendments.

Normally, legal orders do not provide for a *numerus clausus* of soft law acts[215] which is why soft law regularly appears in many different forms[216] and may be adopted by a variety of different actors (vested with public authority). As was mentioned above on different occasions, the procedural requirements for its creation (if any) are by tendency lower – less developed – than with law.[217] In particular at the EU or at the national level, it may therefore be comparatively easy to distinguish a piece of legislation from a soft law act – due to the strict formal criteria of the former.[218] However, an implementing measure or a generally applicable instruction may, with a

213 In that case the apparent (clear) will trumps the concealed actual will of the norm-creator; see Rill, Methodenlehre 465–467. For the limited value of formality criteria in public international law see Pauwelyn, International Law 131–134.

214 For the presumption of legal bindingness see 1.3.2. above. On the level of the single provisions (contained in a legal act) it is true that the will of the legislator can be less clear, sometimes even after having made use of various methods of legal interpretation.

215 For the case of public international law see generally Knauff, Regelungsverbund 257; for EU law see III.3.1.2. below.

216 For an account of the variety of soft law acts at the international, the EU and the national (German) level see Knauff, Regelungsverbund 257 ff; for the heterogeneity of soft law only in international environmental law see D'Amato, Soft Law 56; proposing a list of (in the terminology applied here: also soft law) norms issued by legal instruments see Ruiter/Wessel, Nature 172 f; rating, in the context of EU law, the substance of a measure higher than its form: case T-58/09 *Schemaventotto*, para 86.

217 Heusel, Völkerrecht 302: 'formelle Anspruchslosigkeit' [formal simplicity] of soft law. See, for example, the publication requirements (publication in the OJ) for legislative acts and certain non-legislative acts in the TFEU: Article 297 para 1 subpara 3, and para 2 subpara 2 TFEU, respectively; see also case C-410/09 *Polska Telefonia*, paras 24 f and 30. For soft law acts, no such prescription is laid down in the Treaties (see Article 13 para 2 of Regulation 1049/2001: publication '[a]s far as possible'); see also Dickschen, Empfehlungen 175–180. For the effects of publishing international soft law at the national level see Schreuer, Anwendung.

218 Providing for counter-examples: Senden, Balance 94; with regard to the role soft law plays in national constitutions see Malinverni, Effectivité 300; for the interaction

view to the decision-making procedure, very well be confounded with soft law – and *vice versa*, respectively.

Where procedural requirements for the adoption of a legally binding act are (severely) violated, the output is – depending on the legal order at issue – void or even a so-called non-act. Where at the same time the requirements for the adoption of a soft law act are met (in particular where it turns out that the originator, according to its expressed will, *at least* wanted to adopt a soft law act[219]), the output at issue may be construed as a soft law act, though.[220] Similarly, where there is no legal basis or no competence for adopting a certain legal act, the output may – given the respective competence – be interpreted as a soft law act. Where in such cases the originator's expressed will does not even point in the direction of soft law, the examination of the output can be stopped. Without an appropriate (expressed) will, no soft law act can be created.

A 'soft' wording (aims instead of imperatives, eg 'are invited to', 'shall attempt') makes enforcement impossible and therefore indicates the originator's will to adopt only soft law.[221] A 'soft' wording is not to be confused with a lack of determination.[222] Both legal and soft law norms have to reach a minimum degree of determination in their wording: 'If law is to

between hard and soft law at the national level during the pandemic see Boschetti/Poli, Study 48-51.

219 In case of a mental reservation of the originator, the general rules of interpretation apply. In accordance with the so-called declaration theory (as opposed to the will theory), it is the objective declaration ('expressed will') that counts; see eg Armbrüster, Vorbemerkung, para 21. With regard to the cases of a threat to or a deception of the legislator: Morlok, Informalisierung 72 (in particular fn 124), with further references. Only in case the addressee of the act knows or can be expected to know that the originator has not had an according will, the appearance does not prevail over the actual will, as then there are no legitimate expectations to be protected on the part of the addressee.

220 With regard to the will of the norm-creator see Rill, Fragen 9 f. For the importance of the orginator's will, and for the difficulty to establish this will see Pauwelyn, International Law 134–136. For the 'presumptive law' thesis, that is to say a presumption of legal bindingness for certain output, see Klabbers, Courts 224 f. For the importance of this will/intention see Ingelse, Soft Law, in particular 79.

221 See Ingelse, Soft Law 80. See, as an illustrative example, the Commission Communication at issue in case C-57/95 *France v Commission*; on the meaning of the wording, see in particular the Opinion of AG *Tesauro* in this case, para 16.

222 They may appear in combination, though; see Virally, Valeur 68, uttering that recommendations in public international law display 'une précision souvent très relative'.

have instrumental value, its content should be reasonably clear'.[223] In the context of law, this is one aspect of legal certainty, but also in the context of soft law it applies in principle, because there is simply no normative content without a minimum degree of determination.[224] If necessary, also other indicators, such as the contents and purpose of the relevant act, should be examined,[225] as they may give a hint to the legal quality of the act at issue. Also the available means of ensuring compliance with a norm (if any) may be worth looking at. Means of enforcement characterise law, whereas 'soft sanctions' speak in favour of soft law.[226] A lack of available means of enforcement for a specific norm does not automatically make it non-binding, though (see 2.1.1.1. above and 2.1.3. below).

Other indicators raised in the literature, such as effect – actual changing of the addressees' behaviour – or a certain degree of legitimacy[227] do not appear to require further attention here.[228] As we have seen above, the criterion of effectiveness may neither serve to distinguish soft law from law, nor is it a requirement for the existence of soft law, and legitimacy concerns are addressed (already) by procedural requirements, such as the necessity of a legal basis or the required compliance with higher-ranking (positive) norms of the legal order at issue. As regards the extravagant approach proposed on the level of public international law, namely that law is what we believe to be law, the following can be said: While there may be examples in State practice underpinning this approach,[229] and while this

223 Koskenniemi, Utopia 177; for the allegedly compromise-induced vagueness in the formulation of some pieces of EU legislation see Senden, Soft Law 12.

224 See Arndt, Sinn 134–136; see Sarmiento, Soft Law 274 f, with regard to the distinction between rules and principles which may also be applied in the context of soft law; see also Dworkin, Rights 22-28; for the development of (positivist) legal concepts in 19th century Europe along the lines of (and the quest for) legal certainty see Van Meerbeeck, Principle 279.

225 See Arndt, Sinn 134–153, proposing further elements; Thomas Müller, Soft Law 119.

226 See Abbott/Snidal, Hard and Soft Law 422; see also Knauff, Regelungsverbund 246, who – with a view to the possibilities to react to non-compliance – stresses that a strongly 'reduced bindingness' [reduzierte Verbindlichkeit], NB: non-legal bindingness, may not meet the requirements of soft law; for the institutionalised dispute resolution on the basis of soft law provided for by the World Bank's Inspection Panel see ibid 281 f.

227 See d'Aspremont, Pluralization 193.

228 For a critical account of these criteria see Pauwelyn, International Law 136–139.

229 For example the *opinio iuris* as one constitutive element of customary law.

belief may have a significant impact on a norm's effectiveness, as a general concept it can be upheld neither conceptually nor practically.[230]

Having listed a number of indicators to distinguish law from soft law, it ought to be stressed that soft law needs to be distinguished not only from law, but – on the other side of the scale – also from output which is not (even) soft law, eg policy papers without any normative content. Here the substantive (rather than formal) criterion of normativity (including non-binding normativity) is highly important. The expressed will of the originator to create a (soft) norm, as determined by using the methods of legal interpretation, is a necessary (but not a sufficient) condition for its actual creation. In this context, first of all, we have to ask whether the act is – either explicitly or implicitly – directed to a certain addressee or group of addressees in order to exclude output of a merely programmatic nature. Where it is, is it apparent that the addressee(s) (can be the creator itself) shall be committed and, if so, in which way? Here it is again the wording of the act which will not be the only, but normally the most promising source of knowledge (see also 2.3. below).

2.1.3. Exemplifying the proximity between law and soft law

2.1.3.1. General examples

Above it was attempted to distinguish law and soft law from each other. While this conceptual separation is worthwhile, it should not be concealed that in practice there are cases which, at least *prima facie*, seem to challenge this separation. For instance: A so-called *lex imperfecta* is legally binding, but does not provide for legal consequences of its violation and hence cannot be enforced.[231] A declaratory decision or judgement merely states rights or obligations which a certain person has according to the law. It is

230 See Pauwelyn, International Law 139–141, with further references.

231 See Rill, Fragen 3, who emphasises that such provisions entail a command, as well, and can be accepted in a system of otherwise enforceable legal norms; see also Austin, Province 32 f, with reference to the 'Roman jurists'. In some cases the abstract possibility to claim damages may render enforceable even a *lex imperfecta*: Where the rule not to eat in the public library is not combined with enforcement measures (eg to expel the non-compliant library-user), non-compliance may still be 'sanctioned' where non-compliance causes a damage to another user of the library, eg when he/she is allergic to the food and falls ill or when he/she is slipping on the banana peel and breaks a leg. He/She can then pursue his/her claim before court, arguing that the damage was caused by another person acting in an unlawful way

binding in that it authoritatively states certain rights or obligations, but – if adopted in accordance with the law – it does not create any new rights or obligations. What about a legal act which has been duly adopted (is valid, that means), but is not yet in force? As it clearly is legally non-binding, the question arises whether it can be qualified as soft law. In light of the above definition (1.3.4.), this question is to be answered in the affirmative. In particular, the norm-creator's intention to steer human behaviour can be confirmed. After all, a *vacatio legis* is regularly foreseen in order to allow those addressed to adapt or get accustomed to the new rules. This implies that already during that time they should comply with these rules, but they are not bound to do so.

Also a provision whose content is expressed in very broad terms (for example: 'The authorities in charge shall take adequate measures to protect the environment')[232] raises some questions in this context. The provision may be qualified as legally binding because the wording, at first sight, does not indicate legal non-bindingness. However, a closer look reveals that the terms used ('adequate measures', 'protect the environment') assuming that they are not defined more closely elsewhere in the respective law, leave such a wide margin of action for those addressed ('the authorities in charge') that it is impossible to deduce, by means of a semantic interpretation, a more concrete duty from it. Hence this and similar provisions also cannot be enforced.[233] *D'Aspremont* – because of the leeway the provision grants – would call it a 'soft negotium'.[234] But that does not necessarily mean that it constitutes soft law according to the definition applied here. It is

(non-compliance with the rule which also constitutes a protection standard for the injured user of the library). That way – although only indirectly – an 'enforcement' may take place; in the context of public international law, see the landmark decision in *Factory at Chorzów*, PCIJ No 9 Ser A 1927.

232 With regard to the EU, see eg Article 191 para 2 TFEU. On the qualification of this provision ('principle') and on its lacking enforceability see Nettesheim, Art. 191 AEUV, paras 81–83.

233 See also Bodansky, Character 143. The fact that virtually any legal norm may be subject to (at least slightly) different interpretations is inherent to human language by means of which a legal norm is expressed; see Hart, Positivism 607 f, explaining his famous core-penumbra metaphor, according to which each norm has a penumbra of meaning which requires interpretation to become clear. Only where not even a minimum degree of determination (which may vary from legal order to legal order) is reached, so that the possible results of legal interpretation would be nearly limitless, does a lack of clarity render a norm of law non-enforceable; see also the criterion of 'precision' by *Abbott* and *Snidal* referred to under 1.2. above.

234 D'Aspremont, Softness 1084.

the lack of determination which makes this provision weak, not its legal non-bindingness. It is true, however, that the effect of this provision – allowing for a wide range of different actions – is somehow similar to soft law, which also allows for different actions, meaning that it may lawfully be either complied with or not.[235]

In contrast to legal norms which are not enforceable, in the context of soft law we may come across different modes of pushing compliance, among which the most prominent are the so-called 'comply or explain'[236] and 'naming and shaming'[237] mechanisms.[238] Pointedly, we could say that such rules are legally non-binding but can nevertheless be asserted. This reflects the terminological *contradictio in adiecto*[239] of the concept of soft law mentioned above (1.1.). While some may attribute these means of assertion to 'a limited normative force'[240] of soft law, in the approach taken here it is explained as a form of normativity which is different from legal bindingness and enforceability. Similarly, the breach of a moral norm, eg adultery, may have (morally) normative consequences, eg a bad reputation among acquaintances or colleagues at work. They may be more individual

235 Nevertheless, the type of provision at issue here is legally relevant in that it is to be considered by an authority or court eg in the weighing of different interests when deciding on a claim (which is based on a different, legally enforceable provision). Take the preambles of international treaties as an example. They are an integral part of the respective treaty and serve as guidance for its interpretation which is obligatory in the sense that it must be referred to in case the meaning of a treaty provision is unclear; see Article 31 para 2 of the VCLT 1969; similarly with regard to recitals of EU legal acts: Bast, Grundbegriffe 352, with further references. For the place of Recitals in the hierarchical order of rules see case C-345/13 Millen, para 31.

236 On the theoretical foundation of the 'comply or explain' approach see Horak/Bodiroga-Vukobrat, Experience 184–187; see also Schilchegger, Agenturen 127; Dickschen, Empfehlungen 125–130.

237 On the 'naming and shaming' strategy in international human rights law see Hafner-Burton, Sticks; in the context of the PISA Study see von Bogdandy/Goldmann, Ausübung 75; with an example from the field of banking supervision: Müller-Graff, Rechtsschutz 103; with regard to EU law, the Commission in a legislative proposal has described the purpose of 'naming and shaming' as follows: 'for every possible minor offence [it] may be excessive. It remains, however, a useful deterrent in the case of infringement of the Directive's basic requirement […]'; Amended proposal for a Directive establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, COM(2002) 680 final, 3.

238 For (other) soft means of 'enforcement' see (also) Knauff, Regelungsverbund 294 f; Terpan, Soft Law (2013) 10; Yoshida, Enforcement.

239 Ingelse, Soft Law 79 ('*contradictio in terminis*').

240 D'Amato, Soft Law 55.

and hence less predictable than those following a violation of (soft) law, but they are still consequences of a breach of a norm.

With regard to the 'enforcement' of soft law, it ought to be stressed that these mechanisms still allow for deviance. In case of the 'naming and shaming' mechanism, the deviator risks his/her name to be published, but there is no means available to actually force him/her to comply. With 'comply or explain', the deviator is asked to provide his/her reasons for deviation. That way, the deviator may even convince the creator of the soft law act (or another body in charge of monitoring compliance) of the necessity to deviate. In case of a soft law act, the 'duty' to comply is only a soft one. The duty to explain in case of deviance may be soft (ie legally non-binding), but may as well be hard.[241] In such a constellation there is a strong intersection of law and soft law. Where the underlying norms are soft, the duty to give good reasons for a deviance, however, is hard, the mechanism practically equals a hard rule-exception clause: A legal norm may oblige its addressees, but at the same time provides for certain exceptions (which justify deviance).[242] The addressee may either comply or claim an exception to be applicable. In this case, the legal duty to provide the reasons for deviance seems to 'harden' the soft norm, and the situation is – apart from the fact that simply providing the reasons may allow for a greater leeway than concrete exceptions determined in advance – *practically* equivalent to an entirely hard mechanism.[243]

Another example would be a default rule in the form of *ius dispositivum* which is common in labour law or in tenancy law: Where the contracting parties do not address a certain issue (eg the working hours or the date of payment) in their contract, the law provides for a default rule which is to be applied. If the parties do not want it to apply, they have to agree otherwise.[244]

These cases, which – as examples – do not claim completeness, provide evidence of the strong proximity which may exist between law and soft law. This aggravates the distinction between the two. In my opinion, however, these borderline cases do not *in principle* challenge the separation between

241 For the latter case see Griller, Übertragung 156, with further references.

242 See Opinion of AG *Bobek* in case C-16/16P *Belgium v Commission*, paras 100 f, who even claims that a duty to give reasons for deviation renders the respective rule binding.

243 For other forms of a 'hardening' of soft law see Andone/Coman-Kund, EU soft law 5–7 and 13; see also Tridimas, Indeterminacy 61.

244 See eg Fleischer, Gesetz 692.

law and soft law, as proposed here. On the contrary, they facilitate the intellectual grasp of the sometimes only vaguely felt differences between legally binding and legally non-binding norms.

2.1.3.2. Special effects of public international law in EU law – the *Kadi* saga and the case of WTO law

2.1.3.2.1. Introduction

In order to enrich the discussion on the proximity between law and soft law specifically with regard to the multi-level regulatory regime, we shall now have a closer look at two further phenomena, which are similar to soft law. They are relating to the effect of public international law in the EU legal order, more precisely the authority of resolutions of the UN Security Council on the one hand, and the enforcement of apparent claims laid down in WTO law, on the other hand. These topics shall be presented and subsequently discussed with a view to deepen the above analysis, fleshing out the difficulty to clearly delineate soft law from law.

It is not the purpose of this chapter to provide an exhaustive account of the two subject matters. Rather, they shall be presented only to the extent necessary to disclose the similarities (and differences) to soft law, which subsequently shall be analysed in more depth.

2.1.3.2.2. The effect of UN law in the EU legal order, exemplified in the *Kadi* cases

The question of the effects of resolutions of the UN Security Council in EU law lies at the core of the Court's jurisdiction in the *Kadi* cases. Before discussing these cases, a word should be said about the principal relationship between EU law and public international law – from the perspective of the EU legal order. Primary law tends towards a strong consideration of public international law.[245] The EU shall, among other things, 'contribute to peace […] as well as to the strict observance and the development of international

245 See eg HP Aust, Union 109–111.

law, including respect for the principles of the United Nations Charter'.[246] As regards the abidance by public international law, this provision largely forms a codification of the case law of the CJEU, according to which the EU 'must respect international law in the exercise of its powers'.[247] In particular, the Court has decided in a number of cases that public international law concluded by the MS prior to the foundation of or their respective accession to the EU (or one of its predecessors) shall be given preference in principle.[248]

At the same time, EU law with its determinative characteristics such as direct effect, supremacy and its elaborate human rights standard is very different from (general) public international law.[249] These idiosyncrasies are permanent and, according to primary law and also according to the Court, form core principles of the EU legal order.

Against this background, the *Kadi* cases are to be understood. In these cases, requirements following from UN law and their respective implementation by the EU – still under the TEU and the Treaty establishing the European Community (TEC; both in their respective Nice version) – were at issue. More concretely, the UN Security Council had issued a number of resolutions requesting States, among other things, to freeze the assets of *Usama Bin Laden* and of organisations associated with *Usama bin Laden*, the *Al-Qaeda* network, and the *Taliban*, as referred to in a list set up and, if needed, to be updated by the UN Security Council Sanctions Committee.[250] The resolutions were adopted under Chapter VII of the UN-Charter which is about 'action with respect to threats to the peace, breaches of the peace, and acts of aggression'.

246 For the legal situation under the Nice regime – which was relevant in the *Kadi* cases to be addressed below –see in particular Article 11 para 1 TEU (Nice); see also eg Article 177 para 3 TEC (Nice).

247 Case C-286/90 *Anklagemyndigheden*, para 9; case C-308/06 *Intertanko*, para 51; case C-366/10 *Air Transport Association*, para 123.

248 See eg case 10/61 *Commission v Italy*, 10; case C-158/91 *Levy*, para 12; case C-324/93 *Evans Medical*, para 27; case C-124/95 *Centro-Com*, para 56.

249 See generally Weiler, Transformation. Article 3 para 5 TEU broadly expresses that '[i]n its relations with the wider world, the Union shall uphold and promote its values and interests'. Reflecting upon the political dynamic of these values: Leino/Petrov, Values, with regard to the European Neighbourhood Policy.

250 Security Council Resolution 1267(1999) of 15 October 1999; Security Council Resolution 1333(2000) of 19 December 2000; Security Council Resolution 1390(2002) of 16 January 2002; see also Security Council Resolution 1455(2003) of 17 January 2003.

The EU has implemented these resolutions by adopting Council Regulation 881/2002,[251] taking over the list of persons concerned (to be updated by the Commission), without informing these persons of the reasons for the asset freeze.[252] Therefore Mr *Kadi*, who found himself on the list, among others, filed an action for annulment with the then Court of First Instance, arguing that Council Regulation 881/2002 violated his right to a fair hearing, his right to property, and his right to effective judicial review.[253]

The Court of First Instance stressed the importance of Article 103 of the UN-Charter, pursuant to which '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.[254] This includes obligations emanating from the resolutions of the UN Security Council.[255] While this provision and the relevant case law of the ICJ lay down the primacy of the UN-Charter *vis-à-vis* the law of its members from the perspective of public international law, Community law – the Court of First Instance held – acknowledges this principle, as is expressed in particular in Articles 297 and 307 TEC.[256] The European Community (EC), not being a member of the UN, is not bound to accept this primacy *qua* the UN-Charter, but it is bound to do so *qua* the TEC.[257]

Already in the original version of the Treaty establishing the European Economic Community (TEEC), namely in its Articles 224 and 234 para 1, the MS have expressed their intention to follow their obligations under the UN-Charter. As a consequence of the subordination to the UN-Charter

251 This Regulation was based on Articles 60, 301 and 308 TEC. For the adequacy of this combined legal basis see case T-315/01 *Kadi v Council*, paras 89 ff and, partly differently, joined cases C-402/05P and C-415/05P *Kadi and Al Barakaat*, paras 158 ff; see also Schmalenbach, Kontrollanspruch 37, with further references.

252 For an account of the relevant events – in particular the various output on the part of the UN and the EU, respectively – see joined cases C-402/05P and C-415/05P *Kadi and Al Barakaat*, paras 11–45.

253 See joined cases C-402/05P and C-415/05P *Kadi and Al Barakaat*, para 49.

254 See also *Nicaragua v United States of America*, ICJ Reports 1986, paras 107, to which the Court of First Instance refers in case T-315/01 *Kadi v Council*, para 183.

255 Article 25 of the UN-Charter; see case T-315/01 *Kadi v Council*, para 184.

256 See case T-315/01 *Kadi v Council*, paras 185 ff; see now Articles 347 and 351 TFEU.

257 The motivation for adopting the mentioned TEC provisions lay in general public international law. Accordingly, the MS – when concluding the TEC – 'could not transfer to the Community more powers than they possessed or withdraw from their obligations to third countries under that Charter'; case T-315/01 *Kadi v Council*, para 195.

of the law of the MS and – *qua* primary law – also of Community law, the Court of First Instance eventually refused its general jurisdiction to scrutinise Council Regulation 881/2002, as it is implementing – without the Council thereby having disposed of any discretion – the relevant resolutions of the Security Council. Scrutinising Council Regulation 881/2002 would mean to indirectly examine these resolutions of the Security Council, and affirming this general jurisdiction would again, according to the Court of First Instance, be incompatible with public international law (in particular with Articles 25, 48 and 103 of the UN-Charter and Article 27 of the Vienna Convention on the Law of Treaties (VCLT) 1969), but also with the Treaties, in particular Articles 5, 10, 297 and 307 para 1 TEC and Article 5 TEU.[258] More generally speaking, it would not be in accordance 'with the principle that the Community's powers and, therefore, those of the Court of First Instance, must be exercised in compliance with international law'.[259] Only with regard to *ius cogens* – the body of highest rules of public international law, to which also the UN-Charter has to submit – the Court of First Instance, it held, may scrutinise (indirectly via an examination of Council Regulation 881/2002) the resolutions of the Security Council. It is in particular the 'mandatory provisions concerning the universal protection of human rights' which belong to these supreme rules of public international law.[260] With regard to the rather loose standard *ius cogens* provides in this context,[261] the Court of First Instance concluded – in short – that the asset freeze at issue does not constitute an arbitrary, inappropriate or disproportionate interference with the fundamental right to property of Mr *Kadi* (and others),[262] nor have the applicable procedures brought about a breach of the right to be heard or a breach of the right to effective judicial review.[263] Consequently, it dismissed the action brought against Council Regulation 881/2002.[264]

258 See case T-315/01 *Kadi v Council*, paras 222 f. For cases of the European Court of Human Rights dealing with a similar question, namely whether or not certain state action can be assigned to the EU and the UN, respectively (the cases *Bosphorus*, *Behrami* and *Saramati*), see de Búrca, Court 11–17.

259 Case T-315/01 *Kadi v Council*, para 223.

260 See case T-315/01 *Kadi v Council*, para 231.

261 See also Lenaerts, Kadi 709.

262 Case T-315/01 *Kadi v Council*, para 251.

263 Case T-315/01 *Kadi v Council*, paras 276 and 291.

264 For a more detailed account of the reasoning of the Court of First Instance see Schmalenbach, Kontrollanspruch 35–37.

Against the judgement of the Court of First Instance an appeal was filed before the Court of Justice. Remarkably but not entirely unexpectedly,[265] the Court of Justice in this case took a very different view on the question of primacy of UN law *vis-à-vis* Community law. It put the autonomy of the Community legal system and the fundamental rights as 'integral part of the general principles of law whose observance the Court ensures' at the centre of its reasoning.[266] Judicial review is applied to the Council Regulation at issue, not to UN law (in particular: the relevant resolutions of the Security Council), the Court underlined.[267] The Court, it held, may not even perform a scrutiny of UN law which is restricted to the question of compliance with *ius cogens*.[268] It further stresses that the procedure of implementation of resolutions of the UN Security Council is left up to the UN-MS and that therefore UN law does not prohibit any judicial review of the internal lawfulness of an implementing measure in the light of fundamental freedoms.[269] The law of the EU submits to public international law in certain cases (eg in Articles 297 and 307 TEC), but these provisions cannot be understood 'to authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) [T]EU as a foundation of the Union'.[270] Thus, the CJEU is competent to 'ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law', even if these acts have been adopted in order to implement resolutions of the UN Security Council.[271]

265 See Schmalenbach, Kontrollanspruch 36.

266 See joined cases C-402/05P and C-415/05P *Kadi and Al Barakaat*, paras 282 f and 316; also note AG *Maduro* in his Opinion in this case where he describes the EU legal order – in contrast to public international law – as a 'municipal legal order of trans-national dimensions' (para 21); for an account of *Maduro's* Opinion more generally see Gattini, Cases 216 f.

267 See joined cases C-402/05P and C-415/05P *Kadi and Al Barakaat*, para 286; see also para 300, where the Court negates the 'immunity from jurisdiction of a Community measure like the contested regulation', stating that such immunity 'cannot find a basis in the EC Treaty'.

268 Joined cases C-402/05P and C-415/05P *Kadi and Al Barakaat*, para 287.

269 See joined cases C-402/05P and C-415/05P *Kadi and Al Barakaat*, paras 298 f.

270 Joined cases C-402/05P and C-415/05P *Kadi and Al Barakaat*, para 303. AG *Maduro* in this case puts it this way: 'Yet, in the final analysis, the Community Courts determine the effect of international obligations within the Community legal order by reference to conditions set by Community law' (para 23).

271 Joined cases C-402/05P and C-415/05P *Kadi and Al Barakaat*, paras 285 and 326.

In substance, the Court of Justice held that Mr *Kadi's* rights of defence, especially the right to be heard, and the principle of effective judicial protection, as well as his fundamental right of respect for his property have been infringed,[272] and subsequently annulled Council Regulation 881/2002 to the extent it concerned the claimants.[273]

Following the judgement of the Court of Justice in *Kadi I*, the Commission sent Mr *Kadi* a brief summary of reasons (drafted by the UN Security Council Sanctions Committee), informing him that, on the basis of these reasons, it will adopt a legal act with a view to keeping his name on the list annexed to Council Regulation 881/2002 and giving him the opportunity to comment on these reasons.[274] Mr *Kadi* used this opportunity, requesting the Commission to disclose the evidence supporting the assertions and allegations made in the summary of reasons and also the relevant documents in the Commission's file, requesting an opportunity to make representations on that evidence, once he had received it, and attempting to refute, thereby providing evidence, the allegations made in the summary of reasons.[275]

Subsequently, the Commission listed him again in Annex I to Council Regulation 881/2002 by means of Commission Regulation 1190/2008. Mr *Kadi* then filed an action against this Commission Regulation, as far as it concerned him, arguing – *inter alia* – that it infringed his rights of the defence, to effective judicial protection and to property. The Court of First Instance deemed the named arguments to be justified and annulled Commission Regulation 1190/2008 in so far as it concerned Mr *Kadi*.[276] As regards our focus in this discussion – the relationship between what is now EU law and public international law – the Court of First Instance elaborated on the relevant findings of the Court of Justice in *Kadi I* and concluded that '[s]o far as th[e] principles [of liberty, democracy and respect for human rights and fundamental freedoms[277]] are concerned, the Court of Justice [...] seems to have regarded the constitutional framework created by the EC Treaty as a wholly autonomous legal order, not subject to the higher rules of international law – in this case the law deriving from the

272 See joined cases C-402/05P and C-415/05P *Kadi and Al Barakaat*, paras 353 and 371.
273 Similarly in joined cases C-399/06P and C-403/06P *Hassan*, paras 69 to 75.
274 See case T-85/09 *Kadi*, para 53.
275 See case T-85/09 *Kadi*, para 55.
276 See case T-85/09 *Kadi*, paras 188 and 193–195.
277 See joined cases C-402/05P and C-415/05P *Kadi and Al Barakaat*, para 303.

Charter of the United Nations'.[278] The Commission, the Council and the UK filed an appeal against this judgement before the Court of Justice.

Against the suggestion of AG *Bot* in *Kadi II*,[279] the Court of Justice dismissed the appeals, arguing – similar to its reasoning in *Kadi I* – that the EU courts must ensure the principally full review of the lawfulness of all EU acts 'in the light of the fundamental rights forming an integral part of the [EU] legal order', including those created to implement resolutions of the UN Security Council adopted under Chapter VII of the UN-Charter.[280] With respect to the tension judicial review of (the Commission Regulation amending) Council Regulation 881/2002 creates with the required respect for UN law, the Court contended and (partly) repeated that '[j]udicial review of the lawfulness of the contested regulation is not equivalent to review of the validity of the resolution which that regulation implements. That review does not challenge either the primary responsibility of the Security Council in the area concerned or the primacy of the Charter of the United Nations over any other international agreement. […] Its purpose is solely to ensure observance of the requirement that Security Council Resolutions are implemented within the European Union in a manner compatible with the fundamental principles of European Union law. More specifically, such review contributes to ensuring that a balance is struck between the requirements of international peace and security, on the one hand, and the protection of fundamental rights, on the other'.[281]

2.1.3.2.3. The effect of WTO law in the EU legal order

Another legal discussion bearing witness of the difficulty to clearly separate law from soft law is the treatment of WTO law in the EU legal order, more precisely the fact that the CJEU in its case law denies the capability of WTO law to have direct effect, wherefrom it concludes that WTO law may

278 Case T-85/09 *Kadi*, para 119.

279 Opinion of AG *Bot* in joined cases C-584/10P, C-593/10P and C-595/10P *Kadi*. AG *Bot* supported the Court's approach on the relationship between EU law and UN law as established in *Kadi I*, but in substance it did not deem the claims of Mr *Kadi* to be justified in this case.

280 Joined cases C-584/10P, C-593/10P and C-595/10P *Kadi*, para 97.

281 Joined cases C-584/10P, C-593/10P and C-595/10P *Kadi*, para 87.

not serve as a standard of review for the legality of EU secondary law.[282] While in comparison to national legal orders this approach is by no means exceptional, it was most prominently discussed in the context of the case law of the CJEU.[283]

Whether or not a legal norm has direct effect in general depends on the will of the norm-creator.[284] Sometimes the norm-creator does not explicitly utter its will in this respect. In these cases the will of the norm-creator is to be deduced from the wording, the degree of precision and the structure of the norm. Usually, these factors may reasonably be interpreted differently, which is why the question of direct effect is regularly contested – at least where a legal order does not provide for a highest legal authority which could clarify this question once and for all.[285] Against this background, *Klabbers* has described the concept of direct effect as 'little else but a half-hearted doctrine giving courts a free hand in deciding which norms of international law to allow into their legal order'.[286]

Also WTO law does not contain an explicit provision regarding this question. A proposal of Switzerland to incorporate a direct effect clause

282 Criticising this strong focus on direct effect: Klabbers, Community Law; see ibid 284 ff, pointing to only *prima facie* exceptions in the Court's case law and relativising the Court's role in this context.

283 See Ruiz Fabri, Case 152. For different nuances of these approaches see ibid 153.

284 Under CETA, to take this example, the parties to the agreement have explicitly excluded its having direct effect (in their respective domestic legal systems); see Article 30.6.1 *leg cit*. For investors under CETA's Investment Court System (and the respective CETA provisions) the situation is different.

285 The MS of the WTO and the EU do have a highest legal authority, namely the respective highest courts; see Opinion of AG *Mayras* in cases 21–24/72 *International Fruit Company*, 1234: 'The unity and, it can be said, the very existence of Community law require that the Court is alone empowered to say, with the force of law, whether an agreement binding the Community or all the Member States is or is not directly applicable within the territory of the Community and, if it is, whether or not a measure emanating from a Community institution conforms to that external agreement'.
Alternatively, like in the US, the (national) legislator could – only for the state at issue, of course – expressly decide on the question of direct effect; see Cottier, Theory 105; Trachtman, Direct Effect 657.

286 Klabbers, Community Law 264. Acknowledging this fact, at least implicitly: case C-431/05 *Merck*, para 47. See also case 104/81 *Hauptzollamt Mainz*, para 17, stressing that only if the question of direct effect is not settled by the international agreement at issue, it 'falls for decision by the courts having jurisdiction in the matter, and in particular by the Court of Justice within the framework of its jurisdiction under the Treaty'.

was refused during the Uruguay round.[287] This could be understood as the absence of an according will of the members of the WTO, taken as a whole, and hence as an indication of WTO law's lack of direct effect.[288] Nevertheless, it is widely acknowledged that the municipal courts of the WTO members within their respective jurisdiction can decide themselves on whether or not certain provisions of WTO law should be granted direct effect or not.

The CJEU is one of these municipal courts. Its case law on the question of direct effect of what since 1995 is called WTO law, shall stay in the foreground here. In this context, also the Court's more general approach towards the direct effect of international agreements is to be considered.

As early as in 1972, the Court has dealt with the question of direct effect with a view to provisions of the GATT 1947. As in *van Gend & Loos*, it stressed the necessity to consider 'the spirit, the general scheme and the terms' of the legal act at issue, in our case: the GATT.[289] In view of the fact that many States – important trading partners of the Community – denied direct effect, reciprocity considerations may also have played a role.[290] While accepting that the Community is bound by the GATT,[291] essentially in view of 'the great flexibility of its provisions, in particular those conferring the possibility of derogation, the measures to be taken when confronted with exceptional difficulties and the settlement of conflicts between the contracting parties' the Court has denied the direct effect of GATT 1947/1994 provisions[292] (and also of other WTO law[293]).

287 See Ruiz Fabri, Case 154, with a further reference.

288 See Panel Report of 22 December 1999, *United States – Sections 301–310 of the Trade Act of 1974*, WT/DS152/R, paras 7.72 ff, with regard to the 'open question' whether there are certain rights of individuals under WTO law which national courts have to protect, and with further references (fn 661).

289 Cases 21–24/72 *International Fruit Company*, para 20.

290 See case C-149/96 *Portugal v Council*, para 43; see also Klabbers, Community Law 278, with further references.

291 For the GATT's qualification as Community law see case C-386/08 *Brita*, para 39, with further references; for the questions which arose due to the fact that the EEC was not a 'member of', but only a 'participant in' the GATT see Constantinesco, Recht 217 f.

292 Cases 21–24/72 *International Fruit Company*, paras 18 and 21; for further explanations see case C-280/93 *Germany v Council*, paras 105–110, with further references; for the latter judgement see also Everling, Europe.

293 See joined cases C-300/98 and C-392/98 *Dior*, para 45, with regard to TRIPS.

In spite of the reform following the Uruguay round, leading to more nuanced rules of the new GATT and other new agreements, and the more effective dispute settlement mechanism of the WTO, the Court upheld this case law.[294] In fact, the Court has not only denied the possibility of individuals/undertakings to invoke WTO law when claiming the illegality of an EU law act, it has refused to use WTO law as a standard of judicial review of EU law more generally.[295] That is to say that WTO law in principle may not be invoked by the institutions or the MS, either.[296] Neither may a violation of WTO law on the part of EU institutions lead to the EU's non-contractual liability.[297] Even the output of the Dispute Settlement Body, the Court held, principally is to be treated in the same way as the WTO agreements.[298] Only exceptionally, WTO law may be invoked, namely if EU law makes express reference to specific and precise provisions of WTO law[299] or if EU law is clearly aimed at implementing WTO law[300].[301]

The far-reaching denial of direct effect of WTO law – but not only of WTO law[302] – by the CJEU is in contrast to its case law on some other international agreements, in particular association agreements with

294 See case C-149/96 *Portugal v Council*, para 36, acknowledging these novelties as compared to the GATT 1947, and para 47, refusing to review the legality of Community acts in the light of the WTO agreements.

295 Pointing at the conceptual difference between direct effect and the review of legality: Klabbers, Community Law 265 and 268.

296 See case C-149/96 *Portugal v Council*, para 47; with regard to the MS see also Klabbers, Community Law 265 (fn 10); Ruiz Fabri, Case 158, with a further reference; arguing that the Court – implicitly – has used different standards for MS and institutions as privileged claimants under Article 263 TFEU: Holdgaard, External Relations 270, with further references.

297 See eg case C-104/97P *Atlanta*, para 66.

298 See joined cases C-120/06P and C-121/06P *FIAMM*, paras 128 ff; see also references by W Weiß, Art. 207 AEUV, para 203.

299 See case 70/87 *Fediol*, para 22; for the technique of referencing more generally see 2.2.3. below.

300 See case C-69/89 *Nakajima*, paras 29–32; see Herrmann/Glöckle, Handelskrieg 482 f, with references to the follow-up case law.

301 See Ruiz Fabri, Case 158 f, with regard to 'indirect effect' – that is the interpretation of EU law in accordance with WTO law – which may also be seen as a way to increase the effectiveness of WTO law within the EU legal order; see also case C-53/96 *Hermès*, para 28; case C-308/06 *Intertanko*, para 52. Referring to direct effect and consistent interpretation as modes of interaction between two legal orders see de Búrca, Court 39 f, with further references.

302 See case C-308/06 *Intertanko*, paras 54 ff, with regard to UNCLOS; case C-363/12 *Z.*, paras 85 ff, with regard to the UN Convention on the Rights of Persons with Disabilities.

third countries, in which it has confirmed the direct effect of provisions contained in such international agreements,[303] thereby relying on wording, purpose and nature of the agreement at issue. But also in the case of other bilateral free trade agreements concluded between the EC and third countries the Court has confirmed direct effect of selected provisions.[304] In view of this discrepancy, the *principal* denial of direct effect of provisions of WTO law has been much criticised in legal scholarship as a political rather than a legal decision.[305]

2.1.3.2.4. Discussion

The two phenomena presented above relate to the discussion on the practically often difficult separation between law and soft law in a number of respects.[306] Before dwelling on this relationship, it makes sense to provide for a comparison of the two issues *inter se*. In both cases a multilevel legal situation, more concretely the relationship between the EU and a measure of public international law stays in the foreground. The EU courts have played a pivotal role in shaping this relationship, thereby determining the effects public international law has – not in general, but only in a relative manner, namely: to the extent it obliges the EU. This shaping, in *Lenaert's* words, 'is the result of a balancing exercise between safeguarding the EU's constitutional identity and making sure that EU law does not become

303 See eg case 87/75 *Bresciani*, para 23; case C-162/00 *Land Nordrhein-Westfalen*, paras 19 ff; case C-464/14 *SECIL*, paras 97 ff; case T-798/14 *DenizBank*, para 144.

304 See case 104/81 *Hauptzollamt Mainz*, para 27; case C-162/96 *Racke*, para 34. *De Búrca* argues that with regard to international agreements forming an 'integral part' of the EU legal order (this common phrase primarily points at the effects laid down in Article 216 para 2 TFEU) 'the ECJ has almost always declared [with the exception of WTO law] that international agreements entered into by the EC are directly enforceable before domestic courts'; de Búrca, Court 46.

305 See Klabbers, Community Law 264 and *passim*, with many further references. Note also the words of AG *Cosmas* he uttered in his Opinion in joined cases C-300/98 and C-392/98 *Dior*, para 76, talking about an 'alternative legal framework often marked by a lack of strictness (soft law). That is neither paradoxical nor contradictory. It is justified by the variable geometry and the still incomplete institutionalisation of the coexistence of national, Community and international legal orders. In the context of that institutionalisation, law and politics exchange characteristics: the former imposes its strict and binding nature on the latter and the latter in turn instils its relativity and flexibility in the former'.

306 As well addressing these two (sets of) cases together: Nollkaemper, Role 188 ff.

hostile to the international community, but that it is an active part of it'.[307] While the Court has acknowledged in principle that the EU is bound by the relevant acts of international law (resolutions of the UN Security Council and WTO law respectively), it has, in different ways, drawn limits to the ensuing obligations of the EU. In case of the resolutions of the Security Council, the Court has determined that – in spite of the unconditionally drafted primacy clause contained in Article 103 UN-Charter – their implementation by means of Union law may not lead to a violation of core principles of the EU such as liberty, democracy and respect for human rights and fundamental freedoms. The compliance with these limits of EU (secondary) law implementing the resolutions of the UN Security Council shall be scrutinised by the CJEU. With regard to WTO law, the Court has confirmed that, as far as the EU is concerned, it forms part of EU law. However, it has repeatedly refused to test the legality of EU (secondary) law against WTO law by negating the latter's direct effect.

In the two cases the alleged obligations of the EU emanating from public international law are 'mitigated' by different techniques. As regards the resolutions of the UN Security Council, the EU will implement them (if it is competent to do so), and the Court will review the EU implementing acts in terms of competence (formal element) but also with regard to material (minimum) requirements. These minimum requirements are notably rooted in EU law, not in public international law.[308] In the case of WTO law the technique is of a formal kind: It is the impossibility for claimants to invoke (violations of) WTO law in procedures addressing acts of EU secondary law which leads to the immunity of EU secondary law in this respect. This does not materially alter the EU's obligations, but procedurally it prevents violations of these obligations from being decided upon by the CJEU. The underlying reason that WTO law may not be invoked again has a material stance to the extent that it is based on 'the spirit, the general scheme and the terms' of WTO law.[309] Pursuant to the Court, the limit is rooted in WTO law, as it is the very nature of its provisions which prevents them from having direct effect. However, this view is contested.

In summary, we can say that, broadly speaking, the effectiveness of public international law is, by the application of different methods, reduced

307 Lenaerts, Kadi 708.

308 With the competence as a formal limit this is a matter of course, but with respect to the substantive standard of review it is remarkable.

309 Cases 21–24/72 *International Fruit Company*, para 20.

in both cases. But what about the bindingness of the norms at issue? As regards the resolutions of the Security Council, the actual result of the *Kadi* cases is that the EU shall not be bound by resolutions going against certain fundamental principles of the EU. Even though the Court avoids expressing this and rather dwells on the fact that the resolutions leave their respective implementation up to the addressees (here: the EU), the Court's approach results in the restriction of the resolutions' legal bindingness to the extent they conflict with said fundamental principles of the EU. To this extent, the primacy of the resolutions – which allegedly is upheld by the Court[310] – in fact is neglected.

In case of WTO law, its lacking capability to serve as a standard of review for EU (secondary) law lies at the core of the issue. The Court, it was said, 'displays a certain sympathy toward international law while nevertheless focusing on fundamental principles of the Community's domestic legal order as the ultimate rule against which the legality of Community action must be judged'.[311] In a number of judgements the Court has stressed that this does not alter the fact that the EU is bound by WTO law, and that the latter forms part of EU law.[312] It rather camouflages this stated idiosyncrasy of WTO law as an answer to the question of *how* to comply.[313] However, if conflicting EU law cannot be reviewed – in that respect – before the EU courts, within the framework of the EU this comes close to a non-enforceability[314] of WTO law before the CJEU.[315]

There are even more radical ways to perceive the relationship between EU law and WTO law. So far we have addressed the lack of direct effect of WTO law in the jurisdiction of the CJEU. But the legal 'independence' of the EU legal order from WTO law may be depicted in more unorthodox terms. While the above account of the Court's case law was based on the assumption that the EU in principle is bound by WTO law, legal scholar-

310 See also case C-548/09P *Melli*, para 105, with reference to *Kadi I*, stressing the 'primacy of a Security Council resolution at the international level', while insisting on its duty to review the lawfulness of Community measures.

311 Halberstam/Stein, United Nations 31; see also Lenaerts, Kadi 712.

312 See Herrmann/Glöckle, Handelskrieg 482, with references to the Court's case law.

313 See Ruiz Fabri, Case 168.

314 Emphasising that non-self-executing norms do not entail legal obligations: Baxter, International Law 552–554.

315 For the enforceability of WTO law *vis-à-vis* the MS, however, see case C-66/88 *Commission v Hungary*. Within the framework of the WTO, a violation of WTO law can be made subject to its dispute settlement procedure.

ship provides for an alternative understanding of the relationship between these two legal orders. According to this view, compliance with WTO law is one possibility, but agreeing on compensation or accepting retaliatory measures is legitimate as well. This would mean that WTO law is not 'categorically binding', but that the WTO regime, apart from compliance with the substantive law by its addressees (which apparently is the preferred behaviour), explicitly provides for (lawful) alternatives.[316] While this view can be applied more generally, that is to say with regard to all members of the WTO regime (States as well as the EU[317]), here it is to be considered with a view to the EU.

Remarkably enough, some of the later Court judgements can indeed be read as supporting this idea,[318] which is also referred to as 'efficient breach theory'.[319] It proposes a new perception of the effects of WTO law (as fleshed out by the courts of the WTO members, eg the CJEU) rather than actually suggesting new effects. While this theory may be used as just another argument in favour of denying the direct effect of WTO law, its entertainment certainly would go beyond that and create a tension with the Court's body of case law on this issue. This is because – the hints just mentioned notwithstanding – the Court in its judgements has explicitly acknowledged the EU's being bound by WTO law (see above). Thus, it appears more likely that the Court will stick to its case law, according to which the EU is bound by WTO law (to which it does not accord direct effect), rather than disavow the rule of law by describing the regime of the WTO as 'voluntary, with potential negative effects in case of non-compliance'.

In the perspective of the 'efficient breach theory', WTO law – *qua* being legally non-binding – would come very close to soft law. The severe sanctions non-compliance may entail in the course of a proceduralised regime – laid down in the Dispute Settlement Understanding – sit oddly with the claim for non-bindingness, though. Charming as the 'efficient breach theory' may be, in my view the legal bindingness of WTO law can be upheld with good reasons. Its widely purported lack of direct effect bars its enforcement (by individuals/undertakings), and hence qualifies it as a special case, but it does not render it legally non-binding. *Trachtman* in this

316 See Griller/Vranes, EC-Bananas, para 20.
317 See Article XI para 1 of the WTO Agreement: 'European Communities'.
318 See eg case C-149/96 *Portugal v Council*, paras 35 ff; see also references in Griller/Vranes, EC-Bananas, para 22.
319 See Ruiz Fabri, Case 168 f, with further references.

context said that 'within each society, there exist different kinds of law, with different types and degrees of binding force. There is no "natural" condition of law'.[320] While the author does not follow the idea of degrees of legal bindingness (see 1.3.2. above), it is to be conceded that there are different forms in which legal bindingness may take effect.

In conclusion, both the resolutions of the UN Security Council as dealt with in the *Kadi* cases, and the refusal of direct effect of WTO law by the CJEU relativise the effects of the legal acts at issue. This is brought about by a mitigation of legal authority which is comparable – but not equal – to the phenomenon of soft law. While the latter lacks legal bindingness, in our two examples the scope of legal bindingness is merely *restricted* (resolutions of the UN Security Council) and possibilities of judicial enforcement are excluded (WTO law), respectively. By all means, these cases illustrate – once more – the challenge, but also the necessity of drawing a clear (conceptual) line between law and soft law.[321]

2.2. From other sets of norms

2.2.1. Custom and customary law

Custom describes a set of behavioural patterns habitually performed by a human society.[322] Custom may encompass behaviour as diverse as a religious or a profane ceremony, a certain salutation, courtesy rules or a recurrent local sports event. It is a habit which has developed over time and hence can be called traditional. A custom comes into being gradually, by continuous application. Normally also its coming out of practice is subject to an extended period of time in the course of which it is applied less and less frequently, until it vanishes entirely. Exceptionally, it may end abruptly due to legal prohibition, eg the annual large paschal bonfire may be

320 Trachtman, Direct Effect 655; acknowledging a 'natural condition' of law which is, however, 'rough and imperfect, like our society, and like us'; ibid 677.

321 See also Cannizzaro/Rebasti, Soft law 217.

322 See the definition of *habitus* provided by Bourdieu, Logic 53: 'systems of durable, transposable dispositions, structured structures predisposed to function as structuring structures, that is, as principles which generate and organize practices and representations that can be objectively adapted to their outcomes without presupposing a conscious aiming at ends or an express mastery of the operations necessary in order to attain them'.

banned for fire safety concerns or a religious gathering may be interdicted as a means of political repression. A custom regularly is not prescribed in writing. There may be official or semi-official notes on the performance of a custom (eg chronicles), but they are of a merely declarative nature. A custom as such cannot be legally enforced.[323] Should this be possible exceptionally, the custom has become customary law, an unwritten kind of law arising where, in addition to the custom as such (the terms *usus* or *consuetudo* in this context describe the regular performance of the habit), the constitutive requirement *opinio iuris*, that is the general opinion that the performance of the habit actually is required by a legal rule, is met;[324] or, in the words of the ICJ (with regard to public international customary law): the 'belief that this practice is rendered obligatory by the existence of a rule of law requiring it. […] The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or even habitual character of the acts is not enough'.[325] In public international law, persistent objection by an actor against such a habit can prevent the development of an *opinio iuris* and hence its becoming binding upon the objector.[326] Where customary rules are at issue, in principle the general distinction between law and soft law would apply (see 2.1. above). However, while detecting an *opinio iuris* regularly is a demanding task,[327] it may be nearly impossible to prove the even more nuanced (mostly implicit) conviction of the relevant actors that a certain custom actually constitutes soft law. Thus, in practice there does not seem to be much room for customary soft law.

Conceptually speaking, the delimitation of soft law from customary law is relatively easy. Soft law is legally non-binding and non-enforceable, whereas customary law – as law proper – is both legally binding and (regularly) enforceable. Also soft law and custom in theory can be easily distinguished from each other, since they have few things in common, most

323 For usages in international relations see Bothe, Norms 67.

324 See eg Article 39 para 1 lit b of the Statute of the ICJ: 'general practice accepted as law'; for the origins of this concept of customary law see J Schröder, Theorie 222 f. On the difficulties to prove the existence of these elements see Knauff, Regelungsverbund 231 f. A custom may also be incorporated in written law and thus be considered law; Walter, Soft Law 30 f.

325 *Germany v Denmark, Germany v Netherlands*, ICJ Reports 1969, para 77.

326 See eg Nußberger, Völkerrecht 24.

327 With regard to the fact that customary law (regularly) is not created intentionally see Klabbers, Community Law 289.

importantly that they both entail a non-legal quality of normativity. The 'creation', ie the development, of a custom is a non-intentional process performed by (parts of) society most of the time, whereas the adoption of soft law, leaving apart the rather abstract possibility of customary soft law, constitutes a conscious act of an entity vested with public authority. This is reflected in the fact that a custom does not arise in written form, whereas soft law is at least regularly laid down in writing.[328]

While the conceptual difference seems clear, in practice these three normative systems – custom, customary law, soft law – may be closely linked to each other. Custom and customary law are separated only by the actors' *opinio iuris*. As a 'psychologisches Element' [psychological element][329] it is often difficult to prove its existence. Here soft law may come into play. The existence of soft law regulating a certain issue as a 'compromise over time'[330] may serve – together with other indicators – as evidence proving the existence of an *opinio iuris* (see 1.3.2. above). These indicators need to be assessed carefully, in particular the assumed elevation of the will to create soft law to the conviction that the underlying rules constitute law.[331] Also with regard to the *usus* – in public international law that is above all State practice and the practice of international organisations – the adoption of soft law acts and the respective compliance may be considered – again: carefully – as evidence.[332] Supporters of the idea of 'instant custom'[333] – that is to say customary law which, due to an overwhelming amount of agreement, is not requiring any evidence of *usus* – would maybe qualify certain acts of EU soft law, namely those adopted by consensus,[334] as instant custom. While this view – which can be contested with good reasons – is not considered here any further, it can be said upfront that in the given context it would not entail conceptual difficulties. If, according to this view, it qualifies as EU customary law[335] it is legally binding, if it qualifies as EU soft law it is not. It cannot be both at the same time.

328 See Knauff, Regelungsverbund 232, with partly deviating references.
329 Knauff, Regelungsverbund 232.
330 Abbott/Snidal, Hard and Soft Law 444.
331 In a similar context: Arndt, Sinn 49, with further references; Wengler, Rechtsvertrag 194.
332 See Shelton, Introduction 1; Wittinger, Europarat 208 f; principally in the affirmative, but – for the time being – sceptically: Arndt, Sinn 46.
333 For the concept of 'instant custom' see eg Weil, Normativity 435 f.
334 See Petersen, Customary Law 281, with further references.
335 For the possibility of customary EU law see Klabbers, Instruments 1015.

2.2.2. Morals

The existence of general moral norms is most difficult to prove. This is not only due to the fact that moral norms are very individual – everybody may set moral norms for him- or herself – and may therefore differ from person to person. (Having said that, many human societies claim to have a common moral ground, that is to say fundamental moral convictions which the members of these societies share.) What is more, they are more often than not applied in a private space, beyond public recognition – in a *forum internum*.[336] Even where visible actions are motivated by moral convictions, the content of these convictions cannot always reliably be deduced from the action. The driver of a car may give way to another car at a junction in spite of his own legal right of way for different reasons: He may think it is polite, he may intend to do good to other people, he may want to use the 'gained' time to read a message on his phone, he may want to have a closer look at the person in the other car, he may, as a reactant person, gain pleasure from the fact that he is ignoring a legal rule (even though that rule does not oblige but only entitles him), namely his right of way, etc.[337] This difficulty to find out about people's moral convictions – that is their interiority – distinguishes it strongly from other sets of norms.

A custom finds its expression in (exterior) behaviour, customary law does as well,[338] soft law and non-customary law most frequently occur in written form. Morals in general do neither. That it may be moral convictions which – alone or in combination with other considerations – determine the content of a legal or a soft law norm,[339] as is most obviously the case eg with human rights provisions, does not have any impact on their normative

336 See also Bothe, Norms 95.

337 See Goldmann, Perspective 58, with reference to the 'dual function of law'; see also Goldmann, Gewalt 364 f.

338 As we have seen, even the (internal) *opinio iuris* is regularly established with reference to external acts.

339 See Habermas, Faktizität 137; see also Bianchi, Butterfly 200, who stresses the structural similarity of law and soft law, also with regard to their respective content. There are various scholars – of different schools – who emphasise that in case of a strong immorality of a law, the latter ceases to exist as a legal provision; see only the famous *Radbruch formula*: Radbruch, Unrecht. Sometimes the addendum 'moral' ought to express that a rule is legally non-binding, hence (potentially) soft law; see eg Hockin, World Trade Organization 258, with regard to Article 1114 para 2 of the NAFTA: 'These are "pure moral imperative" intentional clauses, at least on behalf of the environment and safety'.

quality as law or soft law.[340] Neither does the knowledge that an actor only complies with law or soft law because these rules comply with his/her moral convictions change the fact that his/her – external – actions are in accordance with these legal or soft law rules.[341]

2.2.3. Regulation by private actors: the example of standards

Standard-setting by private actors as one example of regulation by private actors,[342] mostly concerning standards of a 'technical' nature, has become more and more common in the past decades – at the national, and to an increasing extent at the EU and on the international level.[343] Partly these private norms[344] have gained considerable momentum, not least due to the increasing economic cooperation between States and, following from that, an outright globalisation of markets.[345] These private norms – often referred to as 'standards'[346] – are used in a variety of fields, most importantly with regard to product characteristics.[347] They are drafted by private actors (without public authority[348]), mostly organisations, and hence *per*

340 For the importance of such a conceptual distinction see eg Thaler, Verhältnis.

341 For the potential 'moral […] effect' of public international soft law see Schermers/Blokker, Institutional Law, § 1238.

342 For the discussion on how to classify private rule-making see overview given by Goldmann, Perspective 48–50, with many further references; as an example for a multiplicity of private bodies operating as a hub for regulatory action take the ENTSO; for its considerable regulatory influence on the elaboration of network codes see in particular Article 58 of Regulation 2019/943.

343 For the economic developments leading to a drastic increase of EU and international standard-setting since the 80s see Mattli/Büthle, Standards 1–3; C Scott, Government 168 f; see also Türk, Lawmaking 83; for the inclusion of private actors in public policy-making in Europe see Héritier, Modes.

344 For the specific meaning of the term 'norm' in this context – as opposed to the general understanding in legal science – see Griller, Normung 7 f.

345 See Schepel, Constitution 2; for the role of private regulation in the pharmaceutical sector see Stenson/Syhakhang/Stålsby Lundborg/Eriksson/Tomson, Pharmacy.

346 This term is not necessarily indicative of private norm-setting. Also public bodies, eg the ILO, a UN sub-organisation, may adopt standards; for international environmental standards (and the modalities of their creation) see Parker, Norms 182 f; for the standards set by the ILO (in the form of conventions or recommendations) see Trebilcock, Trade Policy 175.

347 See Knauff, Regelungsverbund 243.

348 Differently with regard to the most important Austrian standards-setting body: Griller, Normungsinstitut 242 f; the institute is now renamed Austrian Standards.

se cannot be qualified as (soft) law.[349] What makes them come close to or even reach the status of public (soft) regulation is their public recognition (which, of course, differs in degree from case to case[350]). This on average high public recognition arguably results from the technical authority these standards bear, but also from the high compliance rates on the part of relevant economic actors they have reached in the past.

With regard to the international level, exemplarily the standards of the International Organization for Standardisation (ISO) ought to be mentioned. This is a 'global network'[351] of (national) standards bodies from currently 168 countries, organised as an NGO, which drafts and subsequently sells standards.[352] Another example is the International Electrotechnical Commission (IEC), also comprising a network of National Committees and setting international standards within its field.

Also at the EU level such private standardisation takes place – again by a network of national standardisation bodies, but also with a strong involvement of the European Commission and stakeholder groups.[353] The European Standards Organisations (ESOs) – the Comité Européen de Normalisation (CEN), the Comité Européen de Normalisation Eléctrotechnique (CENELEC) and the European Telecommunications Standards Insti-

349 See Somek, Concept 988.

350 See Knauff, Regelungsverbund 243, with further references, who calls for a case by case assessment of technical standards and product certificates, also with regard to their (potential) qualification as soft law.

351 Mattli/Büthle, Standards 4; for the implementation of standards of the ISO on the national level see Roht-Arriaza, Soft Law 274–279.

352 <https://www.iso.org/about-us.html> accessed 28 March 2023. A standard is defined by the ISO as 'a document that provides requirements, specifications, guidelines or characteristics that can be used consistently to ensure that materials, products, processes and services are fit for their purpose'; <http://www.iso.org/iso/home/standards.htm> accessed 28 March 2023 (this definition can now be found eg at <https://carbonnumbers.co.uk/iso-standards-and-certifications/#:~:text=An%20ISO%20standard%20is%20a,are%20fit%20for%20their%20purpose.> accessed 28 March 2023); see also Friedrich, Soft law 187–189; Roht-Arriaza, Soft Law 263; Wilkie, Governance 294. For the historical development of selected national and international standard-setting bodies, in particular the ISO, see Mattli/Büthle, Standards 6–8.

353 See H Hofmann, Normenhierarchien 237; for early contractual relations between the then EEC on the one hand and CEN/CENELEC on the other hand see Erhard, Probleme 27 f; for co-regulation and self-regulation in the EU, and for the limits to the former, for standardisation and the respective EU legislation, for the organisation of the ESOs, the legitimacy of standardisation, its supervision, and other aspects of standardisation see Hofmann/Rowe/Türk, Administrative Law 587–605.

tute (ETSI)[354] – are private[355] associations established under Belgian and, respectively, French (ETSI) private law – NGOs[356] which draft 'European Standards'.[357] They are connected with both MS and international standardisation bodies,[358] but also cooperate strongly with the EU,[359] from which they receive standardisation assignments.[360] They have played an important role in complementing EU internal market law ever since the 1980s.[361]

Also at the national level standards – in general – play an important role. National standardisation bodies cooperate intensely with and largely take over the standards established by the standardisation bodies at the EU and at the international level.[362] The generation procedures, the influence exerted by public bodies and the legal qualification of these standards vary considerably, though.[363]

While a *general* legal qualification of standards is – due to their multiplicity – impossible, an attempt to come to grips with standards from a legal point of view may be the following. Principally, a legal evaluation of

354 These three bodies mirror the respective international standardisation bodies. The CEN, for example, mirrors the ISO; <https://www.cenelec.eu/aboutcenelec/whoweare/europeanstandardsorganizations/index.html> accessed 28 March 2023; see also Senden, Self-Regulation 13.

355 They are neither established under public international law nor are their founding members subjects of public international law; see Griller, Normung 49 f.

356 See Griller, Normungsinstitut 279.

357 For the role of such standards as technical barriers to trade see Erhard, Probleme 23–29; for an early quantitative account of these 'European standards' see Falke, Standardization 654 f.

358 See Hofmann/Rowe/Türk, Administrative Law 597; Craig/de Búrca, EU Law 658–661; Peters, Typology 418 f.

359 See eg the 2009 Framework Partnership Agreement between CENELEC and the European Commission and EFTA.

360 For the cooperation between the then European Communities, CEN and CENELEC, in particular EC requests to CEN/CENELEC for the (paid) elaboration of standards in a certain field see Griller, Normung 23–27; for European agencies as intra-EU bodies setting standards see H Hofmann, Union 460.

361 See Colombo/Eliantonio, Standards 324; Volpato, Effects 195. For the increased importance the standards of these bodies have gained in the aftermath of the 1985 White Paper 'Completing the Internal Market' of the then newly appointed Delors Commission see Eilmansberger, Binnenmarktprinzipien 261; Snell, Internal market 344.

362 For the duty of the standardisation bodies of the MS to take over European Standards as their own (even if not adopted by unanimity/consensus, but only by a majority) see Rule 2.5. in Part 2 of the Rules of Procedure of CEN/CENELEC.

363 For an assessment of the situation in selected countries of the EU see Schepel, Constitution 112 ff.

standards can take place on at least two levels.[364] First, the way they are drafted and the persons or bodies involved can be considered. Where it is only (private) actors without an according public authority involved, the standards they draft as such have no legal, not even a soft law quality.[365] Where, on the contrary, standardisation bodies are vested with the public authority to adopt such standards, the latter – where they are not to be qualified as law anyway – regularly meet the criteria of soft law.[366] The question of whether or not such public authority exists may, in places, give rise to doubts: eg where State actors (with the respective public authority) are strongly involved in standard-setting undertaken by (formally) private bodies,[367] or where they are even double-hatted in that they participate in 'private' standard-setting, but as well in the creation of laws which again refer to these standards, elevating their content to the level of (soft)

364 Critically as regards including 'the standardization process in a hierarchy of norms': Türk, Lawmaking 84.

365 See Braams, Koordinierung 134 f. For the qualification of these standards as facts for example by the Austrian *Verfassungsgerichtshof* see Holoubek/Potacs, Technikrecht 68; see also Griller, Normung 9. Also the CJEU, with regard to a private association of experts in the field of gas and water, appears to refer to a merely factual authority of its output; case C-171/11 *Fra.bo*, para 31.

366 For the case-by-case analysis required with regard to the criterion of public authority see Knauff, Regelungsverbund 243 (fn 201). For the EU level see Opinion of AG *Campos Sánchez-Bordona* in case C-613/14 *Elliott*, para 55, with a further reference. At the international level, this question is strongly related to the question whether the norm-setting organisation qualifies as an international organisation. An international organisation (as opposed to an NGO) can only be founded by public actors, in particular states and international organisations; see Schermers/Blokker, Institutional Law, §§ 36 f.

367 The recommendations or Accords of the BCBS are an example for this problem. The BCBS is composed of representatives of national banking supervisory authorities and central banks. Irrespective of its express lack of 'formal supranational authority' (3. of the BCBS-Charter), self-confidently it describes itself as 'primary global standard setter for the prudential regulation of banks' (1. of the BCBS-Charter). That the Committee's decisions 'do not have legal force' (3. of the BCBS-Charter) nearly goes without saying, but their qualification as soft law is questionable. The Committee is situated with the Bank for International Settlements, but without an explicit foundation in public international law. Also, it is not clear whether the members of the BCSB are (self-)bound by the recommendations; see C Möllers, Behördenkooperation 368 f; for the 'European participation' in the BCBS see Fromage, Articulation; in favour of a qualification of the BCBS's recommendations as soft law: Ho, Compliance; Knauff, Regelungsverbund 289 f and 376; Meyer, Soft Law 888 f; for the legal and factual nature of the Basel Accords see also Arndt, Sinn 83–86. *Köndgen* qualifies them as 'halbstaatliches Expertenrecht' [semi-public expert law]; Köndgen, Privatisierung 493.

law. This addresses the second level which is to be taken into account, ie the way standards are dealt with once they are set. Where they are published by a public body[368] or referred to in a legal provision as a threshold to be met, they are, at least as regards their content,[369] taken over by the (soft) law-maker.[370] Such references can be drafted differently, which is most prominently expressed in the distinction between static and dynamic references.[371] Whereas static references refer to a specific version of a standard or set of standards, dynamic references also allow for a legal incorporation of a future (version of this) standard or set of standards, without the law (ie the reference) having to be adapted.[372] Such a reference can be contained

368 See eg case C-613/14 *Elliott*, para 43, dealing with private standards published by the Commission; for the related publishing practice of the EU see also Colombo/Eliantonio, Standards 328.

369 Formally speaking, a non-legal act does not thereby become law, however; see Jabloner, Rechtsetzung 8 f; Korinek, Verbindlichkeit 322.

370 See Erhard, Probleme 6; see also Peters/Pagotto, Perspective 19 f. See, for example, Article 3 para 2 of Directive 2001/95/EC, according to which '[a] product shall be presumed safe as far as the risks and risk categories covered by relevant national standards are concerned when it conforms to voluntary national standards transposing European standards, the references of which have been published by the Commission in the [OJ]'. According to para 3 *leg cit*, these standards are on an equal footing with Commission recommendations setting guidelines on product safety assessment (EU soft law); for the democratic and rule of law concerns the dominance of technical norms in substance set by private actors entails see Holoubek/Potacs, Technikrecht 60 f and *passim*; for examples of soft law containing references to soft law see Ştefan, Soft Law 105.

371 For the rules of doubt on references contained in acts adopted in the course of an ordinary legislative procedure see EP/Council/Commission, *Joint Handbook for the presentation and drafting of acts subject to the ordinary legislative procedure* (2022) 88 f. It is established practice in the EU to refer to 'essential requirements' related to health, safety and environmental issues in so-called New Approach Directives. Only where these requirements are met may a product be marketed in the internal market. The close determination of the 'essential requirements' is left to be done for the standardisation bodies. Companies may prove that in case of their product the requirements are met even though it does not comply with the pertinent standard, but it is regularly very difficult to provide this evidence; see Colombo/Eliantonio, Standards 334 f, with a further reference.

372 For the legal technique of references and the legal difficulties it entails see Erhard, Probleme 6–13; Röthel, Normen 46; for different referencing techniques see also Holoubek/Potacs, Technikrecht 66–70; for dynamic references to soft law see Walter, Soft Law 27 and, with regard to public international law, Goldmann, Gewalt 56–59; for references to commercial customs see Arndt, Sinn 46; for the case of EU law see case C-613/14 *Elliott*, para 38; for referencing as a way of incorporating provisions of public international law into national law see Shelton, Compliance 131;

in a statute or administrative regulation, but as well in a private contract. Depending on the wording of the reference, the content of the standard or set of standards will then become law or – only where the referring norm constitutes an act of public authority[373] – soft law, at least within the scope of the referring provision.

Especially in the case of dynamic references we may speak of a hidden delegation of (soft or hard, as the case may be) rule-making power to the standard-setters. Whether or not such a delegation is lawful depends on the respective rules on delegation to be applied. As mentioned above, the named European standardisation bodies are strongly involved in the process of rule-making due to the fact that the EU decision-makers (legislator, Commission), in particular since the Commission has proclaimed the 'New Approach' in its 1985 White Paper 'Completing the Internal Market',[374] set out in advance a rule-making work programme including a rough description of the desired content.[375] This approach appears to be mitigating the above concerns rather than underpinning them. After all, it involves in particular the Commission – even if only superficially – in shaping the standards and thereby limits the room for manoeuvre of the standardisation bodies. It does not do away with the principal challenge to democratic rule-making a (potential) delegation of rule-making powers to private bodies poses at all levels of law-making, though.[376]

Legal referencing is not the only way to increase the authority of standards. Standards also become obligatory where penalties are imposed by law in case of non-compliance with them. Where mere incentives for compliance with certain standards are created (eg non-fiscal incentives such as technical assistance or fiscal incentives such as subsidies[377]), room for

for the duty of due consideration as another referencing technique see Müller-Graff, Einführung 152.

373 For the impossibility of the adoption of soft law by private actors (without public authority) see I.3.3.2. above.

374 Commission, 'Completing the Internal Market' (White Paper), COM(85) 310 final; for the importance of such standardisation as part of a 'New Approach' in internal market harmonisation see Craig/de Búrca, EU Law 658-661; see also Griller, Normung 18 ff.

375 See Griller, Normung 23–25.

376 Some of these issues are addressed in case T-229/17 *Germany v Commission*, *passim*; for the specific case of harmonised standards and its effects see Volpato, Effects 200-209.

377 See examples given by Carey/Guttenstein, Governmental Use 22; for a broad concept of sanctions including incentives as 'positive sanctions': Bittner, Sanktion 31–33.

lawful non-compliance remains, which speaks in favour of their (implicit) elevation to the rank of soft law. From the perspective of the official deciding upon whether or not technical assistance or a subsidy is to be granted, the standard is legally binding to the extent that a positive decision may only be granted where the applicant complies with the standard. The case is less clear where the legislator generally refers to a 'state of the art' standard.[378]

Also other cases of private regulation, eg corporate governance codes, which shall not be dealt with here in detail, may come close to or actually reach the status of soft law due to general recognition by bodies vested with public authority.[379]

2.3. From other output of public bodies

Not all output of public bodies can be assigned to a certain set of norms,[380] eg certain letters,[381] policy papers, agendas, reports, studies, administrative correspondence or statistical data.[382] The purpose of such acts generally is not or only indirectly to steer human behaviour,[383] and certainly not to set

378 With regard to the different degrees of profoundness such reference clauses may require with regard to establishing the 'state of the art' see eg the tiered scheme (three levels) established by the German *Bundesverfassungsgericht* in case BVerfGE 49, 89.

379 See Knauff, Regelungsverbund 244–247.

380 For prominent examples of 'informale Kommunikation' [informal communication] of public bodies (and the latter's representatives) in Germany see Croon, Arenen, in particular 50–54.

381 See case 182/80 *Gauff*, para 18; joined cases 42 and 49/59 *S.N.U.P.A.T.*, 72; for a letter including – on the contrary – an implicit decision see ibid, pages 73 f; case T-116/89 *Prodifarma*, para 84; case C-701/19P *Pilatus Bank*, paras 31 ff, with regard to an e-mail; for a letter of a Commissioner to the competent ministers in the MS whose content comes close to soft law see <https://agriculture.ec.europa.eu/news/letter-eu-agriculture-ministers-commissioner-wojciechowski-rural-development-and-covid-19-outbreak-2020-04-08_en> accessed 28 March 2023.

382 For the phenomenon of such informal administrative action more generally see, with regard to German law, Schmidt-Aßmann, Verwaltungsrecht 348–350; with regard to soft law and output that does not even qualify as soft law in the context of the ACER see Godin/Polet/Jamar de Bolsée, Analysis 201 f.

383 See in particular Goldmann, Gewalt, providing for an in-depth analysis of public information, its steering effects and its relation to normative output of public authorities; see also von Bogdandy/Goldmann, Ausübung 69; von Graevenitz, Mitteilungen 169 f; for the example of environmental labels as a piece of authoritative information

(soft) rules,[384] but it is to inform about problems and political plans to solve them, certain developments in practice, scientific evidence, to exchange points of view, or to inform about future rules, etc.[385] In case of doubt, the wording of the output at issue and also its usual handling are to be taken into account.[386] The title ('report', 'communication') is only indicative.[387] Also assumedly non-normative output of public bodies may, exceptionally, contain soft law rules or even legal rules.[388]

Legislative or other decision-making proposals are not in any way binding upon the future addressees of what maybe will become law, but they

(and only indirectly an incentive to adjust consumer decisions, hence only indirectly aimed at steering human behaviour) see Feik, Verwaltungskommunikation 392 ff.

384 In a non-normative understanding, soft law may have in common with other administrative output its purpose to facilitate communication (to function as threads, that means); see Boehme-Neßler, Unscharfes Recht 535 ff, who describes the law as networks composed of 'Knoten' [knots], that is persons/institutions, legal terms (eg '*culpa in contrahendo*') and certain norms (eg the general part of a civil law code which applies also to its special parts and thereby exerts a connective function), 'Super-Knoten' [super-knots], that is cross-border institutions (such as the EU or international organisations), collision norms and dogmatic constructs (such as the third party effect of fundamental rights) and 'Fäden' [threads], that is communication.

385 Future rules, in principle (for the *vacatio legis* see 2.1.3.1 above), are not soft law, because until they enter into force they do not suggest a certain behaviour, ie they do not command. Sometimes future rules may have effects, though, which transform them into (soft) law; with regard to EU law see eg cases C-129/96 *Inter-Environnement Wallonie*, para 45, and C-144/04 *Mangold*, para 28, according to which already in the course of the implementation period the adoption of measures seriously compromising the (Directive's) result prescribed is prohibited; for the *Mangold* case see also Roth, Mitgliedstaaten 138–140; for the prospective view EU soft law may take see Hofmann/Rowe/Türk, Administrative Law 543; with regard to public international law see Schermers/Blokker, Institutional Law, § 1276.

386 See Goldmann, Gewalt 264 f, with further references.

387 See Lenaerts/Maselis/Gutman, Procedural Law 263, according to whom the form is an expression of legal bindingness in the case of regulations, directives and decisions, but otherwise the content is of pivotal importance; with regard to designations in public international law see Bodansky, Instruments 157.

388 With regard to public international law see Ingelse, Soft Law 82; in the context of EEC law (and its MS' national law), AG *Tesauro* has stated: '[I]n principle the classification of measures is a matter for the Court, irrespective of the *nomen iuris* attributed to them. That principle is well established in the law of most of the Member States and has been reiterated on numerous occasions by this Court […]'; Opinion in case C-366/88 *France v Commission*, para 6; see also case C-355/10 *European Parliament v Council*, paras 80-82; case T-258/06 *Germany v Commission*, para 31; Council, Comments on the Council's Rules of Procedure (2022) 101.

have an effect on their respective addressee, the legislator/decision-maker. Procedurally, a legislative or other decision-making proposal (mostly emanating from the executive branch) in many legal orders is binding upon the legislator/decision-maker to the extent that it determines the subject of the act (to be adopted). The legislator/decision-maker can still decide not to adopt an act at all, but if it intends to adopt an act in the course of the procedure initiated by the executive's launching of a relevant proposal it has to stick to the subject. Since the subject of a proposal is regularly malleable, and since the legislator/decision-maker is free to fully change the rules proposed (as long as it sticks to the subject), its leeway is considerable. An executive proposal for adoption normally qualifies as soft law,[389] it is recommended for adoption, without binding the legislator/decision-maker. Where the body making the proposal disposes of special information and/or expertise and where the final decision-maker lacks these qualities the latter's room for manoeuvre *de facto* is limited more strongly.[390] The peculiarities of a proposal as compared to other soft law rules are to be acknowledged: It is legally binding to a very limited extent, and also otherwise it disposes of a steering effect (the legislator/decision-maker is asked to adopt the proposal as a legal act), but at the same time deviation by its addressee (amendments to the proposed body of rules in the course of eg legislative negotiations) in practice are highly expected. The life-time of such a proposal is regularly shorter than that of other soft law rules.

389 For the qualification of a Commission proposal as soft law see III.2.4. below.
390 See, for the international level, Schmalenbach/Schreuer, Organisationen, para 1050.