

THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA AS SOFT LAW

*John King Gamble, Jr.**

I. INTRODUCTION

During the last fifteen years probably no area of international law has commanded more attention than the Law of the Sea. The Third U.N. Conference on the Law of the Sea struggled for more than a decade before finally producing the U.N. Convention on the Law of the Sea in 1982 (the Convention or the MBC).¹ When the MBC was completed, 117 states signed it immediately²; and another thirty-eight signed³ during the ensuing two years during which time the treaty remained open for signature.⁴ However, this treaty requires sixty ratifications to enter into force.⁵ So far only twenty-five states have ratified it.⁶ Thus, the future of the treaty is problematic—it may never enter into force. But the MBC remains one of the most complicated, important attempts to codify international law. The complexity and scope of the Convention suggest that many of the problems and issues generic to conventional law are probably going to manifest themselves in the text of this treaty.

One of the trends in the study of international law coming to the fore since 1970 has been the idea of soft law. This interest in soft law has been spurred by the nature and limitations of international law itself, specifically, the fact that the provisions of international law are often vague and indistinct, creating commitments that may be subjective, tentative and conditional. The purpose of this piece is to examine soft law in order to develop a manageable definition applicable to the Convention. It is anticipated that this will help to sharpen some of the tenets of soft law while providing a different vantage about the strengths and weaknesses of the law contained in the MBC.

* Professor of Political Science, The Pennsylvania State University.

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1. *Official text of the United Nations Convention on the Law of the Sea with Annexes and Index*, U.N. Sales, No. E.83.V5 (1982 [hereinafter cited as MBC]).

2. *Id.* at 190.

3. Up-to-date information kindly provided by the Treaty Division of the UN Secretariat [hereinafter cited as *Treaty Division*].

4. MBC, *supra* note 1, at art. 305, at 105.

5. MBC, *supra* note 1, art. 308, at 106.

6. Treaty Division, *supra* note 3.

II. THE CONCEPT OF SOFT LAW

It is easy and tempting to examine soft law only in the pejorative sense, a tendency that will be avoided here. The most realistic approach to soft law is to acknowledge that a continuum exists from hard law to soft law with numerous graduations. Perhaps it would be preferable to discuss the "softness" of law, a descriptor that could be applied to virtually any instrument. Nevertheless, before trying to develop the continuum, it is necessary to examine the poles that define the continuum. Weil recently wrote that hard law consists of "norms creating precise legal rights and obligations."⁷ According to him, the soft law end of the continuum is characterized by "norms whose substance is so vague, so un compelling, that A's obligation and B's right all but elude the mind."⁸ The late Judge Baxter in an interesting examination of the subject wrote:

But there are norms of various degrees of cogency, persuasiveness, and consensus which are incorporated in agreements between States but do not create enforceable rights and duties. They may be described as 'soft' law, as distinguished from the 'hard' law consisting of treaty rules which States expect will be carried out and complied with. . . .⁹

Gold agrees, writing that soft law can be identified by the "intended vagueness of the obligations that it imposes or the weakness of its commands."¹⁰ But Gold's formulation is at least two dimensional. Law might be soft for two distinct reasons. First, it may impose an obligation that is so vague or unclear that assessing compliance will be almost impossible. Second, the law may establish an obligation that is crystal clear, but dilute that obligation by the use of words such as "may" or "should," resulting in law that is just as soft as if no clear obligation had been developed in the first place. The concept of a hard law to soft law continuum may be disquieting—legal scholars are accustomed to thinking in more precise terms. Weil suggested that there is a legal threshold beyond which a legal norm exists. This would imply not an infinitely gradual continuum but a nodal point after which the law became hard enough that a legal norm is born.¹¹

It is entirely possible that the general idea of soft law may be clear, but it may remain difficult to recognize soft law. Various writers have

7. Weil, *Towards Relative Normativity in International Law*, 77 AM. J. INT'L L. 414 (1983).

8. *Id.*

9. Baxter, *International Law in 'Her Infinite Variety,'* 29 INT'L & COMP. L.Q. 549 (1980).

10. Gold, *Strengthening the Soft International Law of Exchange Arrangements*, 77 AM. J. INT'L L. 443 (1983).

11. Weil, *supra* note 7, at 415.

suggested certain telltale characteristics of soft law. Gold found that soft law instruments often adopted the names of "guidelines" or "declaration of principles."¹² But the name of the instrument is not a foolproof indicator of the softness of the law. For example, the 1974 Agreement on the Prevention of Nuclear War between the U.S. and the Soviet Union is often cited as a good example of soft law masquerading in treaty clothes.¹³ Treaties that seem to have been successful may have considerable soft law character. For example, the 1963 Nuclear Test Ban Treaty contains this escape clause: "Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its county."¹⁴

Busuttill examined the idea of precision, or the lack of it, in agreements. Sufficient precision is needed if an argument is to be binding (or to be relatively hard).¹⁵ But as Schachter has noted, if one relies entirely on precision as an index of softness, then almost all treaties will be found deficient.¹⁶ So at the very least, it can be stated that the name of the instrument cannot be used as a reliable indicator of soft law, just as the name of a treaty instrument is not an absolute predictor of content or disposition.¹⁷

Another indicator of the softness of law may be the procedure used to develop the norms. Simma believes that voting and consensus procedures at international conferences often indicate soft law because these procedures can serve as a substitute, albeit often only a temporary substitute, for the harder procedures of signature and ratification.¹⁸ Often the clearest indication of the softness of law can be gleaned from the actual wording. Weil notes that phrases like "seek to," "make efforts to," "promote," "avoid," and "take steps with a view to," are signals of soft law.¹⁹ Of course, for a treaty as long as the MBC, this has the clear implication that the softness of the law may vary considerably from part to part or even from line to line. If one has access to the *travaux préparatoire* of an instrument, the softness may be indicated by changes in wording. For example, when the Charter of Economic Rights and Duties of States was

12. Gold, *supra* note 9.

13. B. SIMMA, Consent: Strains in the Treaty System. *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW* 489 (1983).

14. 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43.

15. Busuttill, *The Bonn Declaration of International Terrorism*, 31 INT'L & COMP. L.Q. 484-85 (1982).

16. Schachter, *The Twilight Existence of International Non-Binding Agreements*, 71 AM. J. INT'L L. (1977).

17. See Gamble, *Multilateral Treaties: The Significance of the Name of the Instrument*, 10 CAL. W. INT'L L.J. 1-24 (1980).

18. SIMMA, *supra* note 13, at 488.

19. Weil, *supra* note 7.

being drafted, a wording change from "obligations" to "provisions" was a tacit acknowledgement of the softness of the law being developed.²⁰

III. SOFT LAW AND THE 1982 LAW OF THE SEA CONVENTION

The length and complexity of the 1982 U.N. Convention on the Law of the Sea suggest that it should be a good test case for the soft law encountered in treaties. One would surmise that most of the devices and manifestations by which law could be softened or hardened would be illustrated by the MBC. From another vantage, the size of the treaty is a liability—its length makes an article-by-article analysis very time consuming. Thus, I shall develop a scheme that can be applied to the MBC and then employ a content analysis of that treaty in order to try to discern the broad contours of softness.

Trying to operationalize the concept of soft law and apply it to a treaty is no easy task. Two distinct issues must be confronted. First, what aspects of treaties, *not* intrinsically part of softness, might be expected to relate to or help to illuminate softness? Two such aspects will be considered here. First, most international law can be dichotomized into rights and obligations.²¹ Treaty law, including the MBC, endeavours to strike a balance between rights and obligations. While in some instances the distinction may be difficult to draw, it is at least desirable to inquire whether the softness of law differs for rights and obligations. A second important "extrinsic" attribute that may influence softness is the importance of the provisions. It is significant whether those more important provisions tend to be softer or harder. A fairly convincing *logical* case could be made on either side of this issue. For example, one might speculate that important provisions require the maneuvering room provided by more softness. Equally as likely, it could be argued that states, before agreeing to be bound by important provisions, will demand a tighter legal framework, i.e., harder law, so that compliance is more certain.

In assessing the softness of a specific treaty provision, there appear to be several ways by which softness is produced. First, softness is directly related to the specificity, certainty and tangibility of the behavior that is permitted (i.e., the rights) or required (i.e., the obligations). It will be illustrated that provisions of the MBC vary enormously along what

20. Brower and Tepe, *The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law?* 9 *Int'l Law* 310 (1975).

21. Some would use the terms "rights" and "duties" rather than "rights" and "obligations." For a thorough discussion of the terms, see D. Walker, *THE OXFORD COMPANION TO LAW* 385, 897-8, 1070-72.

might be called a concreteness dimension. Second, even though the behavior prescribed may be very certain and concrete, there remain numerous gradations in obligation to carry out the behavior. Often this can be seen in the verb used in the text. For example, MBC provisions may use the verbs "must," "shall" or "will," or "may" when describing obligations. Obviously the verb selected has a marked influence on the softness of the resulting law. The matter is much simpler for rights which usually are conditioned by the verb "may" or its equivalent—there are virtually no examples in the MBC where a state is required to assume a right.

There are three other potentially important components to this softness equation that will be acknowledged here but not dealt with in detail. The softness of law could be affected significantly by reservations to the Convention. Usually reservations can be expected to soften provisions. Further, the amount of softness could differ substantially from state to state since each may have a different reservation. However, reservations may be less of a problem because the MBC prohibits *all* reservations.²² However, declarations and statements are permitted:

. . . a State (may) when signing, ratifying, or acceding to this Convention, (make) declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention.²³

Although the results will not be known for decades, it is possible that many states will increase the softness of MBC law, as it applies to them, through the use of the above provision.

A somewhat analogous situation pertains to dispute settlement provisions. These provisions can affect the softness of virtually any portion of a treaty. The situation with respect to the MBC provides for fairly firm dispute settlement procedures, but these provisions are cumbersome and complex and can exclude certain articles. The number of articles specifically excluded from dispute settlement provisions is so small that it is risky to infer much from them.²⁴ It seems that this would increase the softness of the excluded provisions. Further, one encounters the fascinating "second derivative" case where dispute settlement provisions themselves are soft law that is applied to substantive provisions. Of course, the ultimate softening of treaty provision may be procedures to denounce

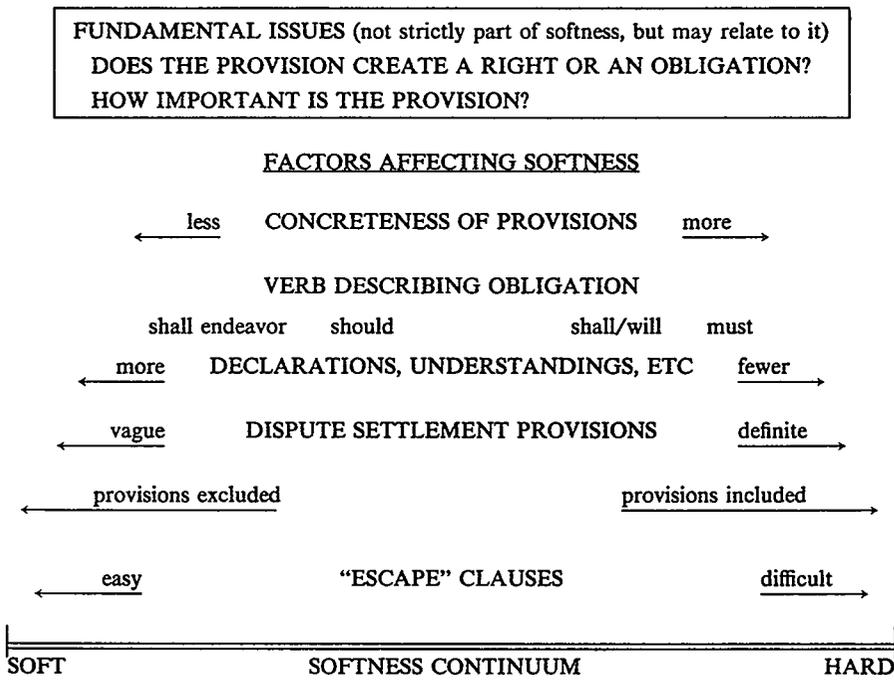
22. MBC, *supra* note 1, at art. 309.

23. *Id.* at art. 310.

24. MBC, *supra* note 1. All or part of these articles can be excluded from dispute settlement provisions: 15, 61, 62, 246, 253, 297.

or withdraw from the treaty. The MBC requires only one year's written notice for denunciation.²⁵ Figure I provides an overview of the approach to softness of law that will be discussed and applied in several different ways. Before providing a macroscopic overview of the MBC, it is desirable to illustrate how specific provisions fit into the framework described in Figure I. This will also provide an introduction to some of the findings discussed in the subsequent section.

FIGURE 1
APPROACH TO SOFT LAW



The Rights/Obligations Distinction. The line of demarcation between rights and obligations may not always be clear; often rights and obligations seem like opposite sides of the same legal coin. For the purpose of this work, marginal cases have been included in the obligations category. Further, there are many examples of rights that are granted followed by numerous obligations in the exercise of those rights. Thus, it is not surprising that the obligations created by the MBC far outnumber the rights. Provisions creating rights do not always use the word right, but usually their intent is clear. Obligations are almost as self-evident. For example, Article 20 describes the obligation of submarines in the territorial sea of a foreign state: "In the territorial sea, submarines and other underwater vehicles are required to navigate on the surface and to show their flag."²⁶

Assessing the Importance of Provisions. The issue of the importance of provisions should

25. MBC, *supra* note 1, at art. 317.

26. *Id.* at art. 20.

not be ignored, but it is fraught with subjectivity. Thus, one has to balance two unpleasant realities—the subjectivity of trying to “measure” the importance of an item against the obvious distortion coming from assuming that all provisions have equal importance. The approach taken to deal with this dilemma uses a five-point scale ranging from “most important” = 5, to “least important” = 1 (no values below 2 were assigned). All major substantive provisions received scores of 4 or 5, avoiding making many arguable judgments.

The Concreteness Index. Provisions in the MBC range widely in the concreteness and tangibility of the behavior that is prescribed. A scale is used for concreteness ranging from 5 = most concrete to 2 = least concrete. Articles can be very concrete, e.g., “the right to sail ships flying its flag on the high seas” (concrete level 5).²⁷ Other portions of the MBC have introduced uncertainties, vagueness and, less pejoratively, maneuvering room. For example, “States shall take other measures as may be necessary to prevent, reduce and control such pollution” (concrete level 3).²⁸

The Verb Used. A careful reading of the MBC revealed that the distinction based on the verb used to “activate” an obligation is not very discriminatory. A wide range of verbs is encountered, but the vast majority of them (more than 95%) fall into only two categories. First, there are the verb connected with the establishment of a right—usually this is the verb “may.” Second, more than 90% of the treaty consists of normal declarative verbs including “will,” “shall” and the numerous forms of English language verbs. There are very, very few examples of stronger verbs, e.g., “must,” or weaker formulations, e.g., “should” or “shall endeavor.” Thus, while these rare occurrences may be of interest in a specific case, their paucity precluded drawing any general conclusions about their use. It is a separate and interesting issue whether the same would hold true for other treaties.

Examples from the Convention illustrate an idea of the range and diversity of right and obligation provisions. For instance, “Specific obligations assumed by the States under special conventions . . . should be carried out in a manner consistent with the general principles and objectives of this Convention” (concrete level 4, importance level 4 as measured on the same scale).²⁹ Another obligation example states, “The drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast . . .” (concrete level 4, importance level 5).³⁰ “Any State which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in narcotic drugs . . . may request the co-operation of other States to suppress such traffic” is an example of a right (concrete level 3, importance level 5).³¹

IV. ANALYSIS OF DATA FROM THE U.N. CONVENTION ON THE LAW OF THE SEA

In order to access the impact of soft law on the MBC, a content analysis was done of the entire treaty. For each provision, the following data were tabulated:

- a. the Part and article in which the provision was found
- b. whether a right or an obligation was created
- c. the concreteness, 5 = most; 2 = least
- d. the importance, 5 = most; 2 = least
- e. the verb used to “condition” the provision, 5 = must, 4 = shall, 1 = may

Each provision was coded. All provisions have been included in this

27. *Id.* at art. 90.

28. *Id.* at art. 207.2.

29. *Id.* at art. 237.2.

30. *Id.* at art. 7.3.

31. *Id.* at art. 108.2.

analysis except those not relating to a right or an obligation assumed by a state. For example, it was felt that the detailed description of the functions of international organizations did not bear directly on rights and obligations of states. A total of 656 observations was made. Since this entire procedure is somewhat arbitrary and subjective, usually aggregate results are reported only for those parts of the MBC for which more than twenty-five observations were possible. There are seventeen parts to the Convention corresponding to most major substantive matters addressed by the law of the sea; those that meet the twenty-five observation criterion are indicated with an asterisk:

- Part I Introduction
- Part II Territorial Sea and Contiguous Zone*
- Part III Straits Used for International Navigation*
- Part IV Archipelagic States*
- Part V Exclusive Economic Zone*
- Part VI Continental Shelf*
- Part VII High Seas*
- Part VIII Regime of Islands
- Part IX Enclosed or Semi-enclosed Seas
- Part X Right of Access of Land-locked States
- Part XI The Area*
- Part XII Protection and Preservation of the Marine Environment*
- Part XIII Marine Scientific Research*
- Part XIV Development and Transfer of Marine Technology*
- Part XV Settlement of Disputes*
- Part XVI General Provisions
- Part XVII Final Provisions

It was noted earlier that the verb operationalizing an obligation did not provide enough variety to be useful as an indicator of the softness of the law. Thus, the most important indicator relating directly to softness is the five-point concreteness index. The 656 observations are distributed among the four categories. Only 26% (158) fall in the most concrete category. Level 4 (45%) was the modal observation, but 29% of the cases fall below Level 4. Level 3 has 28%, while Level 2 has the least (1%).

If one makes the arbitrary determination that scores less than Level 4 represent a significant amount of softness, it then becomes possible to compare the softness of the law across eleven parts of the MBC for which enough data are available. This illustrates the percentage of observations with a concreteness index score of Level 3 or less. Parts III (straits), V (the exclusive economic zone), and XIV, (transfer of marine technology)

show the softest development and law, each above 35%. Parts IV (archipelagic states) and XV (settlement of disputes) appears to be the hardest, under 20%. Part XI (The Area) falls slightly below that of Part III. Parts VI (Continental Shelf), VII (High Seas), XII (Protection and Preservation of the Marine Environment) and XIII (Marine Scientific Research) falls between 20% and 30%. Part II falls slightly below 20%. These results are generally consistent with expectations. Transit through international straits necessitated many hard compromises, thus producing much ambiguous language.³² The developed countries have been leery of technology transfer requirements; they appear to have been successful in muddying the legal waters.³³ Exclusive economic zone issues have developed to the point where many clear compromises have been struck and the language appears to be relatively clear.³⁴ It is more difficult to account for the hardness of the dispute settlement provisions, but it may be due to the unique character of those provisions, e.g., permitting states to select the mechanism of their choice, and to the relatively small number of observations in this category.³⁵

It is important to the purpose of this work to inquire whether the rights/obligations dichotomy is reflected in concreteness level. This can be calculated by computing the average concreteness level for rights and obligations for each MBC Part for which enough data exist. The highest average concreteness levels occur for Part II (the territorial sea, 4.3), Part VI (the continental shelf, 4.3), and Part XV (dispute settlement, 4.6). The lowest average concreteness occurred in Part III (international straits, 3.7), Part XI (the Area, 3.8) and Part XII (protection of the environment, 3.8). It seems reasonable to surmise that this use of high concreteness indicate stable, "old" law about which less controversy exists. In contrast, Parts III, XI and XII are newer law for which consensus is less complete.

The differences in average concreteness for rights and obligations reveals several interesting things about the MBC. First, in all cases except Part III (straits), rights tend to be more concrete than obligations. For three Parts, V (the exclusive economic zone), VII (high seas) and XI (the Area), the concreteness of rights tends to be conspicuously greater than for obligations. One plausible explanation is that these three dealt with subjects where rights, although fewer in number, were relatively clear and uncontentious. However, less agreement was possible about

32. *Id.* at Part III.

33. *Id.* at Part XIV.

34. *See id.* at Part V.

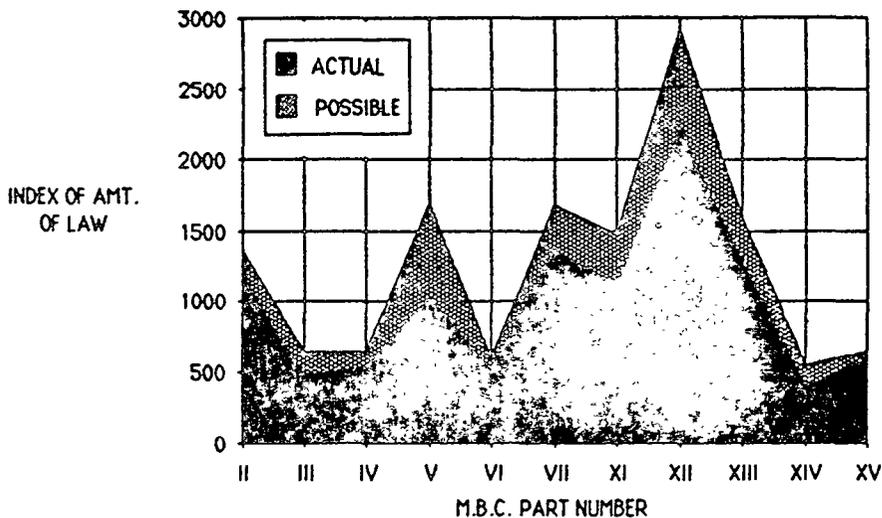
35. *Id.* at Part XV.

the corresponding obligations. Of course, any interpretation of these results must be tempered by the fact that there are many more obligations than rights, an average of 4/1. Figure 2 is an attempt to assess the aggregate amount of law created by the MBC and the impact of softness on that law. For each data point in each part for which enough data are available (11 parts in total), an index of the amount of law was computed by multiplying the following:

importance level x concreteness level

The results were summed to give the aggregate index number for each part. The black area corresponds to the actual amount of law—if all provisions achieved the maximum concreteness, the gray area would be added. Thus, the gray area shows the amount of law that is “lost” to softness.

FIGURE 2
AGGREGATE EFFECT OF SOFTNESS



Although there is attrition to softness in all parts, softness seems to have the least effect on provisions dealing with the continental shelf. The sections dealing with the Exclusive Economic Zone and the Marine Environment seem to be the biggest losers due to softness of law both in absolute and percentage terms.³⁶ The impact is also quite substantial on the high seas (Part VII) and the sea-bed area (Part XI).³⁷

36. *Id.* at Parts V and XII.

37. *Id.* at Parts VII and XI.

V. SUMMARY AND CONCLUSIONS

It seems clear that the softness of law is an important concept that can help to elucidate many aspects of international law. A good departure point is the insistence that the focus be softness of law, not soft law. The latter will tend to dispose unproductive, dichotomous, black/white only thinking that leads nowhere. There are a number of problems with existing scholarship about soft law. The first and most obvious is that much of the work focuses exclusively on instruments of questionable legal status—these are surely soft, but they are by no means the only soft law. Second, many first-rate scholarly pieces concentrate on a single instrument selected for study because it was thought to be soft in the first place. The point is that the results of such studies are probably not indicative of the nature and extent of softness throughout international law.

Examining the MBC provided an interesting test case of soft law in a context that may be fairly representative of treaties as a whole. Some clear findings emerged from the content analysis of the MBC. First, on the negative side, neither the importance level of provisions nor the distinction between rights and obligations seems to be fundamental to the degree of softness. More tangible, positive findings include the fact that a sizable portion of the MBC is quite soft, i.e., below Level 4 on the scale. Of substantive provisions in the convention, those dealings with the continental shelf seem to be the hardest. In terms of maximum impact of softness, the parts dealing with international straits, the exclusive economic zone, the transfer of marine technology, and protection of the marine environment seem the most affected by softness.

There are many other approaches that could be taken in investigating the concept of softness of law. More treaties could be examined systematically. The results from this content analysis of the MBC suggest that the idea of concreteness should be expanded and defined more precisely. The point that should be emphasized is that softness is going to be a generic, nagging problem of international law. By approaching softness more thoroughly and systematically, the failures and flaws of international law itself may be easier to understand and resolve.

