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# SOFT LAW AND THE INTERNATIONAL LAW OF THE ENVIRONMENT

*Pierre-Marie Dupuy\**

## INTRODUCTION

“Soft” law is a paradoxical term for defining an ambiguous phenomenon. Paradoxical because, from a general and classical point of view, the rule of law is usually considered “hard,” *i.e.*, compulsory, or it simply does not exist. Ambiguous because the reality thus designated, considering its legal effects as well as its manifestations, is often difficult to identify clearly.

Nevertheless, a new process of normative creation which jurists feel uncomfortable analyzing does exist and has been developing for more or less twenty years. “Soft” law certainly constitutes part of the contemporary law-making process but, as a social phenomenon, it evidently overflows the classical and familiar legal categories by which scholars usually describe and explain both the creation and the legal authority of international norms. In other words, “soft” law is a trouble maker because it is either not yet or not only law.<sup>1</sup>

This heterogeneity requires that one first consider, without necessarily subscribing to any “sociological” school of thought, the social reasons for this phenomenon. There seem to be three:

The first reason is structural in nature: it is the existence and development of a ramified network of permanent institutions, both at the universal and regional levels, since the end of the Second World War.

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1. See SOCIÉTÉ FRANÇAISE POUR LE DROIT INTERNATIONAL, *L'ÉLABORATION DU DROIT INTERNATIONAL PUBLIC* (1975); E. MCWHINNEY, *UNITED NATIONS LAW MAKING* 78-79 (1984); *CHANGE AND STABILITY IN INTERNATIONAL LAW-MAKING* 66-101 (A. Cassese & J. Weiler eds. 1988); F. MUNCH, *NON-BINDING AGREEMENTS* 1-11 (1969); M. LACHS, *SOME REFLECTIONS ON THE SUBSTANCE AND FORM OF INTERNATIONAL LAW*, 99-112 (1972); O. Schachter, *The Existence of Nonbinding International Agreements*, 71 *AM. J. INT'L L.* 296 (1977); R. Baxter, *International Law in "Her Infinite Variety,"* 29 *INT'L & COMP. L.Q.* 549 (1980); Bothe, *Legal and Non-Legal Norms — A Meaningful Distinction in International Relations?*, 11 *NETHERLANDS Y.B. INT'L L.* 65 (1980); Weil, *Towards Relative Normativity in International Law?*, 77 *AM. J. INT'L L.* 413 (1983); Virally, *La Distinction entre Textes Internationaux de Portée Juridique et Textes Internationaux Dépourvus de Portée Juridique*, 60-*I ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL [A.I.D.I.]* 166 (1983); *Délibérations de l'Institut en Séances Plénières, Première Séance Plénière*, 60-*II A.I.D.I.* 117 (1984) (M. Virally, rapporteur); Aust, *The Theory and Practice of Informal International Instruments*, 35 *INT'L & COMP. L.Q.* 787 (1986).

The "UN family" of organizations plays the leading role here. These institutions offer the world community a standing structure of cooperation which makes it possible to organize permanent and on-going political, economic and normative negotiations among the member States of this community. Furthermore, the increasingly important function of non-governmental organizations provides an efficient complement to the existing intergovernmental framework by assuring, in particular, a dynamic relationship between inter-State diplomacy and international public opinion.<sup>2</sup>

The second reason is the diversification of the components of this world community. Since the late 1950s, the arrival of underdeveloped countries on the international stage has made it necessary to adapt and reconsider, by way of normative negotiation, a great number of international customary norms which had been elaborated at a time when these countries were not in existence as sovereign States. It is well known that these new States, having the weight of the majority without the power of the elder countries, have speculated on the utilization of "soft" instruments, such as resolutions and recommendations of international bodies, with a view toward modifying a number of the main rules and principles of the international legal order.

The last and most important element, closely linked to the previous one, is best characterized by the rapid evolution of the world economy and increasing State interdependence combined with the development of new fields of activity created by the unceasing progress of science and technology. This phenomenon requires the timely creation of new branches of international law that are adaptable and applicable to each new level of achievement reached as a result of technological advancement. Thus, international economic law<sup>3</sup> and international law relating to the protection of the human environment are areas in which new "soft" regulations have emerged in predominant fashion.

The inter-relationship among these three elements, even if complex, is nonetheless quite evident: the steady evolution and adaptation of these new norms necessitate a constant renegotiation which usually takes place within the many organs of international organizations. One could say that the "soft" law "wave" reflects both, on the one hand, a desire for a new type of law rendered necessary by the previ-

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2. M. BETTATI & P.-M. DUPUY, *LES ONG ET LE DROIT INTERNATIONAL* (1986).

3. An important component of international economic law, for instance, has to do with the relationship between international law and economic development. *See generally*, *LA FORMATION DES NORMES EN DROIT INTERNATIONAL DU DÉVELOPPEMENT* (M. Flory, A. Mahiou & J. Henry eds. 1984).

ously enunciated factors and, on the other, a certain fear that existing law is too rigid — either too difficult to be rigorously applied by the poorest countries or incapable of adapting to the rapidly evolving areas which it is supposed to cover and regulate.

It would, however, be a mistake to believe that, given these considerations, “soft” law is solely an attribute of international law. For partly the same reasons, particularly given the rapid evolution of scientific advances, one can observe its appearance in certain domains of municipal law. For example, very few countries have yet adopted precise legislation providing for normative regulation of genetic research and its applications in “assisted procreation.” The preference has instead been to define, through various institutions and procedures, a variety of “soft” ethical guidelines addressed to scientists and physicians without resorting to laws, decrees or other “hard” legal instruments. That this phenomenon is common nowadays is one of the many reasons why “soft” law should not be considered a “normative sickness” but rather a symbol of contemporary times and a product of necessity.<sup>4</sup>

Because the existing body of international environmental law has, in part, emerged on the basis of “soft” norms, it provides a good field for observing the general sociological and juridical phenomenon termed “soft” law. The 1972 Stockholm Declaration adopted by the UN Conference on the Human Environment, for example, constitutes the normative program for the world community in this field. Although, from a formal point of view, the Declaration is only a non-binding resolution, many of its “principles,” particularly Principle 21, have been relied upon by governments to justify their legal rights and duties. The subsequent State practice has been, no doubt, influenced by such provisions. It is in this context and with the benefit of these introductory remarks that we shall briefly and successively examine the creation (I), the forms and content (II), and the legal effects (III) of “soft” law in the field of international environmental law.

## I. CREATION OF SOFT ENVIRONMENTAL LAW

### A. *The Institutional Framework*

The primary function assumed by international institutions in the international “soft” law-making process has already been illustrated. In practice, the development of “soft” law norms with regard to the protection of the human environment began immediately after the Stockholm Conference, one of the consequences of which was the cre-

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4. *Contra* Weil, *supra* note 1, at 413-23, 441-42.

ation of a special subsidiary organ of the UN General Assembly devoted to the promotion of both universal and regional environmental law. This body, the United Nations Environment Program ("UNEP"), has played a leading role in the promotion of regional conventions aimed at, for example, protecting seas against pollution. Although it was not supposed to develop in such a manner, UNEP has also evolved into a standing structure for negotiating draft resolutions sent, after their elaboration, to the General Assembly, where their contents have been either passed as is or expressly referred to in resolutions. A prime example of this phenomenon is provided by the 1978 UNEP Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States.<sup>5</sup>

At the regional level in general and in Europe in particular, several international institutions have engaged in important activities related to environmental protection: the Organization for Economic Cooperation and Development ("OECD"), which, in particular, has adopted a series of recommendations conceived of as a follow-up to the Universal Stockholm Declaration regarding the prevention and abatement of transfrontier pollution;<sup>6</sup> the EEC which has adopted Programmes of Action for the Environment, on the basis of which "hard" law is later established, mainly by way of "directive";<sup>7</sup> and the Council of Europe, which, even before the recent, intense international cooperation in this field, was perhaps the first international intergovernmental institution to bring to the attention of States the necessity of protecting the environment.<sup>8</sup>

The action of non-governmental organizations ("NGOs") has also contributed to the enunciation of "soft" law principles regarding the environment. The International Law Association ("ILA"), for example, adopted an influential resolution in 1966 known as the Helsinki Rules on the Use of Waters of International Rivers<sup>9</sup> which was ex-

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5. *Report on the Intergovernmental Working Group of Experts on Natural Resources Shared by Two or More States on the Work of its Fifth Session Held in Nairobi from January 23, to February 7, 1978* (D. Kinyanjui, rapporteur) [UNEP Governing Council decision 6/14 of May 19, 1978], reprinted in 17 I.L.M. 1094, 1097 (1978) [hereinafter *UNEP Draft Principles of Conduct*].

6. See ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT AND THE ENVIRONMENT (1986) [hereinafter *OECD AND THE ENVIRONMENT*], which contains OECD resolutions dealing with the protection of the environment.

7. See, e.g., *Council Directive of 15 July 1980 on Air Quality Limit Values and Guide Values for Sulphur Dioxide and Suspended Particulates*, 23 O.J. EUR. COMM. (No. L 229) 30 (1980).

8. See, e.g., *Resolution 71(5) on Air Pollution in Frontier Areas*, 1971 EUR. Y.B. (Council of Eur.) 263.

9. INTERNATIONAL LAW ASSOCIATION, REPORT OF THE FIFTY-SECOND CONFERENCE (HELSINKI) 477 (1966).

panded and enlarged by the same institution in 1982 with the adoption of the Montreal Rules of International Law Applicable to Trans-frontier Pollution.<sup>10</sup> The Institute of International Law ("IIL") has played an equally important role by promulgating resolutions on the Utilization of Non-Maritime International Waters;<sup>11</sup> on the Pollution of Rivers and Lakes and International Law;<sup>12</sup> and on Transboundary Air Pollution.<sup>13</sup>

In this context, the regional commissions of the United Nations play a role that could become more important in the near future. This is reflected in the recent Bergen Declaration adopted on May 14, 1990, by thirty environment ministers at a meeting convened jointly by the United Nations Economic Commission for Europe and the government of Norway.<sup>14</sup> One can find in the terms of this declaration different considerations, guidelines and principles which echo those of other contemporary declarations such as the Declaration on Human Responsibilities for Peace and Sustainable Development proposed a year earlier by Costa Rica,<sup>15</sup> or the Declaration of Environmental Interdependence adopted by the Interparliamentary Conference on the Global Environment in Washington, D.C. on May 2, 1990.<sup>16</sup>

### B. *The Soft Lawmaking Process*

As with other areas in which "soft" law plays a part, *repetition* is a very important factor in the international environmental "soft" lawmaking process. All of the international bodies referred to above should be viewed, as far as their recommendatory action in this field is concerned, as transmitting basically the same message. Cross-references from one institution to another, the recalling of guidelines adopted by other apparently concurrent international authorities, recurrent invocation of the same rules formulated in one way or another at the universal, regional and more restricted levels, all tend progressively to develop and establish a common international understanding. As a result of this process, conduct and behavior which would have

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10. INTERNATIONAL LAW ASSOCIATION, REPORT OF THE SIXTIETH CONFERENCE (MONTREAL) I (1982).

11. 49-II A.I.D.I. 381 (1961).

12. 58-II A.I.D.I. 196 (1979).

13. 62-II A.I.D.I. 296 (1987).

14. See *Bergen: Weak Declaration Adopted*, 20 ENVTL. POL'Y & L. 84 (1990).

15. See *Human Responsibilities for Peace and Sustainable Development*, 19 ENVTL. POL'Y & L. 232 (1989).

16. See *The Interparliamentary Conference on the Global Environment*, 20 ENVTL. POL'Y & L. 112 (1990).

been considered challenges to State sovereignty twenty years ago are now accepted within the mainstream.

Let us examine, by way of illustration, four substantial examples of this phenomenon in the context of international environmental "soft" law. The first example involves the principle of *information and consultation*. This principle usually manifests itself as an obligation whereby States must inform and consult one another, prior to engaging in any activity or initiative that is likely to cause transfrontier pollution, so that the country of origin of the potentially dangerous activity may take into consideration the interests of any potentially exposed country. From a more general point of view, the principle covers the additional duty to provide to these potentially exposed States all relevant and reasonably available information concerning transboundary natural resources and transfrontier environmental interference.<sup>17</sup>

The principle of information and consultation has been reiterated for almost twenty years by the different organizations cited above as well as by others. It can be found in many recommendations or resolutions: the aforementioned 1978 UNEP Draft Principles of Conduct on Shared Natural Resources; UN General Assembly resolutions 3129 (XXVIII) of December 1973 and 3281 (the Charter of Economic Rights and Duties of States);<sup>18</sup> OECD Council recommendations on Transfrontier Pollution<sup>19</sup> and the Implementation of a Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution.<sup>20</sup> In the context of NGO activity, the same rule is

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17. For a presentation of duties of States with regard to the protection of the environment, see generally Handl, *Territorial Sovereignty and the Problem of Transnational Pollution*, 69 AM. J. INT'L L. 50 (1975). See also Handl, *Balancing of Interests and International Liability for the Pollution of International Watercourses: Customary Principles of Law Revisited*, 13 CANADIAN Y.B. INT'L L. 156 (1975); Dupuy, *Bilan de Recherches de la Section de Langue Française du Centre D'Étude et de Recherche de L'Académie*, in LA POLLUTION TRANSFRONTIÈRE ET LE DROIT INTERNATIONAL 33 (1985) (publication of the Centre for Studies and Research in International Law and International Relations, Hague Academy of International Law); Lammers, *The Present State of Research Carried Out by the Centre for Studies and Research*, in LA POLLUTION TRANSFRONTIÈRE ET LE DROIT INTERNATIONAL, *supra*; WORLD COMMISSION ON THE ENVIRONMENT AND DEVELOPMENT, EXPERT GROUP ON ENVIRONMENTAL LAW, LEGAL PRINCIPLES FOR ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT (1986).

18. G.A. Res. 3129, 28 U.N. GAOR Supp. (No. 30), U.N. Doc. A/Res./3050-3199; G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31), U.N. Doc. A/9631 (1974), *reprinted in* 14 I.L.M. 251 (1975). UN bodies other than UNEP, such as the ECOSOC Commission on Transnational Corporations, also work on environmental matters and produce "soft" standards for environmental protection. See, e.g., *Transnational Corporations and Issues Relating to the Environment*, U.N. Doc. E/C.10/1987/12 (1987).

19. OECD Council Recommendation C(74)224, Annex, Title E (1974), *reprinted in* OECD AND THE ENVIRONMENT, *supra* note 6, at 142, 145.

20. OECD Council Recommendation C(77)28(final), Annex, Title C (1977), *reprinted in* OECD AND THE ENVIRONMENT, *supra* note 6, at 150, 153.

contained in the already-mentioned ILA resolutions of 1966 and 1982, as well as in the IIL resolutions of 1961, 1979 and 1981.

The second example concerns, on a more specific level, *environmental impact assessment* procedures. These procedures are directly related to the principle of information and consultation since they make it possible to estimate the impact of a planned activity on the environment of a neighboring State.<sup>21</sup> Adherence to such procedures has been recommended several times by various sources, such as the 1978 UNEP Draft Principles of Conduct on Shared Natural Resources and the 1981 UNEP Conclusions of the Study on the Legal Aspects Concerning the Environment Related to Off-Shore Mining and Drilling within the Limits of National Jurisdiction.<sup>22</sup> These UNEP recommendations have both been endorsed by the UN General Assembly in its Resolution No. 37/27 of March 24, 1983, on International Co-operation in the Field of the Environment, as well as in its resolution No. 37/7 on the World Charter for Nature (articles eleven and sixteen).

Support for the same procedures can be found in the 1974 OECD Declaration on Environmental Policy and other recommendations adopted by the same organization.<sup>23</sup> A faithful echo of the same rule can also be found in a 1985 EEC Council Directive pertaining to the Assessment of the Effects of Certain Public and Private Projects on the Environment.<sup>24</sup> It would be a mistake, however, to conclude that this type of rule has only been recognized by industrialized countries; it was, for instance, recognized and recommended by the Economic Commission for Africa Council of Ministers in 1984.<sup>25</sup>

The third example of repetition in the international "soft" law-making process is provided by the principle of *non-discrimination* according to which States should not substantially differentiate between their own environment and those of other States as regards the elaboration and application of laws and regulations in the areas of prevention, reparation and repression of pollution. With regard to instances of transfrontier inland pollution, States must also allow persons concerned with such occurrences access to available administrative and

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21. U.N. Doc. UNEP/ENV/GE.1/R.11/Rev.1 (1984).

22. *The Environment Program: Program Performance Report January-April 1981*, U.N. Doc. UNEP/GC.9/5/Add.5 at 36 (1981).

23. Declaration on Environmental Policy (Nov. 14, 1974), reprinted in *OECD AND THE ENVIRONMENT*, *supra* note 6, at 15.

24. *Council Directive of 27 June 1985 on the Assessment of the Effects of Certain Public and Private Projects on the Environment*, art. 7, 28 O.J. Eur. Com. (No. L 175) 40, 42 (1985).

25. *Economic Commission for Africa, Annual Report*, 69 U.N. ESCOR Supp. (No. 11) para. 2, U.N. Doc. E/ECA/CM.10/38 (1984).



judicial proceedings.<sup>26</sup>

The principle of non-discrimination has been introduced quite systematically in OECD Council recommendations concerned with trans-frontier pollution, in particular, recommendation C(77)28. One can also find this principle in the 1978 Draft Principles Relating to Shared Natural Resources and in several of the other recommendations already mentioned.<sup>27</sup> It is interesting to note that, in this area and on the basis of those programmatic instruments, the same principle has been introduced in a "hard" instrument, namely the 1982 UN Convention on the Law of the Sea.<sup>28</sup>

The final and most recent example of convergence between non-legally-binding texts of different natures and origins is to be found in contemporary approaches to the problems surrounding the protection of the global atmosphere. The number of "soft" instruments calling on the world community to strengthen international cooperation on the basis of a new "global" approach and the perception of the world atmosphere as part of the "*common heritage of mankind*" has been increasing in the past two to three years. If this phenomenon continues, it will likely have some legal consequence, particularly with regard to the environmental responsibility that the present generation has vis-à-vis future generations.<sup>29</sup>

The contemporary "common heritage" approach is reflected, for example, in the UN General Assembly Resolution 43/53 of January 27, 1989, in which it is recognized "that climate change is a common concern of mankind . . ." <sup>30</sup> A second reference can be found in the statement agreed to by the International Meeting of Legal and Policy Experts hosted by the Canadian government in Ottawa on February 20-22, 1989. This statement takes the form of a draft convention on the protection of the world climate and global atmosphere. It declares that "the atmosphere . . . constitutes a common resource of vital interest to mankind."<sup>31</sup> Another text which can be cited in this context is

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26. See OECD, NON-DISCRIMINATION IN RELATION TO TRANSFRONTIER POLLUTION: LEADING DOCUMENTS (1978) [hereinafter OECD, NON-DISCRIMINATION].

27. OECD, NON-DISCRIMINATION, *supra* note 26, at para. 11.

28. See, e.g., *Third United Nations Conference on the Law of the Sea, United Nations Convention on the Law of the Sea*, U.N. Doc. A/CONF.62/122, arts. 194(4) and 227 (1982), reprinted in 21 I.L.M. 1261 (1982).

29. See WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW COMMON PATRIMONY AND INTERGENERATIONAL EQUITY (1989); D'Amato, *Do We Owe a Duty to Future Generations to Preserve the Global Environment?*, 84 AM. J. INT'L L. 190 (1990).

30. *Protection of Global Climate for Present and Future Generations of Mankind*, U.N. Doc. A/Res/43/53, para. 1 (1989), reprinted in 28 I.L.M. 1326, 1327 (1989).

31. STATEMENT OF THE MEETING OF LEGAL AND POLICY EXPERTS, PROTECTION OF THE ATMOSPHERE: INTERNATIONAL MEETING OF LEGAL AND POLICY EXPERTS (February 22, 1989)(Ottawa).

the Hague Declaration of March 11, 1989, signed by representatives of twenty-four States at the Hague at the initiative of France, the Netherlands and Norway. The Declaration states that it is the "duty of the community of nations vis-à-vis present and future generations to do all that can be done to preserve the quality of the atmosphere."<sup>32</sup> Support for the same approach can also be found in the different reports of the Intergovernmental Panel on Climatic Change established in 1989 under the co-sponsorship of the World Meteorological Organization and UNEP<sup>33</sup> and in the Decision on Global Climate Change adopted by the UNEP Governing Council in May 1989.<sup>34</sup>

These various texts appear to define a new trend which may eventually lead to the negotiation of a new general multilateral convention on the protection of the world climate. The adoption of such a convention has been called for, in particular, by the Noordwijk Declaration on Climate Change adopted at a ministerial conference of representatives of sixty-seven governments from every part of the world in November 1989.<sup>35</sup>

But these "soft" instruments, as is the case with others usually referred to in the general context of the "soft" law phenomenon, are in many respects rather heterogeneous in nature. Their substantial convergence does not create a new binding rule of international environmental law. This remark leads both to methodological problems, which will be dealt with later in this article, and necessitates a more thorough examination of the forms and content of "soft" environmental law.

## II. THE FORMS AND CONTENT OF SOFT ENVIRONMENTAL LAW

The examples provided earlier illustrate that much of "soft" law is incorporated within "soft" (*i.e.*, non-binding) instruments such as recommendations and resolutions of international organizations, declarations and "final acts" published at the conclusion of international conferences and even draft proposals elaborated by groups of experts. It is thus generally understood that "soft" law creates and delineates goals to be achieved in the future rather than actual duties, programs rather than prescriptions, guidelines rather than strict obligations. It

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32. *Hague Declaration on the Environment*, 28 I.L.M. 1308, 1309 (1989).

33. See, IPCC (WHO/UNEP) World Climate Program Publications Series, No. IPCC-1/TD-W.267.

34. *United Nations Environment Program, Governing Council Decision on Global Climate Change*, UNEP GC Dec. 15/36 (May 25, 1989), reprinted in 28 I.L.M. 1330 (1989).

35. MINISTERIAL CONFERENCE ON ATMOSPHERIC POLLUTION AND CLIMATE CHANGE, THE NOORDWIJK DECLARATION ON CLIMATE CHANGE (Nov. 1989).

is true that in the majority of cases the "softness" of the instrument corresponds to the "softness" of its contents. After all, the very nature of "soft" law lies in the fact that it is not in itself legally binding.

Although this assertion is generally correct, it remains necessary both from a conceptual and, in certain situations, a practical point of view, to distinguish clearly between the *substance* and the *instrument* — they are not necessarily always in perfect accordance with one another. Two kinds of situations present themselves in which this type of potential incoherence can be observed. First, there are cases where the content of a formally *non-binding* instrument has been so precisely defined and formulated that, aside from the precaution of using "should" instead of "shall" to determine the proper behavior for concerned States, some of its provisions could be perfectly integrated into a treaty.<sup>36</sup>

Moreover, it is extremely interesting to observe in practice, as the author has had the opportunity of doing in his capacity as legal advisor to the OECD Transfrontier Pollution Group (1974-80), that Member States' delegations approach the negotiation of those provisions with extreme care, just as if they were negotiating treaty provisions. Such behavior suggests that States do not view such "soft" recommendations as devoid of at least some political significance, if not, in the long term, any legal significance. In fact, for a few of these "soft" instruments, some States consider it necessary to formulate reservations to such texts, just as if they were creating formal legal obligations. The most famous example of this is the UN 1974 Charter on Economic Rights and Duties; this is also true for the OECD Council Recommendation C(74)224 on Some Principles Concerning Transfrontier Pollution.<sup>37</sup>

Second, an increasing number of treaty provisions can be found in which the wording used is so "soft" that it seems impossible to consider them as creating a precise obligation or burden on States parties. The number of conventions in which such evasive prescriptions are enunciated appears to be increasing: for instance, many provisions of Part XII of the 1982 UN Convention on the Law of the Sea (e.g., articles 204(1) and 217(2)); the majority of the articles of the 1979 Economic Commission for Europe Convention on Long-Range Trans-

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36. See, e.g., *Principles Concerning Transfrontier Pollution*, OECD Council Recommendation C(74)224 Annex (1974), reprinted in *OECD AND THE ENVIRONMENT*, *supra* note 6, at 142; *UNEP Draft Principles of Conduct*, *supra* note 5.

37. The Spanish delegation made several reservations to the Council Recommendation. The reservations were, however, withdrawn after several years. See *OECD Council Recommendation C(74)224 Annex (1974)*, reprinted in *OECD AND THE ENVIRONMENT*, *supra* note 6, at 144-47.

boundary Air Pollution;<sup>38</sup> as well as the provisions of the 1985 Vienna Convention on the Protection of the Ozone Layer.<sup>39</sup>

Such a situation can sometimes, if not often, be explained in light of the difficulties with which delegations have been confronted in trying to reach an agreement. This is certainly the case in the second of the last three cited examples. Another factor which explains the inclusion of "soft" provisions in the text of a treaty can, however, be identified: with regard to difficult and complex areas of concern, the protection of the ozone layer for example, States realize from the outset of negotiation that easy solutions do not exist and that too rigidly-defined obligations would only lead to inefficiency by deterring a significant number of concerned governments from ratifying the convention.

Thus, States prefer to define, by common agreement, programs of action which invite them to adopt, starting at the national level, adequate material and regulatory measures. One can assume that such a prudent strategy has been encouraged by the example furnished by the positive results often produced when States effectively take into account the guidelines proposed in some of the resolutions or recommendations defined within the framework of international organizations. One perceives, then, a sort of "soft" law "contagion" which affects the transformation of "soft" instruments into "hard" ones.

Even given the accuracy of this assertion, one must recognize that it does not simplify the task of defining the scope and nature of the "soft" law. It does, however, lead to the conclusion that the criteria used to identify "soft" law should no longer be *formal*, *i.e.*, based on the compulsory or non-compulsory character of the instrument, but instead *substantial*, *i.e.*, *dependent on the nature and specificity of the behavior requested of the State*, whether or not it is included in a legally binding instrument. To be more rigorous, if the norm is included in a non-binding instrument, it should be considered presumptive evidence of the "soft" nature of the norm; at the same time, the "hard" or "soft" nature of the obligation defined in a treaty provision should not necessarily be identified on the sole basis of the formally binding character of the legal instrument in which the concerned norm is integrated and articulated.

These observations lead to the conclusion that the identification of "soft" law, significant at least because it may potentially become

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38. *United Nations Convention on Long-Range Transboundary Air Pollution*, U.N. Doc. ECE/HLM.1/R.1 (1979), *reprinted in* 18 I.L.M. 1442 (1979).

39. *Vienna Convention for the Protection of the Ozone Layer*, opened for signature Mar. 22, 1985, U.N. Doc. UNEP/IG.53/5/Rev. 1, *reprinted in* 26 I.L.M. 1529 (1987).

“hard” law in the near or distant future, should derive from a systematic case-by-case examination in which a variety of factors are carefully considered. These factors would include, among others: the source and origin of the text (governmental or not); the conditions, both formal and political, of its adoption; its intrinsic aptitude to become a norm of international law; and the practical reaction of States to its statement. These criteria should be applied, for example, to the various texts mentioned earlier calling for a mankind-oriented and global approach to world climate protection. In other words, one must avoid grouping texts of remote origins and character in order to demonstrate the development of an emerging “soft” rule.

### III. THE LEGAL EFFECT OF ENVIRONMENTAL SOFT LAW

Two different sets of problems must be considered with respect to a discussion of the legal impact of international environmental “soft” law. The first set of problems concerns the question of the influence of “soft” law on the general international law-making process. How and under what conditions do some “soft” norms become compulsory? The second set of problems is twofold: even before their evolution into “hard” laws, do existing “soft” regulations have any influence on the definition of the content of international law? If so, does this have any impact on the international responsibility of States for the commission of wrongful acts?

Again, it should be clearly noted that the international law of the environment is explored and used as an example here merely because it provides a fertile ground for analysis and not because it is a field in which “soft” law presents any particular theoretical or technical problems.

#### A. *Soft Law and General International Law*

The law-making process is a long-term process. This remains true even if the notion of “long-term” is a relative one — the prevailing conception of “long-term,” as hinted by the International Court of Justice in the *Continental Shelf* case, is one which has tended to shorten over the last decades.<sup>40</sup>

As early as Roman times, jurists spoke of *leges in statu nascendi* (not to be confused with *lex ferenda*). It is sufficiently clear that the creative process of customary rules enables different heterogeneous elements to participate in the crystallization of the new custom. It be-

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40. *North Sea Continental Shelf* (W. Ger. v. Den. and W. Ger. v. Neth.), 1969 I.C.J. 3, 42-43 (Judgment of Feb. 20).

comes equally obvious that the accumulation of recurrent resolutions can greatly contribute to the creation of such a new general customary rule. It should also be noted in this context that positive cross-references between *treaties* and *resolutions* (both types of instruments incorporating the same rule at the same time) are of real importance in this respect.

In the context of "soft" instruments, one could say, using the classical working of legal theory in regard to the creation of custom, that the cumulative enunciation of the same guideline by numerous non-binding texts helps to express the *opinio juris* of the world community.

This last observation, although different in character, should be viewed in light of the one made in 1986 by the International Court of Justice with regard to several important resolutions adopted by the UN General Assembly: "The effect of consent to the text of such resolutions . . . may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves."<sup>41</sup> One should certainly not systematically go that far in interpreting the frequent repetition of "soft" rules in different kinds of texts. However, taking into account the criteria outlined earlier at the end of Part I of this article, one should pay careful attention to indications of a new *opinio juris* likely to emerge among nations thanks to the frequent reiteration of certain identical principles.

This conclusion is somewhat problematic, however, if one takes into account the rather dogmatic concepts and legal categories presented by the classical theory identifying the "two elements" of customary law (practice and *opinio juris*) when analyzing the "soft" law phenomenon.<sup>42</sup> This classical theory has been systematized by the positivist school to explain a law-making process in which the measure and conception of time was substantially different, and where the rule of law appeared as the end product of a long and careful ripening process.

Today, even given the heterogeneity of the contemporary law-making process, it would not be completely accurate to conclude that the relative importance of these two elements has been reversed so that the voicing of *opinio juris* takes precedence over the material element of State practice.<sup>43</sup> It would be more consistent with the reality of this process to say that, through the channel of steadfast institutionalized

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41. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 4, 100 (Merits of June 27).

42. See Haggemacher, *La Doctrine des Deux Eléments du Droit Coutumier dans la Pratique de la Cour Internationale*, 90 R.G.D.I.P. 5 (1986).

43. CHANGE AND STABILITY IN INTERNATIONAL LAW MAKING, *supra* note 1.

negotiation, State practice is modified by the constant pressure of diplomacy. In this respect, general international law-making is no longer, if it has ever effectively been, a process characterized by the explicit recognition of "general practice accepted as law."<sup>44</sup> As a result, "soft" law must also be viewed in light of the interaction of competing legal strategies pursued by different categories of States whose varied interests are not always considered by other States to be converging. In any event, it is evident that a substantial part of "soft" law today, in an impressionistic way, describes part of the "hard" law of tomorrow.

The normative emission of international institutions plays a catalytic role in this process. For example, one could argue convincingly that the information and consultation requirement has nearly reached the point beyond which it should be considered a customary norm. Evidence of this can be found in both the methodology and materials used by several groups of experts charged with the task of establishing draft codification articles describing the content of the general international law of the environment. Both the 1987 recommendations of the World Commission on Environment and Development Expert Group on Environmental Law<sup>45</sup> and the ILC draft articles on the law of non-navigational uses of international watercourses<sup>46</sup> provide major examples. Both drafts have been supported by reports and commentaries which both take into account and largely rely upon "soft" instruments emanating from international organizations, even if not necessarily consistently confirmed by actual and unanimous State practice.

This last element makes it difficult to identify among the codified principles the ones which already belong to *lex lata* and those which are still to be considered as *lex ferenda*. It does, however, sufficiently establish that the codifying bodies consider "soft" law at the very least to be a reliable indicator of actual trends in contemporary international environmental law-making. Rules and principles such as regular exchange of information, prior notification of planned activities capable of damaging the environment in a neighboring country, equal right of access to and non-discrimination between actual or potential victims of transfrontier pollution behind and across the frontiers, have

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44. I.C.J. STATUTE art. 38.

45. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *supra* note 14.

46. In particular, see *International Law Commission: Sixth Report on the Law of the Non-Navigational Uses of International Watercourses*, U.N. Doc. A/CN.4/427 (1990)(S. McCaffrey, Special Rapporteur); *Draft Report of the International Law Commission on the Work of its Forty-Second Session*, U.N. Doc. A/CN.4/L.449 (1990).

been largely launched by "soft" instruments which are now explicitly cited and recalled as valuable materials in the codification process.

### B. *Soft Law and International Responsibility*

A "soft" norm can help to define the standards of good behavior corresponding to what is nowadays to be expected from a "well-governed State" without having been necessarily consecrated as an in-force customary norm. Among those standards of good behavior which constitute the type of due diligence that can be expected from a State in the context of international cooperation are: prior consultation before enforcing a regulation or empowering a private person to undertake an activity which might create a significant risk of transfrontier pollution; early international notification of a polluting accident; due recourse to procedures of impact assessments; and non-discrimination between and equality of access for victims of both national and transfrontier pollution.<sup>47</sup> These and other standards of behavior were recognized in the context of a due diligence definition by the arbitrators in the famous Alabama Case.<sup>48</sup>

Another indirect effect of international "soft" law regulations should not be underestimated: the impact of these "soft" norms on national legislatures and national legislation as reference models which anticipate internationally-grounded State obligations emerging in the near future.

When evaluating due diligence in the context of determining State responsibility under international law, one must consider the standards established by "soft" norms, although not (or not yet) compulsory in themselves. No single one of these standards by itself, it seems, should suffice in identifying illicit State activity in instances where it is ignored. Such a deficiency should, however, create a presumption of illegality and, in instances where a number of such norms are violated, constitute evidence of an illicit act.<sup>49</sup>

Of course, the evaluation of compliance with such standards of "good behavior" falls within the jurisdiction of international judges or arbitrators. From the point of view of international environmental law, it is disturbing to note the absence of recent arbitral or jurisdic-

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47. Dupuy, *Due Diligence in the International Law of Liability*, in LEGAL ASPECTS OF TRANSFRONTIER POLLUTION 369 (1977); Dupuy, *Le Fait Générateur de la Responsabilité Internationale des Etats*, 188 RECUEIL DES COURS 21 (1984).

48. In the United States, see, e.g., Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 17 I.L.M. 214 (1978).

49. For an appraisal of international safety standards in the field of nuclear energy, see Handl, *Après Tchernobyl: Quelques Reflexions sur le Programme Legislatif Multilateral à L'Ordre du Jour*, 92 R.G.D.I.P. 5 (1988).



tional awards; States do not appear to be very keen on settling disputes in this area by entrusting them to independent third parties. Each State knows that rules of law and material situations are reversible and that a country victimized by transboundary pollution today could very well end up being the polluter of tomorrow.

Nevertheless, international standards based on "soft" law are not only available for use by international judges or arbitrators. They can also be of great help in every day inter-State diplomacy. They may also effectively be taken into account by municipal judges in evaluating the legality, with regard to international law, of any internal administrative action having had or able to have some damaging impact on the environment beyond national boundaries. Furthermore, municipal judges may take these international standards into account in order to give a correct interpretation to very generally formulated international obligations.

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Albeit indirect, the legal effect of "soft" law is nevertheless real. "Soft" law is not merely a new term for an old (customary) process; it is both a sign and product of the permanent state of multilateral cooperation and competition among the heterogeneous members of the contemporary world community.

The existence of "soft" law compels us to re-evaluate the general international law-making process and, in doing so, illuminates the difficulty of explaining this phenomenon by referring solely to the classical theory of formal sources of public international law.