

CHAPTER 5: SOFT LAW

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The question of whether there is a "soft law" in international law has been the subject of recent debate. To some extent we recognize a limited normative force of certain norms even though we concede that those norms would not be enforceable by an international court or other international organ. In this respect there is a kind of "soft law." To say that it does not exist because it is not of the "enforceable" variety that most legal norms exhibit might blind us to another dimension of the reality of international practice. If "soft law" seems to explain certain behaviors on the international legal scene, then perhaps it ought to be acknowledged as a separate phenomenon. This Chapter is addressed to this new, and controversial, form of international law.

A. Developing and Identifying Soft Law¹

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 creation 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.

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; 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"; 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.

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 which was expanded and enlarged by the same institution in 1982 with the adoption of the Montreal Rules of International Law Applicable to Transfrontier Pollution. The Institute of International Law ("IIL") has played an equally important role by promulgating resolutions on the Utilization of Non-Maritime International Waters; on the Pollution of Rivers and Lakes and International Law; and on Transboundary Air Pollution.

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 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. An 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. 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); OECD Council recommendations on Transfrontier Pollution and the Implementation of a Regime of Equal Right of Access and

Non-Discrimination in Relation to Transfrontier Pollution. In the context of NGO activity, the same rule is contained in the already-mentioned ILA resolutions of 1966 and 1982, as well as in the IIL resolutions of 1961, 1979 and 1981.

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.

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 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.

Moreover, it is extremely interesting to observe in practice 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.

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 Transboundary Air Pollution; as well as the provisions of the 1985 Vienna Convention on the Protection of the Ozone Layer.

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 "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.

B. DEBATE: Is Graduated Normativity (1) Desirable or (2) Avoidable?

1. Undesirable and To Be Avoided²

There is no denying that in any international context identification of the demarcation line between law and non-law may constitute a challenging task, given the nature of the international law-making process as frequently informal and essentially decentralized. But any conceptualization of the manifold and complex indicia of international law in terms of "hard" vs. "soft" law is inherently problematical. Apart from their basic ambiguity, the notions imply a graduation of normativity which is logically untenable. An alleged norm either constitutes a legal prescription or it does not. Legal norms are carried by expectations of authority and of control. By contrast "soft law," typically exemplified in the ascription of "legal" status to resolutions or decisions of international organizations, informal international understandings, or certain other international commitments entered into by states, lacks in this respect. It is an over-inclusive concept and thus blurs the crucial characteristics of legal norms. The result is a loss of clarity as to the status of the norm concerned. The concept of "soft law," whether by design or by default, is thus apt to advance legal pretensions. By the same token, the concept tends to undermine the authority of established legal norms. For acceptance of graduated normativity works both ways.

It is this latter impact, indeed potentially intended result, of the use of "soft law"—that is, the relegation of established legal norms to secondary status on a graduated scale of normativity—that is of special concern with respect to determining the substantive criteria for the rights and obligation of states with regard to transboundary air pollution. Given the generality of many basic international legal principles, their application in a given context presupposes, by necessity, a large measure of cooperation among states concerned to clarify specific legal implications of the basic concept. To that extent entitlements are routinely "negotiable." But any development which fosters the "negotiability" of fundamental allocative premises for each and every case is unsound. Abandonment of well-established legal positions is inefficient, given at least potentially high administrative costs if states were to renegotiate each time what on all accounts should be a well-settled legal issue. More importantly, it causes a decline in the certainty of legal expectations in general, thereby invites the assertion of more extreme claims, and promotes conditions for the emergence of more frequent as well as dangerous international confrontations.

There is substantial evidence of a growing acceptance of the notion of "graduated normativity" in international legal contexts. For example, in obvious analogy to "soft law," some commentators have begun to talk about "soft responsibility" in the sense of a responsibility that ranks lower than "classic responsibility" in terms of its normative contents. A similar tendency seems to permeate some of the work of the International Law Commission. Thus, during the Commission's debates on the topic of "international liability for injurious consequences arising out of acts not prohibited by international law," obligations that engage state responsibility and obligations that arise out of lawful state conduct were referred to as dealing with "different shades of prohibition." And, indeed, the first special rapporteur's draft articles as a whole have been termed a "soft approach" to the liability topic, in apparent allusion to the fact that clearly nontraditional "legal" obligations constitute a major feature of its normative structure.

2. Desirable and Unavoidable³

Soft law is presented as a new, unusual, and pathological phenomenon. The term is new, but what it refers to is not, nor is it a quintessentially international phenomenon. Although like anything else it can be abused, it is not per se a legal pathology. In some circumstances, it may perform very important legal functions. The prevalence of the phenomenon appears to have complicated the work of international lawyers enormously, but I submit to you that the complications derive less from particular uses of soft law and more from the nature and complexity of international law itself. It is interesting to note that many of the people who use the term "soft law" pejoratively often are concerned less with the alleged fictitious character of certain prescriptions that purport to be law (after all, if they are fictitious, why worry about them?), and much more with the redistribution of political power in certain

arenas of international lawmaking. That is sometimes one of the unexpressed targets of criticisms of soft law.

Normal normativity is not something that is monolithic, or unidimensional. Relative normativity is in no sense exceptional. The ego is constantly bombarded by many different communications in the subjunctive mood, and the ego constantly makes assessments of which ones are important, which ones one can run a risk of violating, and so on. We know that in various ways all the norms we are subjected to as individuals, and the norms that we are subjected to as advisers to more composite entities, are soft in various ways, and we make calculations as to which must be complied with and which must not. We have, in other words, a sliding scale of hardness or softness in all norms.

That sliding scale serves very important policy purposes. A totalitarian system, as its name imports, seeks to regulate every facet of social process with prescriptions accompanied by severe sanctions. Liberal and democratic systems prescribe with restraint and severely sanction only those matters that are indispensable for the protection of public order. All other social orders, or social sectors, are not characterized by anormativity. That is an impossibility. As the Romans said, *ubi societas ibi jus*--wherever we have a social arrangement we have law. Rather, they are characterized by norms that are supported by relatively mild sanctions, softer norms, if you like. Viewed from this angle, variability of sanction is not pathological but an important tool for refined and nuanced sociolegal engineering. As we will see, many so-called soft international norms are actually intentionally and functionally soft. They would be unworkable were they made much harder. Distinctions between degrees of control intention and severity of sanction are extremely important for scholars and practitioners.

International law classically provides us with many examples of soft law. One may be found in the corpus of comity, or *comitas gentium* norms in the international system whose violation is not delictual, but is nonetheless seen as an unfriendly act. Violations of comity may serve as a way of communicating displeasure, and indicating the unwillingness of one state to accept the actions or demarches of another. All the actions traditionally grouped under retorsion are essentially norms of comity. They are soft, and yet they perform a very important function within the international system.

In some cases, drafters intentionally select a soft formula or achieve the same effect by adopting a soft means of enforcement. Consider international jurisdiction allocations in the Restatement. A formula that allocates the same competence to two competing states might be viewed as so soft as to be normatively meaningless. But if the allocation were made exclusively to one state or the other, the entire drafting exercise would be disrupted.

As a last example, consider trade agreements between advanced industrial democracies. Because domestic economic disruptions have an internal political dimension, prudent governments on both sides of the agreement are reluctant to lock themselves into binding arbitral or adjudicative dispute resolution mechanisms. All parties appreciate that disruptions that lead to unilateral departures from the agreement often are driven by powerful domestic forces. A hard dispute resolution mechanism will yield a hard answer, but the loser will repudiate it to the detriment of the rest of the agreement, other agreements, and possibly to the fabric of international trade. Soft dispute arrangements, then, are not pathological. They are not imperfect; they serve a purpose in this context.

The point was made with extraordinary clarity by Sir Joseph Gold in an article five years ago in the *American Journal of International Law*. Sir Joseph said that it is too easy to be condescending toward soft law. Soft law can overcome deadlocks in the relations of states that result from economic or political differences among them, when efforts at firmer solutions have been unavailing. A substantial amount of soft law can be attributed to differences in the economic structures and economic interests of developed, as opposed to developing, countries. Much soft law therefore is to be found in the law of universal international organizations, including the decisions of their organs. Sometimes, Sir Joseph says, soft law may be the only alternative to anarchy. And though I would disagree with him when he says that soft law has the capacity to become hard law, I disagree because it seems to me to be beside the point. Even if soft law does not harden up, soft law performs important functions, and, given the structure of the international system, we could barely operate without it.

Normativity varies in three other ways that complicate the discussion of what is now referred to as soft law. One phenomenon has to do with the confusion of promoting new law and actually making new law. Because international law for the most part is made in customary processes, the line between the agitation for new norms and when those new norms become accepted is extremely blurred. In some cases it is consciously blurred by us, when we go out of our way to present something that is in the process of becoming law as law. Political scientists recently have become interested in this whole prelegislation phase: the ways and the reasons why some vague, popular discomfort slowly takes a political vector and becomes an insistence on legislation. We have not done it in international law. If we did we might be able to identify some of the ambiguous uses of soft law.

Another manifestation of this phenomenon has to do with the prevalence of aspirational norms in contemporary international law. In many settings we have norms that are created with no intention of making them

effective. That does not mean that they are not legally important, or that they do not serve some purpose, but there is no question that they are not intended to be effective. No techniques for enforcement are established. These very soft norms often are used as a compromise. In the 19th century, they were referred to as *voeux* at conferences. We now put them in the ordinary legislative formula, which may become somewhat confusing, particularly when particular groups wish to rely on them.

In some cases, complementarity, built-in contradictions that make particular norms ineffective, is not accidental but is a consciously premeditated technique used by legislators. It was Rudolph von Jhering who was the first to observe that contradictory and incompatible legislation in a single political system is not an accident but is designed to accommodate incompatible and powerful political interests, by giving legal expression to each of the claims and transferring to the courts or other applicative agencies the competence to strike politically appropriate balances in each case. In this respect I would disagree respectfully with Professor Willem Riphagen who tends to view the proliferation of contradictory soft norms as an international legal system run amok. It is not very tidy, but it serves a very important homeostatic function.

Soft law can be found in many systems, but the phenomenon in international law seems to be increasing for a number of reasons. First, the elites who compose the politically relevant strata of the international system, for all their diversity, share a consuming interest in maintaining power. This becomes the basis for agreement. But the various elites of the international system respond to constituencies marked by radically diverse levels of development and aspiration. While elites may find it possible to reach private agreements among themselves that maximize their own interests, public lawmaking must promise the fulfillment of the unrequited popular demands. This factor may account for the proliferation of normative formulations that are produced in international fora, despite the fact that their proponents know well that there is no way of implementing them. This particular factor, accounting for the increase of soft law, is aggravated by the extraordinary gap between aspirations, many of them cynically cultivated by elites, and the possibilities for their realization. Limitations on the availability of resources for implementation mean that it is sometimes better just to spin out law as a way of creating a sort of surrogate or ersatz satisfaction.

The rapid growth of soft law and complaints about it are, in large part, a concern of the developed countries. Part of it has to do with the deep dissatisfaction that we feel at the shift of power within formal lawmaking arenas, in which we are a numerical minority. We discover that many of these fora make law we do not like. This law, we insist derisively, is soft. This may be a valid complaint, but those who are making this soft law also have a valid complaint. From their perspective, customary law, which we would consider very hard, is in fact law that is created primarily because of the great power that we in the industrial world exercise over others. There are really two sides to the controversy over soft law. It is important, when we criticize it, to appreciate that there are others on the other side of the mirror who are looking at it quite differently.

Despite all these criticisms, soft law does perform certain positive functions, in a world that is deeply divided. Thanks to soft law, we still have people channeling efforts toward law and toward trying to achieve objectives through the legal mechanism, rather than going ahead and doing it in other fashions. This, in itself, represents some reinforcement of the legal symbol and, at least, prevents or retards the use of violence to achieve aims. On the other hand, most of the law that is made this way cannot be fulfilled in any effective fashion, and this will have a long-term cost. Like Gresham's law in economics, bad law may drive out good law. The excessive use of soft law, which is dictated by certain compelling exigencies now, may ultimately weaken the entire international lawmaking system.

FOOTNOTES CHAPTER 5

¹ Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT'L L. 420, 422-25, 428-31 (1991). Copyright 1991. Reprinted by permission.

² Gunther Handl, *National Uses of Transboundary Air Resources: The International Entitlement Issue Reconsidered*, 26 NAT. RESOURCES. J. 405, 407-09 (1986). Copyright 1986. Reprinted by permission.

³ *A Hard Look at Soft Law*, 82 AM. SOC'Y INT'L L. PROC. 371-77 (1988) (remarks of Michael Reisman). Copyright 1988. Reprinted by permission.