RECENT TRENDS IN INTERNATIONAL LAW MAKING

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It is an honour to have been invited to give the opening substantive address at this conference. The subject is timely, important, intellectually challenging. My fellow speakers are among the best in the profession; and the audience seems ready to hear us out.

I have been asked to give an "overview". When you reach a certain age, you are asked for "overviews" or retrospects. Having been in or around international law-making for nearly half a century, I should presumably be able to detect its "recent trends". But identifying international law-making today is not as easy as it used to be.

The two principal categories – law-making treaties and general custom – have become entangled with each other and with a variety of normative declarations that do not fall into either category. "General principles of law" hitherto a modest source, viewed with some suspicion by positivists, has been increasingly invoked by scholars and, on occasion, by judges. Its close relative, equitable principles, has also been accorded a respectable place by tribunals, whether as *infra legem* or *praeter legem*. Apart from these, there are the multitude of international resolutions, recommended standards, memoranda of understandings, gentlemen's agreements, codes of conduct and parallel declarations all treated in varying degree as prescriptive – that is, as calling for compliance by the governments in question. Whether or not such texts are entitled to be regarded as international law or as some near-relative ("pre-law", soft law, law in *statu nascendi*, etc) has given rise to a considerable body of writing and a variety of views. However labelled, these international texts and instruments are part of, or closely related to the law-making processes. An "overview" of "recent trends in international law-making" cannot ignore them even if they do not fit comfortably into the categories of Article 38 "sources".

One safe conclusion about "recent trends" is that there is a proliferation of international rules and standards, whatever their precise legal status. They extend to virtually every field of human activity that transcends natural boundaries. International lawyers know, perhaps better than others, how difficult it is to keep reasonably cognizant of significant new law and its "soft" relatives. Whether hard or soft, the rules are applied in countless decisions of governments and by the numerous enterprises and individuals involved in transnational activity.

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A comprehensive overview of law-making trends would consider the sub-matter dealt with, the participants, processes of negotiation and adoption, normative intent, extent of acceptance and their relation to political and social ends. To attempt that would take me far beyond the limits of time and space - not to mention my personal limitations. My comments will be less systematic and somewhat impressionistic. They are presented under three headings (bearing in mind, the Conference theme of "consent").

1. Progressive codification
2. Outflanking the treaty rule
3. More about soft law

Progressive Codification

The UN Charter, as it emerged in San Francisco, contained a little noticed clause in Article 13.1(a). It imposed on the General Assembly a duty to "initiate studies and made recommendations for the purpose of ... encouraging the progressive development of international law and its codification". This provision, barely discussed in its origin, became the basis for a sustained UN effort to formulate a body of international law based both on customary law and the current needs of the international community. These two bases, summed up as "codification" and "progressive development", were seen as distinct in intent and function.[1]

Codification, of course, is not supposed to create new law, only to formulate in systematic and precise "codes" the rules derived from practice accepted as law. It is usually seen as "scientific", not political. The customary law is to be "ascertained" and "declared" by experts, even if the rules are thought to be unsatisfactory or obsolete.[2] On this premise, codifying is a form of restatement that could best be done by legal bodies. In contrast "progressive development" is in the final analysis a political act.

It soon became apparent in the early years of the United Nations that codification could not be solely restatement and that inevitably it would have novel and developmental elements. One reason for this is essentially structural. The formulation of a general rule based on precedents necessarily abstracts from the actual cases; it always applies to situations different in

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1 The Statute of the International Law Commission, Article 15 states that:

> "The expression 'progressive development of international law' is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression 'codification of international law' is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive state practice, precedent and doctrine."

some respects from the past cases.[3] As Julius Stone put it, "the conversion of *ius non scriptum* into *ius scriptum* must involve the certainty at the least of inadvertent law creation; and even the merely declaratory form of the project therefore raises questions of policy both as to the desirability and as to the contents of the codes".[4]

Moreover, State practice is often divergent and an aim of codification as Judge Charles De Visscher noted "is always to replace divergent practice with some unity in the interpretation and application of the law".[5] The codifiers – whoever they may be – generally find it necessary to fill in gaps and eliminate inconsistencies. They cannot ignore changes brought about by contemporary developments. Codifying therefore goes beyond recording and restating; it always has a creative role.

These facts were recognized by the legal advisers and scholars who established the framework for codification and progressive development in the United Nations. In response, they proposed a two–layer system. An elected expert body of international lawyers – the International Law Commission – would prepare studies, reports and draft "articles" together with a commentary. Those articles might then be incorporated in general multilateral conventions to be considered and, if acceptable, adopted by States. In that way, the "scientific" and "political" tasks would be joined. States would not be bound until they consented to the treaty. As an alternative to a convention, the Commission could simply recommend that the General Assembly take note of, or adopt, its report.[6]

This scheme has been in operation for nearly four decades. Though hardly noticed outside of the small circle of international lawyers, the codification system has produced some valuable results. Fourteen multilateral conventions have been concluded on the basis of the drafts produced by the International Law Commission. Pessimists (such as Julius Stone) who predicted that governments would use the codification process to undermine the authority of existing rules got that wrong. The major codifying conventions – notably, those on treaty law and on diplomatic and consular relations – have

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2 Hurst, "A Plea for the Codification of International Law on New Lines" (1946) 32 The Grotius Society 135–153.

3 Lauterpacht, "Codification and Development of International Law" (1955) 49 AJIL 16.

4 "The Vocation of the International Law Commission" (1957) 57 Col LR 16 at 18–19.

5 De Visscher C, *Theory and Reality in Public International Law* (Eng trans by Corbett PE, 1968), p 150.

6 The Soviet Union argued that codification should be carried out solely by multilateral conventions whereas the United States and the United Kingdom maintained that restatements would be more helpful, especially if they received approval of the UN General Assembly. The Statute of the Commission provided for both alternatives, as well as simply publishing the ILC report. See Briggs H, *The International Law Commission* (1965), pp 198–202.

strengthened the authority of international law. The conventions on the law of the sea of 1958 and of 1982 are in part the product of codification combined with development.[7] The main codification conventions were applied as existing law even before their entry into force; they have been accepted as law by non-parties as well as parties. Legal advisers of governments (and in private practice) no longer have to search through the uncertain and fragmentary body of precedents and diplomatic history in cases where the conventions have set out the rule. Thus the conventions accumulate authority; practice follows the treaty. To be sure, a specific treaty rule may be challenged by a non-party, claiming that it is not customary (as was done in the *North Sea* cases[8]) but this has been rare. The codification conventions on treaty and diplomatic law are as close as we can find to hard law for the international community as a whole.

Despite these achievements, questions are raised as to the value of the Commission's role at the present time. One question in this regard concerns the quality of the Commission as an expert body. In its earlier years, the Commission was composed largely of leading scholars in the field of international law. The authors of the major treatises were represented; nearly all members were recognised experts. This is no longer the case. Today a much enlarged body, the Commission is composed mainly of diplomats and officials, with very few generally recognised authorities.[9] The election process in the General Assembly has become more politicised. It appears that governments nominate candidates with little regard to their standing in the field. It must be said, however, that there are exceptions and most of the special rapporteurs have produced work of considerable merit.

A more basic question is raised by the assumption that the Commission's codification projects should be directed to the adoption of a general multilateral convention. The doubts that have been raised about this reflect in some degree the earlier scepticism about governmental codification. The experience over the years has lent some support to the argument made years ago by Julius Stone (and others) that the process of negotiating and bargaining in adopting conventions would lead to the "lowest common denominator" of law.[10] Critics of the process point out today that the objective of reaching

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7 With respect to the law of the sea conventions, the International Law Commission recognised that the distinction between codification and progressive development "can hardly be maintained". Several articles adopted by the Commission, based on a "recognised principle of international law" had been framed so that they properly fell under "progressive development". Yb ILC 1956, Vol II, p 277.

8 ICJ Rep 1969, p 3.

9 The Commission consists of 34 members, most in the diplomatic service of their governments. Some of the members attend few sessions.

10 See Stone above n 4.

consensus has resulted in vacuous or highly ambiguous provisions in the codifying conventions.[11]

Even in areas of well-recognised reciprocity such as treaty and diplomatic law, difficulties were encountered in reaching generally acceptable rules on some issues. Problems of conflicting interests become much harder to resolve on the basis of reciprocity in large conferences. Neither majority decisions nor consensus can overcome these difficulties. The result is that the conventions do not obtain the necessary ratifications or they are riddled with reservations and "understandings".

These difficulties are magnified by the continuing flow of new developments affecting every field of international law. No matter what the subject – whether it is general such as state responsibility or narrow such as the diplomatic bag – new technology, changing economic conditions, unexpected political shifts have an impact on the attitudes of governments. Under these conditions, attempts to fix legal rules for an indefinite future on the basis of precedents do not appear to be promising.

Does codification then have much of a future? Two of the most influential international lawyers of our time argue that it does. For example, the late Sir Gerald Fitzmaurice, a former judge of the International Court and member of the International Law Commission, and a long-term legal adviser to the British Foreign Office, wrote with (uncharacteristic) fervour that:[12]

"Codification is the one remedy that alone can anchor rules, internationally, in the firm bed of authority. The process is slow but it alone will avail and it could be considerably accelerated and enhanced. The instrument there is the shape of the International Law Commission – so constituted as to give expression to all the main currents of international legal opinion. The cry must be codification, more codification and yet more."

Writing more recently, Judge Roberto Ago, who was for many years one of the leading members of the International Law Commission and its first rapporteur on state responsibility, considered some of the current problems of codification.[13] He concluded that there is still much need and room ("un vaste horizon") for codification though it will probably change its form and methods.[14]

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11 Zemanek, "Codification of International Law: Salvation or Dead-End" in *Le droit international à l'heure de sa codification: Etudes en l'honneur de R Ago* (1987), vol I, p 581; Simma, "Consent: Strains in the Treaty System", in Macdonald R St J and Johnston D M (eds), *The Structure and Process of International Law* (1985), p 485 at 488–490.

12 "Enlargement of the Contentious Jurisdiction of the Court" in Gross L (ed), *The Future of the International Court of Justice* (1976), Vol 2, p 467.

13 "Nouvelles reflexions sur la codification du droit international" in Dinstein Y (ed), *International Law at a Time of Perplexity* (1989), p 1.

14 Ibid p 31.

An alternative model is suggested by the Commission's work on State Responsibility in which the special rapporteurs' studies, the Commission's reports and the proposed articles have now become the principal source of doctrine and of rules that can be invoked and applied as evidence of general customary law.[15] The Commission's work on International Water Courses and on "International Liability for Injurious Consequences Arising Out of Acts not Prohibited by International Law" are also likely to have substantial influence on official positions even if no convention is adopted. In these areas, the line between *lex lata* and *de lege ferenda* is often neither clear nor ascertainable because of the paucity of general practice. Other subjects taken up by the Commission involve more State practice but also reveal significant divergences. Statements by the rapporteurs and by the Commission as a whole attempt to resolve such divergences by reasoned analysis based on general principles, policies underlying practice and pragmatic considerations. Their reports and draft articles are likely to be relied on by governments and by their legal advisers when concrete controversies arise or when national legislation is under consideration.

This may be viewed as an intermediate stage between custom and codification in its full sense with the advantage (as Zemanek has suggested[16]) of helping governments gradually to conform their expectations and actions to the code. Even if the Commission's articles never attain treaty status, they achieve persuasive authority from the material presented in the reports and the agreement of the Commission. Much depends on the quality of this work, not simply as a register of past practice but as an adequate response to new conditions and felt needs. This involves, to borrow a phrase from De Visscher, a "tied reasoning"; it is not only a matter of "counting observed regularities but of weighing them in terms of social ends considered desirable".[17] In this sense, codification should be "progressive", that is responsive to contemporary needs and common interests.

The role of governmental consent in this process of law-making is obviously not as clearly defined as it is in treaty negotiation and acceptance. It is more diffuse and extended in time. During the stage of consideration by the Commission, some governmental views may be expressed by members of the Commission or reflected in their attitudes. The fact that the Commission members serve in a personal capacity (not as representatives of their States) does not inhibit their support of views taken by their governments. In many instances, such support is clearly expressed. Moreover, as many of the Commission members are officials of their governments, their designated

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15 References to the ILC articles and Commentary are often found in the memoranda and arguments submitted by legal counsel in international judicial and arbitral proceedings. I suspect that the legal opinions of legal advisers in government service also rely on the Commission's drafts.

16 Zemanek, above n 11 at 601.

17 De Visscher, above n 4 at 156–157.

status as individual experts is largely eclipsed by their governmental position. The great majority of governments not represented by members of the Commission may present their views through their representatives in the Legal Committee of the General Assembly or in written statements in response to inquiries from the Commission. These comments are part of the consensus-formation sought by the Commission. They are a means of obtaining governmental consent in the early stages of the codification process. However, during those stages the input of governmental comment is uneven and in many cases has little effect on the Commission's drafts. Governmental "consent" is expressed more effectively through the subsequent conduct of States and their expressions of their view of the law (ie *opinio juris*). At bottom, consent is manifested by State action over time. Such actions are the product of governmental decisions generally influenced by the relevant political and social factors.

Is this diffuse process of codification and development less desirable than the codifying treaties? The latter have obvious advantages. The treaty negotiation process provides an opportunity for all governments to take part in a common process and to express their consent in accordance with their constitutional processes. The treaty itself when in force carries more authority than drafts or reports of a commission. On the other hand, the treaty process may produce watered-down, equivocal law. The alternative process allows for Commission drafts to undergo the tests of time. It is a more malleable process in which particular cases can have a role in shaping a consensus. But unlike customary law pure and simple, the Commission drafts provide the systematisation and generalisation that gives coherence to the body of precedents. Moreover, their formation through extended discussion in a broadly representative forum helps to allay concerns over preferences to special interests.

The choice between treaty and non-treaty codes cannot be determined in the abstract. Which is preferable or feasible depends on the subject in the light of needs and attitudes. Both processes will continue to be utilised and we can safely anticipate that, in one form or another, "progressive codification" will continue.

Outflanking The Treaty Rule

The idea that a multilateral treaty may be obligatory for non-parties has not been limited to codification treaties. The principle, of course, is not that the treaty as such is binding but that the rules expressed in it are customary law, or perhaps in some cases, general principles accepted as law. The International Court of Justice in the *North Sea Continental Shelf* cases[18] laid down three conditions under which a treaty rule may be considered as customary law: namely,

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18 ICJ Rep 1969, p 3.

(i) where the treaty rule is declaratory of pre-existing customary law;

(ii) where the treaty rule is found to have crystalised customary law in process of formation; and

(iii) where the treaty rule has been found to have generated new customary law subsequent to its adoption.

The Court seems to have suggested still another ground in its 1986 Judgment in the *Nicaragua* case[19] in reference to the UN Charter rules on the use of force, Articles 2.4 and 51. The Court found that identical or similar rules were customary law that had developed "under the influence of the Charter to such an extent that a number of rules have acquired a status independent of it".[20] It also said:[21]

> "even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary law, those norms retain a separate existence."

The Court then stated that the identical rules may have different consequences *qua* treaty rules and *qua* customary rules. It referred to differences in the methods of interpretation and application but did not spell them out. One implication of this rather cryptic comment is that a treaty rule expressing the contractual obligations of the parties may be superseded or displaced by a customary rule mutually identical in content but interpreted and applied differently in cases where the treaty rule would not apply.

The distinction made between the development of custom under a rule similar or identical to the treaty rule (ie the Charter) and the interpretation of the treaty itself is especially difficult to comprehend where virtually all States are parties to the treaty (as in the case of the UN Charter). The Court did not say how it could tell when the practice by the UN members relative to the rules on the use of force became customary rather than treaty practice. Judge Jennings observed that the Court, being unable to apply the treaty as such (because of the US jurisdictional reservation relating to multilateral treaties), decided to apply the treaty in effect by calling it customary law.[22]

The Court's readiness to find customary law identical or similar to treaty rules is symptomatic of a wider tendency to do so in various areas of international law. To be sure, the principle is maintained that treaties as such cannot create obligations for non-parties. But, as Prosper Weil has put it, while that principle has not been "frontally assaulted", "it has been cunningly outflanked".[23] The "outflanking" has presumably been accomplished because

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19 ICJ Rep 1986, p 14.

20 Ibid, pp 96-97 (para 181).

21 Ibid, p 95 (para 178).

22 Ibid, p 532.

23 "Towards Relative Normativity in International Law" (1983) 77 AJIL 413 at 438.

of the ease by which "custom" or "general" international law is found to have been expressed or generated by a treaty provision.

A notable example is the position taken by the United States and other governments that the 1982 UN Convention on the Law of the Sea expresses customary law in large part (with the exception of provisions on seabed mining, dispute settlement and organisational matters).[24] This claim goes beyond the Convention's articles that embody long-accepted customary law; it extends to the recognisable new law adopted in the convention in regard to the width of the territorial sea, the exclusive economic zone and rights of passage through straits and archipelagic waters. The contention that those provisions have been generated and generally accepted during the gestation of the Convention has strong empirical support but only up to a point. That point is the underlying premise of the Convention as "a package deal" in which rights and obligations were interlinked. The Convention itself recognises the principle of interrelationship of the problems dealt with. In addition, many specific linkages were expressly or implicitly agreed by the drafters. We can readily see why many governments that are prepared to accept the Convention as a package (and series of packages) would resist attempts by non-party States to declare some provisions as custom, and claim their benefits, while rejecting other provisions.[25] An example would be a claim to rights of passage through archipelagic waters without accepting other rules such as the dispute settlement requirements.

Thus, while international law may appear to be expanded by selecting treaty provisions as "generally acceptable rules" and therefore customary law, that "expansion" may prove illusory when the States concerned demand the quid pro quo bargained for in the treaty process. In a real sense, the treaty process - whether multilateral or bilateral - may be weakened, not strengthened, when substantive treaty rules are transported into customary law on a selective basis, disregarding the mutual and reciprocal agreements that are part of the treaty as a whole.[26] A similar problem arises in regard to bilateral treaties when they are taken as evidence of custom on a selective basis, disregarding the mutual and reciprocal agreements that are part of the treaty as a whole. For example, bilateral agreements on foreign investment have been presented as authority for customary law in respect of standard provisions relating to the treatment of foreign business. However, the investment agreements are bargained-for arrangements between the governments involving mutual concessions. To characterise some provisions as customary law because they have become standard clauses without taking the other quid pro quo into account weakens the treaty process. Moreover, it does not truly

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24 *Restatement of Foreign Relations Law of the United States* (3d) (1987) Part V, Introductory Note.

25 Caminos and Molitor, "Progressive Development of International Law and the Package Deal" (1985) 79 AJIL 871.

conform to the requirement of customary law when it is a selective and partial use of the State practice in question.[27]

These doubts as to the wisdom of "outflanking" the treaty principle do not mean that I would exclude treaty negotiations and treaty clauses entirely from the material that may be pertinent as evidence of customary law. Treaty clauses of a declaratory character may evidence *opinio juris* and evidence of State practice may emerge in treaty negotiations or conferences (as was the case in the Law of the Sea Conferences).

The tendency to infer customary law from treaty provisions has been especially marked in regard to human rights treaties. It is probably true that many States, though not parties to the International Covenants or the other major human rights treaties against discrimination, actually comply to a considerable degree with the substantive provisions of those treaties. In consequence, the human rights treaties may be said to have generated new customary law based on those treaties. The Restatement of the Foreign Relations Law of the United States, unofficial but authoritative, has identified several customary human rights, basing its conclusion in part on the participation of States generally in the preparation and adoption of the international agreements on human rights.[28] Professor Meron has also asserted that "the repetition of certain norms in many human rights instruments is in itself an important articulation of state practice and may serve as evidence of customary international law".[29] He adds to this the "confirmation of the rights in national practice, primarily through the incorporation of the right in national laws".[30] On the basis of these indicators, Meron concludes that a considerable number of the civil and political rights in the Covenants are rules of customary law.

Supporters of human rights are naturally tempted to accept this conclusion. However, adequate evidence of compliance within many national States generally is not available, except in fragments. Nor do we have State practice manifested in the traditional form of claims and counter-claims against States for violations. On the international level, violations of human rights are brought up in international bodies which may adopt collective decisions on the charges made. A good case can be made for treating these actions as "State practice" coupled with *opinio juris* confirming a conviction that the human rights in question are part of general customary international law as well as treaty law. However, our experience to date would not justify concluding that all of the human rights Covenants have become customary law. Those that

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26 See Charney, "The United States and the Law of the Sea After UNCLOS" (1983) 46 Law and Contemporary Problems 37.

27 Schachter O, *International Law in Theory and Practice* (1985), p 324.

28 *Restatement*, above n 24, Section 701, Reporter's note 2.

29 Meron T, *Human Rights and Humanitarian Norms as Customary Law* (1989), p 92.

30 Ibid, p 94.

have a good claim are the rights that have been the subject of international condemnations expressed in strong and unqualified terms. These also tend to be rights that are generally respected and given effect in most national states. To conclude that they are now customary (or general) international law binding on non-parties as well as parties to the human rights treaties does not mean that the treaty principle has been "outflanked". It means rather that some of the treaty norms have influenced the perceptions of legality on the part of non-parties and that their behaviour and the collective decisions of international bodies are adequate evidence that the norms are now regarded as binding on all States.

This conclusion would apply more generally than human rights. A positive approach would take account of a strong expression by many States that a specific kind of conduct was internationally illegal and that a significant number acted on that conviction. Practice would be required but the necessity of "general and consistent practice" might be relaxed. In the *Nicaragua* case, the Court said practice was necessary to confirm *opinio juris* but it made no attempt to show generality and consistency of practice.[31] When practice is infrequent or inconsistent, a stronger showing of *opinio juris* should be necessary. Conversely, widespread and consistent practice would suffice to support claims of *opinio juris*, especially when they relate to matters recognised as governed by international law (for example, territorial limits, rights of passage, protection of nationals).[32]

This approach does open the way for judgments of "relative normativity": it acknowledges that international rules are not all equal. Some are more important than others because they express deeply-held and widely shared convictions as to the unacceptability of the prohibited conduct.[33] This holds for widely accepted humanitarian rules such as those against genocide, killing prisoners, torture, and aggression. Contrary and inconsistent practice would not and should not defeat their claims as customary law. In contrast a treaty adopted on the basis of reciprocity with rules that are mutually dependent on each other would not be considered as binding on non-parties. They are not meant to be abstracted from the treaty as a whole.

More On Soft Law

I turn now to an area of law-making that does not dare to speak its name: the production of norms that do not purport to be law. Such norms come in all shapes and sizes, under various appellations; declarations of principles, codes of conduct, standards of treatment, informal agreements, guidelines, interpretive understandings. They emanate from international bodies, ranging from the UN General Assembly and global conferences to small technical

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31 ICJ Rep 1986, p. 3 at 99-100 (para 188).

32 See Schachter, "Entangled Theory and Custom", in Dinstein above n 13, p 717 at 731-732.

33 Ibid, p 735.

bodies concerned with specialised matters. Regional bodies – large and small – are a prolific source of such texts; so are the large specialised agencies in the United Nations system. As might be expected, the prescriptions differ widely in their aims, formation and scope. Some are the product of many years of study and negotiation by governments; others are quick responses to political pressures. They vary greatly in their effects and in the measures of implementation.

Perhaps the only safe generalisation to make about such heterogeneous phenomena is that no generalisation can hold. To describe the general category, international lawyers have had recourse to metaphors. "Soft law" has been most common, though it may mislead. The French have been more inventive, suggesting "les normes sauvages", "para-droit", "per-droit", or "pré-droit".[34] Contemporary legal writing contains many general references to soft law and its relation to the sources listed in Article 38.1 of the Statute of the International Court.[35] However, there are not many empirical studies that have examined how and to what extent such non-binding precepts influence State behaviour in particular areas.

For the most part, governments and international lawyers have considered non-binding normative texts to be an appropriate, and often, welcome product of international negotiations and the deliberations of international collective bodies. Such texts have often filled a space between negotiated treaties and customary law. They responded to the need for standards resulting from the enormous increase in activities that transcend national borders. The multitude of new problems brought about by economic growth and technological developments as well as by the emergence of new States and other international actors gave rise to demands for new guides to State conduct. Multilateral treaties meet this demand in part only; they require hard and fast commitment (as well as lengthy negotiation) that many governments are not ready to undertake. It is an easier process to supply the normative products through the quasi-parliamentary procedures and majority voting. Governments could vote for them on the comforting assumption that their non-obligatory character left compliance entirely to governmental discretion. Their "consent" in such cases was quite different from "consent" to a treaty.

However, a sharp change in attitude occurred in the nineteen-seventies. The normative resolutions, albeit non-obligatory, no longer appeared to be safe. A leading international lawyer, Professor (now Judge) Robert Jennings expressed this concern dramatically in an address to the International Law

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34 See generally Nguyen QD, Daillier P, and Pellet A, *Droit International Public* 3rd ed (1987).

35 See, for example, Seidl-Hohenveldern, "International Economic Soft Law" (1979) 163 HR 169; Virally, "A propos de la lex ferenda" in *Mélanges pour P Reuter* (1981), p 519; Baxter, "International Law in Her Infinite Variety" (1980) 29 ICLQ 549; Bothe, "Legal and Non-Legal Norms" (1980) 11 Neth YBIntL 65.

Association in 1976.[36] He warned of the danger that international law would be "submerged under the rival empires of paper emanating from international assemblies".[37] This comment found an approving audience among many European and North American international lawyers. They, too, perceived the "rival empires" as threatening established law.

To understand this change in attitude (and it was a change), one must consider the historical circumstances. It is clear that the apprehension voiced by Jennings was caused by the several resolutions and declarations adopted in the UN General Assembly under the rubric of a New International Economic Order.[38] Particular legal concerns centered on the Charter of Economic Rights and Duties of States[39] and on several resolutions defining "Permanent Sovereignty over National Resources" which were framed in terms of rights and obligations.[40] These were perceived by governments of the major industrial countries as efforts to create new international law rules and to subvert established principles that protected foreign investment and free enterprise.[41] Whether the texts were in fact subversive of existing law has been debated; it need not be discussed here. But there can be no doubt that the actions of the majority in the United Nations were directed in a broad way toward a transfer of economic wealth to the poorer (or "developing") countries.[42] To seek to accomplish this objective by majority vote over the strong objections of the States that had effective power predictably aroused apprehension in those countries. Today a different climate prevails, one in which it seems to be generally recognised that declarations of rights and obligations on economic matters are not likely to have practical effect unless they are accepted by States that have the resources required. "Soft law" at least in these matters faces a stiffer requirement. The apparent trend in regard to international economic matters is that the concurrence of governments with economic power and resources will have decisive importance in the formation and adoption of "soft law".

This probability does not mean that majorities in the UN or other international bodies will entirely forego using their voting power to attain their ends. We can expect that new standards and other prescriptions will continue to be adopted even though some powerful states will object. I see this (pace

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36 "The Discipline of International Law" (1976), McNair Lecture in *Report of 57th Conference of the ILA*, p 622.

37 Ibid, p 632.

38 UNGA Res 3201 (ES VI) (1974).

39 UNGA Res 3281 (XXIX) (1974).

40 For example UNGA Res 523 (VI), (1952); UNGA Res 1803 (XVII),(1962). See Schachter O, *Sharing the World's Resources* (1977), p 125; Hossain K (ed), *Legal Aspects of the New International Economic Order* (1980).

41 See, for example, Brower and Tepe, "The Charter of Economic Rights and Duties of States" (1975) 9 Int Lawyer 295.

42 See Schachter, above n 40, pp 105–114.

Jennings) not as submerging international law but as steps toward replenishing international law by identifying new needs and objectives.[43] The guidelines of conduct, expressed "softly", may in time receive the full imprimatur of international law. Such classic "soft law" instruments as the Stockholm Declaration on the Environment and the General Assembly Declaration in the Definition of Aggression exemplify this potential development.

While hopeful about such developments, I share the concern of many observers about a tendency of some international bodies to "cheapen the currency" of their resolutions. The adoption of principles that are vague and mushy – or even self-contradictory – dilutes their normative significance. This has rightly been perceived as an unfortunate tendency of some UN bodies. Critical scrutiny of proposals is too often abandoned for fear of offending a political grouping or of appearing to be "reactionary".

Such resolutions may simply fade away for lack of credibility but they may in some cases add incoherence and confusion to the interpretation of existing law. Philip Alston's trenchant article calling for greater "quality control" in respect of human rights resolutions is very much in point.[44] It applies to other areas as well as to human rights.

A hopeful trend is that governments in international organs are no longer content to treat prescriptive norms as if they were self-executing. Implementation and accountability are now regarded as essential elements of normative declarations, whether soft or hard law. Reporting, monitoring, transparency are emphasised by governments and international organisations. This indicates that institutional implementation rather than eventual customary law is the significant practical outcome of the non-binding normative resolutions. Governmental conduct is more likely to be influenced by the implementation procedures than by the claim that the norm has become customary law. The latter claim may assume some importance in a case before the International Court or another tribunal; but, outside of litigation, it would be very marginal to a government's decision on whether it should comply with a resolution of a non-binding character.

It is often overlooked by international lawyers that much of the standard-setting and implementation by international bodies takes place in highly specialised technical fields. In these cases, the consent of States occurs through participation and collaboration rather than through formal consensual procedures of adherence. Moreover, experts, not diplomats, generally act for governments. The experts usually are part of an international professional community. I believe this holds for the great majority of specialised subjects – from, say, aviation through zoology – that are being dealt with on the

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43 See Pellet, "Le bon droit et l'ivraie" in *Mélanges Chaumont* (1984), p 465 at 480–493.

44 "Conjuring Up New Human Rights: A Proposal for Quality Control" (1984) 78 AJIL 607; see also, "Making Space for New Human Rights: The Case of the Right to Development" (1988) 1 Harv HRYb 3.

international level. The requirement of State consent in these cases may be "outflanked" by the collaboration of experts.

Conclusion

This account of trends in international law-making is far from complete. The situations it discusses show some of the complexities in applying the apparent requirement of State consent to the diversity of "international legislation" now proliferating. The paradigmatic model, exemplified by the multinational treaty process, has only a slight bearing on the formation and acceptance of new law (hard and soft) in the situations discussed. The governments of States, of course, are nominally the principal participants in the process but they are not monolithic nor always completely in control. The international world is too pluralistic, too kaleidoscopic for that. The demands for new norms and rules now extends over a broad range of human activity, far more than envisaged when the United Nations was created. That demand is being met largely through international institutions and transnational communities. New legal techniques and methods of implementation are coming into use. International lawyers have only begun to study these; they have an opportunity to make a valuable contribution by empirical studies and policy analysis grounded in realistic assessments. A vast horizon invites exploration.