Symbols and ideas – rules, guidelines and international law

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This paper provides a new understanding of the use and usefulness of terms like "law", "rule", and "control" by a consideration of areas of activity in which international law has a principal role.

> It is indeed as a means to control, to guide and to plan the life of the nations out of court, in the processes of international economic development . . . , in the means of co-operating and communicating on the seas, in the air and in the as yet unappropriated dimensions of outer space, in common efforts to rescue humanity from ruin through unlimited and uncontrolled breeding or the rapacious use of the resources of the earth, in the gradual approximation of international labour and health standards, that international law is beginning to exercise its principal function.[1]

A cursory review of activity in the international relations arena during this last half of the twentieth century confirms that these are indeed the areas into which unprecedented energy and urgency have been directed. However the role of international law as the suggested means of control, guidance and planning demands further thought. If it is accepted that this is a principal[2] function of international law what does it say of its nature? To define international law by reference simply to what it does — a control, guidance and planning mechanism in the life of nations — tells nothing of the nature of the controls.

If the subject were to be illuminated by the beams of light cast by traditional definitions of law, and in particular of international law, the intersection would indeed be small. The light emanating from the nineteenth century lamp of Austin[3] would brighten only those controls in the nature of commands backed by coercive threats. Other beams would illuminate only those rules to which states had

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1 Friedmann *The Changing Structure of International Law* (Columbia University Press, New York, 1964), 94.

2 That it is a principal function is not to suggest that it is the sole function. Friedmann himself draws the distinction between an international law of coexistence and an international law of cooperation: Friedmann op.cit. n.1, 60-63.

3 Austin *Lectures on Jurisprudence* (5th ed., Murray, London, 1885).

consented to be bound[4] or those which a court would apply in determining a legal dispute.[5] Alternatively, the search for a single objective definition hight, as Glanville Williams suggests,[6] be abandoned and law treated as being simply a symbol for an idea, the idea varying with the person who uses the word.

It is not intended to proceed on the basis of settled, arbitrary definitions for terms such as law, rule, control or guide. Rather, the purpose of this paper is to attempt, through a discussion of the activity occurring in some of the areas where Professor Friedmann sees a principal role for international law, to understand better the use and usefulness of these terms. Part I of this paper deals with key variables, namely the forms in which the activity manifests itself, the nature of its content and the procedures for its implementation and follow up. Parts II and III focus on the reasons behind, and the effects of, the various permutations of form, content and procedure. The conclusion then returns to the larger themes touched on above, and asks whether the result is law, and if so (or for that matter if not), what does this suggest about law in the international arena?

I. SETTING THE SCENE — SOME VARIABLES

A. Form

Donne observed that no man is an island.[7] With a pun unintended the same can be said of states. As entities functioning within the confines of what has been aptly described as a planetary spacecraft[8] the realities of international life demand a certain amount of interaction. That the volume of this interaction has mushroomed reflects the increase in economic interdependence among a numerically enlarged community of nations, the common and competitive use of global resources on a scale hitherto impossible, and the general expansion of perception to matters global.

The concern here is with the formalised product of this interaction, or more precisely, with the nature of the form in which it is embodied. Given that international interaction manifests itself on a variety of levels through diverse and numerous intergovernmental and non-governmental agencies, as well as through

4 "The great majority of contemporary international lawyers have taken the sense of obligation as the crucial test of the 'reality' of international law. The general legal philosophy underlying this approach is that obedience to law does not necessarily rest upon either command or the threat of sanction but on the acceptance of a norm as binding." Friedmann op.cit. n.1, 85.

5 Lauterpacht *The Development of International Law by the International Court* (Stevens, London, 1958), 21; Ross *A Text-Book of International Law* (Longmans, London, 1947), 80.

6 Williams "International Law and the Controversy Concerning the Word 'Law'" (1945) 22 Brit. Year Book Int. L., 146-147.

7 "No man is an Iland, intire of itselfe; every man is a peece of the Continent..." John Donne *Devotions Upon Emergent Occasions* (1624) 17.

8 "We travel together, passengers on a little space ship, dependent on its vulnerable reserves of air and soil, all committed for our safety to its security and peace ...". Adlai Stevenson, quoted in *Proceedings of the Conference on International and Interstate Regulation of Water Pollution* (Columbia University, New York, 1970), iii.

traditional diplomatic channels, a corresponding diversity of form should be anticipated.

Traditionally, those forms that have attracted the tag "legal" have fallen into fairly well-defined categories. Domestically, primary and subordinate legislation are easily recognisable. At the international level, treaty and custom have perhaps the highest profile. The question of what other forms might also be accorded the status of law depends, as earlier indicated, on what is meant by law. If, for example, a definition is taken of law as the body of authoritative materials on which judicial decisions are based,[9] legal form will be ". . . the literary shapes, official or otherwise, in which the authoritative materials are to be found."[10] In this sense an enquiry into forms is an enquiry into sources[11] and the question might be restated — are the sources of international law exhaustively defined in article 38 of the Statute of the International Court of Justice? Any answer must wait until after the discussion in this paper of the effects of form. All that is presently sought is to highlight the existence of alternative forms, particularly those that have frequently resulted from international dialogue in the areas to which Professor Friedmann refers.

Logically first, perhaps, is the unilateral declaration of a single state. While it might seem more like international monologue than dialogue it clearly has an international aspect in its being directed or addressed to the international community as a whole, or to identified states within that community. It is accepted here as a product of interaction, deserving of the *inter* prefix, for the simple reason that international actions and declarations do not exist in a vacuum. They are the product of things that have gone before and the catalyst for things yet to come.

More readily recognised as the product of dialogue are the joint declarations which flow from some structured meeting of international actors, generally the conference forum and frequently held under the auspices of one of the multitude of agencies noted above. Examples are provided by the so-called Final Act adopted by thirty-five nations following the 1975 Helsinki Conference on Security and Co-operation in Europe (C.S.C.E.)[12] and the Guidelines for Multinational Enterprises formulated under the umbrella of the Organisation for Economic Co-operation and Development (OECD) but adopted as a joint declaration by member states outside that framework.[13]

9 Pound "Hierarchy of Sources and Forms in Different Systems of Law" (1933) 7 Tul.L.Rev. No. 4, 475-476.

10 Ibid., 478.

11 Pound, idem, defines three senses in which "sources of law" is used;

1. . . . the organ of politically organised society from which the authoratative materials proceed or by which they are given . . . .
2. . . . the moulding influences which have given those materials form and content.
3. . . . the literary shapes . . . in which the authoratative materials are to be found.

It is this last sense which equates with the definition of form referred to in this paper.

12 (1975) 14 International Legal Materials, 1292.

13 See Baade "The Legal Effects of Codes of Conduct" in *Legal Problems of Codes of Conduct for Multinational Enterprises* (Horn ed., Kluwer-Deventer, The Netherlands, 1980), 19. A convenient text of the guidelines located at 454-461.

A variant on the above is where an organ of an international organisation adopts a declaration by resolution, essentially by obtaining the requisite number of votes from constituent members. Given the wide membership of the United Nations, and the regular sessions of its General Assembly, that forum has been a particularly prolific source of such forms.

One final form that warrants singling out is the instrument embodying the draft or negotiating text preparatory to the formulation of a treaty. Where, as in the law of the sea context, the conclusion of a treaty instrument is a long time coming, the draft text cannot be discounted. That it is the interim product of ongoing interaction is surely no disqualification. How many forms can claim to contain the last word on the subject matter they deal with?

Clearly the above forms are not exhaustive of the possibilities, and they have not been exhaustively defined in terms of the possibilities within each grouping. They represent, however, the alternatives to traditional legal forms most evident in recent times — alternatives which are suggestive of law but whose uncertain value and judicial effect have, in the terminology of some, led to the cautionary qualification of "soft".[14]

B. Content

The second variable on which to focus is the nature, as distinct from the substance, of the content in these formalised products of international dialogue, that is, the way in which this content is expressed. There are two main distinctions.

The first is between imperative and recommendatory language with an obvious example being the use of "shoulds" or "shalls". The distinction can be described simply on the basis of common understanding and ordinary recognition of language that "requires" and language that "suggests", together with language the connotations of which fall somewhere between the two.

The second distinction can be drawn in relation to the specificity or generality of the content. This degree of abstractness is clearly a continuum between uncertain extremes. In his 1972 lectures to the Hague Academy, Professor Arangio-Ruiz saw this continuum as one involving quantitative differences only.[15] Speaking in relation to legal rules he referred to this difference as concerning only " . . . the number of legal relationships — or of obligation-right relationships — envisaged by the rule."[16] An individual, concrete rule might therefore concern only one legal relationship while an abstract or general rule may envisage a virtually infinite number.

Professor Arangio-Ruiz obviously considered that the legal character of the rules and indeed the suitability of the term "rule" was conferred by a variable other

14 Dupuy "Declaratory Law and Programmatory Law: From Revolutionary Custom to 'Soft Law'" in *Declarations on Principles* (Akkerman, Van Krieken, Pannenborg eds., Sijthoff, Leyden, 1977), 247-248.

15 Arangio-Ruiz "The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations" in (1974) 137 Recueil Des Cours, 724.

16 Idem.

than the abstractness of content. These initial issues raise the question whether there is not, as well as the quantitative element of our abstractness continuum, the possibility of a qualitative transition. At some level of generality a provision's nature as a rule, its designation as "legal", or indeed its legal significance if so designated, might alter.

When considering a content variable alongside a form variable a number of observations suggest themselves. Clearly content distinctions run across, as readily as with, the grain of the form variable. Traditional legal forms do not hold a monopoly on concrete and imperative language. Similarly, the so-called soft-law forms are not restricted to a soft content; to an exhortation solely of abstract principle. In addition, within any one example of formalised dialogue the content need not be consistent in terms of imperative or recommendatory language and abstractness of expression. This feature has led one author to refer to the aforementioned OECD Guidelines as a "zebra declaration" in recognition of the variable quality and effect of particular provisions.[17] Seidl-Hohenvelden uses the physical imagery of law as soft or hard with respect to these content variations.

Each provision is a unique blend of language. Just as there is a variety of terms or phrases possible to express imperative or recommendatory sentiments, so too the abstractness or generality of a provision can take different forms. The use of vague criteria such as reasonable measures or substantial damage can be contrasted with generality that springs from a provision's scope of application. Consider article 2(3) of the Charter of the United Nations which exhorts peaceful settlement of all international disputes between all members of that large organisation. Distinctions such as those suggested above will therefore need to be considered carefully as there will indeed be differences within differences.

C. Procedures for Implementation and Follow-up

To complete the scene-setting a third factor can be introduced into the combination. The question is — in what way have the parties provided for the attainment of any objectives contained in their expression of agreement? This will entail questions of how a provision is initially implemented and of how compliance or non-compliance, attainment or non-attainment is later policed. In short, the concern is with the measures that attempt to make the formalised dialogue effective.

One distinction, for our purposes, is the possibility of implementation and follow-up on either national or international levels. This is not to suggest that all provisions will require some positive action on one or other level. The expression of the subject-matter in a particular form may indeed achieve the object sought and therefore be sufficient implementation of itself. If, for example, a provision were formulated as a traditional legal norm prescribing certain international conduct of international actors, its simple expression may be sufficient to ensure the applicability of established follow-up mechanisms such as sanctions, the imposition of judicial remedies, with perhaps the back-up of article 94 of the Charter.

17 Baade op.cit n.13, 20.

Implementation at the international level need not, however, be limited to existing international machinery. In the numerous conservation regimes governing the use of maritime resources formulations frequently have a constitutional function. A secretariat or commission is established with the task of giving effect to the objectives of the particular regime. The variety of follow-up mechanisms that might commonly be available include; the collection and publication of information gathered perhaps through compulsory reporting, the registration of activities, or the operation of an observer system; the ability to draw non-compliance to the attention of the offender and his peers; and a role in the resolution of disputes between participant states, which might involve anything from the provision of facilities for the parties to work out their own solutions to the exercise of quasi-judicial functions.

It may be that the domestic institutional machinery of participant states is sought for these policing or administrative functions. In these cases international implementation will be effective only where this results in its automatic application to the domestic sphere. It is relevant in this regard that article 25 of the Constitution of the Federal Republic of Germany deems "general principles of law" to be part of federal law and clause two of article VI of the United States Constitution, provides mutually agreed conference facilities for inter-party consultation. The

Failing such automatic transition, specific national implementation may result from a simple legislative reference giving the provision force of law. In New Zealand this can be seen in the Carriage by Air Act 1967 in relation to certain international conventions unifying international air carriage rules.[18] Alternatively, domestic action might be taken to give effect to agreed provisions but in a manner that best meets the state's own interests. For example, article 47(1) of the Code of Conduct for Liner Conferences 1974 introduces this latitude in the manner of domestic implementation by requiring that "[e]ach Contracting Party shall take such legislative or other measures as may be necessary to implement the present Convention."[19]

Often national and international implementation form a complimentary means of rendering the dialogue effective. At a simple level it may be that an international supervisory body needs domestic recognition in order to function properly within the territories of the various participants.[20] A more comprehensive example of dual implementation and follow-up is provided by the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.[21] For the national arena this UNCTAD Code enjoins states to adopt, improve and enforce legislation and to improve domestic procedures for information gathering, while ensuring appropriate safeguards where legitimate business secrets are involved.

18 By s.7 the provisions of the Warsaw Convention and Guadalajara Convention, set out in full in schedules to the Act, have force of law in New Zealand.

19 (1974) 13 International Legal Materials 912, 940.

20 So, for example, participant states in the recent Convention on the Conservation of Antarctic Marine Living Resources are required by art. VIII to accord the Commission established by the Convention "... such legal capacity as may be necessary to perform its function and achieve the purposes of this convention" in their respective territories; (1980) 19 International Legal Materials, 841, 846.

At the international level a supervisory role is retained for UNCTAD which receives reports from participant states, publishes its own annual report, and provides mutually agreed conferences facilities for inter-party consultation. The necessary institutional machinery is found in the establishment of an Intergovernmental Group of Experts on Restrictive Business Practices within the UNCTAD framework.

II. REASONS BEHIND A FORM, CONTENT AND PROCEDURE CHOICE

An initial reason for a form, content and procedure choice is hinted at in the very format of this discussion. A consideration of reasons in advance of a discussion of effects recognises a chronology of events whereby the speculated effect of a given combination is itself an important reason for its adoption. The more important adherence to the specified conduct or attainment of the specified goal is seen to be, the more likely a combination is sought the perceived effect of which will be to ensure such compliance or attainment. Perhaps as a product of domestic conditioning some states might bring their own particular viewpoint to the fold of traditional legal rules.[22] Those that do not share that viewpoint will lobby for alternative combinations and perhaps even find it necessary to withdraw from the dialogue or refuse its formalisation.

This is the important ingredient of perceived self-interest that finds its justification in the concept of sovereignty. Altruistic expressions favouring the greater good over national self-interest may be roughly said to feature in the various combinations in inverse proportion to the actual compromise to self-interest predicted in the effect of any particular combination. The sceptic might therefore agree with the comment that the acceptance of some options is no more than an "*. . . acquiescence but delay strategy.*"[23] However, the very fact that interaction occurs at all and concerning subject-matter of undoubted national importance suggests at least that dialogue cannot be avoided. It may even suggest a recognition that self-interest is ultimately best served by the attainment of the greater good.

Yet drawing conclusions on the political motivations behind particular choices requires some caution. The C.S.C.E. Final Act adopted at Helsinki, with its exhortations of compliance with international law, the promotion of human rights and the advancement of cultural and educational objectives, provides an illustration. It is hard to imagine how any of the principles might be thought of as contrary to the national interests of the United States, a primary force behind ensuring that no binding obligations flowed from the formulation. However, one of the principal United States negotiators at the Conference subsequently pointed out that the non-legally binding character was promoted by the United States partly through a fear that the public euphoria that might follow the conclusion of a more legal

21 U.N. Doc. TD/RBP/Conf./10 (1980).

22 See, for example, Chile's proposal for strict and binding rules to regulate transnational corporations in Transnational Corporations: Views and Proposals of States on a Code of Conduct, U.N. Doc. E/C 10/19 of 30 December 1976, para. 9.

23 Ries "The 'New International Economic Order': The Skeptics' Views" in *The New International Economic Order, Confrontation or Cooperation between North and South?* (Sauvant & Hasenpflug eds., Westview Press, Boulder, 1977), 79.

option would increase pressure on it to pull out of Western Europe.[24] The declaration was thus ". . . a political statement, negotiated largely by diplomats and not by lawyers, to fulfil political and not legal objectives."[25]

Personnel would therefore seem to provide yet a further reason. The growth of interaction has its necessary parallel in the increasing number of different national actors representing a state internationally and in the diversity of forums in which the interaction is taking place. Of personnel the difference between lawyers promoting legal ends and diplomats promoting political ends has been made above. Their capacity as representatives, or terms of reference, provides a further factor. The constitutional authority to enter into certain combinations, particularly those traditionally accepted as legally binding, may be the preserve of certain representatives only.

The possibility has also been suggested[26] that the legal tradition of the actor may influence the choice of combination. A simplistic expression of this might suggest that those with a common law background tend to place their faith in concrete arrangements, while their civil law counterparts may be more at ease with general principle, deductively applied in subsequent specific situations.

The forum in which the interaction takes place has also been seen as influencing the formalised outcome. An important factor in the outcome of the Helsinki Conference, the C.S.C.E. Final Act, can be traced to the conference Rules of Procedure which required all formulations to be reached by consensus.[27] In the General Assembly, where most decisions can be taken by a simple majority and each member is accorded equal voting rights,[28] the enlargement of the international community has transformed this forum into a platform for the developing nations. Their demands and challenges to the existing order can, in theory, be expressed as specifically and imperatively as they desire.

A hybrid of the personnel and forum contingencies is discussed by Piper.[29] Focussing on the pre-Assembly origins of an Assembly resolution he distinguishes between those resolutions originated by legal experts and committees, such as the International Law Commission or the Sixth (Legal) Committee, which it was thought might reflect more careful legal analysis, and those that come to the Assembly via non-legally oriented bodies where the articulation of policy, whether political, economic, social etc., might overshadow legal alternatives.

24 Russell "The Helsinki Declaration: Brobdingnag or Lilliput?" (1976) 70 Am.J.Int.L., 242.

25 Ibid., 248.

26 Idem. But before placing undue importance on a contingency of this nature consider the stances taken by the United States and France in the *Air Services* arbitration, infra n.71, the former espousing general principle to fill gaps in their bi-lateral agreement, the latter looking no further than the lack of an express rule.

27 Consensus here meaning the absence of any objection expressed by a representative and submitted by him as constituting an obstacle to the taking of the decision in question; C.S.C.E. Rules of Procedure para. 4.

28 Charter of the United Nations, art. 18(1). But note art. 18(2) which requires a two-thirds majority for "important Questions".

29 Piper "On Changing or Rejecting the International Legal Order" 12 Int. Law. 293, 296-297.

This recognises that different combinations can be the legitimate result of fulfilling different functions and objectives. The discussion in this paper of accommodating the perceived self interests of participants tended to suggest that one of the main reasons for resorting to soft options was to find a compromise, albeit second best, that would attract the widest acceptance. Implicit is the feeling that the hardest option, that which leaves least room for manoeuvring, is the ideal and would, in a situation of total co-operation and unity of purpose, be selected. It may be open to question whether in such a utopian setting anything need be selected.

Yet the importance of a compromise function is not to be lightly dismissed. The provision of middle ground that lets dialogue continue and allows states to emerge from corners into which they back themselves is valuable indeed. But does a compromise function provide the only justification for less than hard options? Flexibility is often touted as a positive attribute of soft options. At a time when great complexity and constant change are equally descriptive of international society, flexibility would indeed seem a plus. Even at a time when this pace and complexity could be regarded as slightly more civilized, the Permanent Court of International Justice was quick to champion the notion that international relations demand flexibility.[30] Yet it would be as well to identify the possible senses in which soft arrangements might be said to be flexible.

1. The transitory advantages of form

The ability to meet change may be achieved by the adoption of a form that allows for easy amendment. When the substantive content of the present form becomes obsolete the flexible form is one that can be superseded or altered with the least difficulty. Thus an agreemnt between Iran and Afghanistan concerning the Helmand River Delta Commission was contained in the minutes to the meeting at which the agreement was reached. Such a solution was later said to be;[31]

> . . . an example of successful employment of an informal method of recording an agreement, in force without delay yet so flexible that the parties can at any time amend or even supplant the agreement by subsequent agreed minutes to that effect.

The capacity for avoiding delay could indeed be another flexibility attribute. When complex matters are on the dialogue agenda it may be that final, detailed arrangements cannot be formulated without some initial progress, some trial and error activity, testing the ground and illuminating the path. In essence, some initial formulation ". . . sufficient to allow the desired work to proceed and to bear fruit."[32]

In the development of a new international economic system the desire for flexibility in this sense is echoed in the comment that "[t]he system must be designed

30 " . . . it would be incompatible with the flexibility which should characterise international relations to require the two Governments to reopen a discussion which has in fact already taken place . . . " *Mavrommatatis Palestine Concessions* P.C.I.J. Ser.A, No.2, 15.

31 Management of International Water Resources: Institutional and Legal Aspects U.N. Doc. ST/ESA/5, (1975), 32 para. 87.

32 Ibid., 31 para. 83.

to allow short term reversible experimentation . . . ".[33] What is gained is the identification of problems and the ability to test untested solutions. From a compromise viewpoint the spinoff is that "[s]ome demonstrable progress with tangible benefits may, indeed, be precisely wnat [a reluctant state] needs to snow in order to generate the national willingness to enter into more formal arrangements and commitments."[34]

2. *Attributes of an abstract content*

There is clearly an element of flexibility inherent in the abstractness of a particular provision. Generality widens the scope of actors and actions governed. From a logistics viewpoint one might therefore agree with the comment;[35]

> . . . in any political system with many actors stability can be better preserved by general rules, influencing the pattern of behaviour of the whole system, rather than trying to manage or control every one of the many actors and situations.

The flexibility lies in the ability to deal with variations of activities perhaps not initially contemplated by actors perhaps not previously existing. Can a flexibility which may offend the domestic law touchstone of certainty be justified? A positive answer, it is submitted, stems from the comments of Professor Friedmann with which this paper began. The present day focus of international law is, to borrow from industrial relations terminology, increasingly on disputes of interest rather than right.[36] International delinquency, the drawing of lines between right and wrong, is being overshadowed by the need for co-operative adjustment and common improvement among states competing for limited resources. This shift in focus is reflected in the International Court being more frequently presented with disputes requiring an application of distributive, rather than remedial, justice.[37] The import of such an alteration to the objective or function of the formalised dialogue is that it might logically be reflected in the chosen combination by which it is expressed.

What is being suggested is, first, a focus on positive standards in place of prohibitory norms. As the then President of the United States, Richard Nixon, said in 1970 of the environmental debate, "[t]he fight against pollution . . . is not a search for villains."[38] Such an endeavour does not suit the drawing of hard and fast measures. Improvement is an on-going process without upper limit. Often it is an end result that is most important with the means to that end suitably left to individual states. Frequently, effective means of achieving the desired end will still be in the development stages. Here it will be undesirable, if not impossible, to stipulate required action too specifically. Retaining freedom of action can therefore

33 Jackson "International Economic Problems and their Management in the 21st Century" (1979) 9 Ga.J. Int. & Comp. L. 497, 501.

34 Supra n.31, 31 para. 83.

35 Mates "Peaceful Coexistence in a Changing and Multinodal World" in *Declarations on Principles* op.cit. n.14, 31.

36 Essentially, a dispute of rights involves the interpretation of existing relationships, the status quo, while a dispute of interest concerns the renegotiation of the relationship, an attempt to change the status quo.

37 ". . . questions of *establishing* a *system* or *régime* of equitable allocation of resources engage elements of distributive justice; on the other hand *disturbances* to the system fall under the province of corrective justice." *Fisheries Jurisdiction (United Kingdom* v. *Iceland)* [1974] I.C.J. Rep. 71, separate opinion of Judge Dillard.

38 *New York Times,* New York, U.S.A. 10 February 1970.

be seen as in some way satisfying both sides of the everpresent sovereignty effectiveness tension.[39]

Secondly, there is the increasing recognition of concurrent, rather than exclusive, rights. Finding a balance between the former is a different operation from drawing a line that delimits the existence, or not, of the latter. Thus in the dispute over Icelandic fisheries, that eventually found its way to the International Court,[40] the preferential rights of Iceland were recognised as existing alongside the historic rights of the United Kingdom and each of these competing rights were to be balanced not only with the other but together with a third input, the conservation interest.

Similarly the problem of transboundary air pollution is not solved by the simple assertion that the polluting state has an absolute right of action within its own territory.[41] There is the interest of neighbouring states in being free from the effects of extra-territorially inflicted harm to their environment. This conflict was clearly recognised in principle 21 of the Stockholm Declaration on the Human Environment where both ". . . the sovereign right to exploit their own resources pursuant to their own environmental policies . . ." and the ". . . responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States . . .", stand side by side.[42] A distributive regime would seem to be required here just as it is often required in the negotiation of maritime zone delimitation between neighbouring states.

Not only does the elaboration of a distributive regime require that these concurrent rights be balanced, but also that this be done with the knowledge that the next instant in time may see the circumstances change such that the balance is upset. The need for flexibility is apparent.

One answer is to establish some kind of superstructure that can guide the formation of concrete regimes as new situations arise or old regimes become obsolete.[43] The generality that would ensure the flexibility needed to meet such an objective should not attract the criticism of being transitory or soft. It will not itself be rendered obsolete at some future point simply because concrete regimes have evolved to encompass every possible situation. As already mentioned such a state of affairs may last only so long as the very next instant.

39 See, for example, the expression of commitment to environmental improvement in the Convention on Long-Range Transboundary Air Pollution, (1979) 18 International Legal Materials, 1443 where the emphasis is on laying the groundwork for research and consultation while at the same time merely enjoining contracting parties ". . . as far as possible [to] gradually reduce and prevent air pollution . . .".

40 *Fisheries Jurisdiction (United Kingdom* v. *Iceland)* [1974] I.C.J. Rep. 1.

41 The award of the arbitral tribunal in the *Trail Smelter Arbitration,* R.I.A.A. vol.III, 1911 et seq, illustrates that such an assertion would not be tenable.

42 Declaration of the United Nations Conference on the Human Environment, (1972) 11 International Legal Materials, 1420.

43 Consider the treatment of conservation and management of high seas living resources in the Law of the Sea Convention recently opened for signature in Caracus. In a mere five articles the convention provides broad guidance for the adoption of specific conservation measures.

3. The dictates of sovereignty and effectiveness

Finally, it must be considered that function, as a factor influencing the choice of combination, is not limited to the question — what is it sought to achieve? It is appropriate also to ask the related question — to whom is the dialogue addressed? The globe has become the playground and the place of business of countless individuals, companies and private organisations. Since these entities are by tradition not subjects of international law, and cannot, for example, be party to an action before the International Court, the dialogue of which they are the subject may be formalised with this fact in mind. This is especially important in relation to implementation and follow-up procedures if it is hoped that the dialogue achieve some measure of effectiveness. In relation to the conduct of transnational corporations it is recognised that since they are ". . . the creatures of national rather than international law, legal regulation of their activities is most effective when carried out through national legal procedure."[44]

Similarly in the protection of human rights, where the subject is the individual human being, an internationally implemented agreement that lacks a follow-up mechanism allowing for the receipt of complaints from aggrieved individuals may result in the suppression of breaches for want of a champion. In this regard it is relevant to note that article 25 of the European Convention on Human Rights 1950 allows the Commission to receive petitions "from any person, non-governmental organisation or group of individuals" claiming that it is the victim of breaches of the Convention by contracting parties.[45]

Yet the desire for effectiveness is once again only one side of the coin and the dictates of sovereignty can be seen in the caveat to article 25 which provides that the competence of the Commission to receive petitions is contingent on individual contracting parties separately declaring that they accept this particular jurisdiction of the Commission.

III. SOME EFFECTS — PRACTICAL AND JURIDICAL

It is now time to question what has until now gone unchallenged, namely is there a qualitative difference between the effects of various combinations that justifies the selective use of the "law" and "soft law", "rule" and "guideline" tags. Three variables have been the focus of the discussion in this regard because it has been widely assumed[46] that they play a lead role in determining what effects flow from the formalised dialogue of which they are primary characteristics. Initially the greatest leeway for enquiry can be retained if, as the dictionary suggests, the enquiry is concerned with the consequences or results flowing from the dialogue.

By the very fact of international dialogue on a particular topic, that topic

44 U.N. Centre on Transnational Corporations, Materials Relevant to the Formulation of a Code of Conduct, U.N. Doc. E/C 10/18 (1977), 85 para.281.

45 For a series of commentaries on these and other aspects of the Convention, see The European Convention on Human Rights (1975) 11 Int. & Comp. L.Q. Supp. Publn.

46 Obviously, some commentators would look no further than form, others only at the actual implemetation and follow-up reality. That all three might have an input is clearly accepted in the code of conduct modalities paper, supra n.44, 85-105.

becomes the legitimate subject-matter for international debate, at least for the participants in the dialogue. As Schachter observes a relation to the effects of so-called gentlemen's agreements:[47]

> It becomes immaterial whether the conduct in question was previously regarded as entirely discretionary or within the reserved domain of domestic jurisdiction. By entering into an international pact with other states, a party may be presumed to have agreed that the matters covered are no longer exclusively within its concern.

It was, in part, a fear of this effect that led South Africa to abstain from voting on the Universal Declaration of Human Rights.[48] This was a fear which subsequent international activity concerning racial discrimination in South Africa proved well-founded.

Secondly, by formalising the dialogue the subject-matter has in some way been ordered and subsequent dialogue will have a tendency to focus on this formula. In short, there exists an agenda for debate. The tactical advantages of having the dialogue proceed on ones own terms, rather than those of an opponent, are well recognised in any debate. Most importantly, it seems that setting the agenda is achieved by the expression of the substantive subject-matter, whether this expression is embodied in a soft form or not.[49] Where dialogue has already begun these expressions can be seen as attempts " . . . to upset or at least alter the direction of current specialised and pragmatic negotiations . . . ".[50] In other words, they attempt to replace the old agenda.

Thirdly, there is what has been variously described as the legitimation[51] or justifying[52] effect. Essentially, where an agreement, albeit soft, has been concluded, parties to that agreement would be precluded from challenging the right of another state independently to take action in accordance with the agreement, such as implementing the provisions into its domestic law. National law action in line with the voluntary provisions of an agreement would be said to have been justified, or made legitimate, by virtue of the agreement.[53]

47 Schachter "The Twilight Existance of Nonbinding International Agreements" (1977) 71 Am.J.Int.L., 296, 304.

48 U.N. Doc. A/811, 16 December 1948; text in (1949) 43 Am.J.Int.L. Supp., 127-132. The comment on South African apprehensions is made in Green *The United Nations and Human Rights* (Brookings, Washington, 1958), 670.

49 Thus dialogue between North and South over the establishment of a new economic order could not ignore the early framing of the issues by the Third World in such General Assembly resolutions as the Charter of the Economic Rights and Duties of States (G.A. Res. 3281 XXIX) and the Declaration on the Establishment of a New International Economic Order (G.A. Res. 3201 S-VI).

50 Brower and Tepe "The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law?" (1975) 9 Int. Law. 295, 302.

51 Baade op.cit. n.17, 27.

52 Seidl-Hohenveldern "International Economic 'Soft Law' " in (1980) 163 Recueil Des Cours No. 2, 165, 192.

53 Hence the comment that: "Western countries are fully aware of, and reconciled to, the fact that even voluntary international guidelines can be promptly enacted as binding national law by any country that wishes to do so"; Davidow "International Antitrust Codes of Conduct: A Progress Report" at 15 Fordham Corporate Law Institute, International Antitrust, 14-15 Nov. 1978. The author was then Director, Office of Policy Planning. Antitrust Division, U.S. Department of Justice.

This making effective the provisions of an agreement is surely at the heart of this enquiry. As Seidl-Hohenveldern points out in relation to soft law rules, though it remains valid beyond this limitation, " . . . no better result could be hoped for than the effective application of these rules."[54] The definition of effects can now be narrowed down so that this focus on effectiveness can be pursued.

It is now appropriate to consider the extent to which the dialogue changes the conduct of the parties or the expectations of what is required by way of future conduct, with an initial focus on the out of court management of their mutual affairs. The complexity of such an enquiry is echoed by Schachter when he commented that to ascertain such expectations involves a consideration of the political, economic and psychological conditioning factors likely to influence the responses of governments.[55]

Clearly, where procedures for the implementation and follow-up of particular provisions are specified, they constitute a readily visible effect in themselves. As Bothe recognises, "[i]mplementation procedures are not only proof that compliance is expected, they are also a means of exerting pressure to secure compliance . . . ".[56]

So, domestic implementation may secure powers of management and enforcement to a national body while international implementation may secure the jurisdiction of the International Court or specifically constitute a new dispute settling forum or mechanism for promoting compliance. If power is delegated to an agency or secretariat at an international level a measure of supervision results proportionate to the powers delegated.[57] Furthermore, the organisation itself will be bound by any provision it adopts, notwithstanding its effect on member states.[58]

Where, however, no express provision as to the implementation and follow-up of the dialogue is evident, either from the dialogue itself or by reason of the internal constitutional arrangement of an international organisation, a discussion of expectations of compliance becomes more speculative and requires an examination of the form and content variables and, ultimately, their consideration in light of a supposed legal/non-legal distinction.

By entering into international dialogue when the option of silence is notionally available it cannot be presumed that all that was sought by a state was the opportunity to hear the sound of its own voice. Certainly, individual examples of dialogue may amount to little more than propaganda. Yet, unless this status were to be accorded to any dialogue not embodied in traditional legal form, it must be accepted that provisions in soft forms create expectations of conduct in conformity with those provisions. The reality of international practice certainly bears

54 Op.cit. n.52, 212.
55 Schachter "The Evolving International Law of Development" (1976) 15 Colum. J. Transnat. L., 6.
56 Bothe "Legal and Non-Legal Norms — A Meaningful Distinction in International Relations?" [1980] Netherlands Yearbook Int. L., 65,78.
57 Decisions of the OECD Council are, for example, binding on member states.
58 Since the adoption of the Universal Declaration of Human Rights, for example, the organs of the United Nations could not have paid different wages to their male and female workers doing equal work; Seidl-Hohenveldern, op.cit. n.52, 195.

this out as has been observed in relation to the resolutions of international organisations:[59]

> International practice . . . shows a constant reliance on the recommendations type of decisions of international organisations . . . there is an evident reluctance openly to contravene recommendations such as resolutions of the United Nations General Assembly. Whenever possible, States confronted with recommendations will not attempt to rely on assertion of their legal irrelevance, but will either deny violations, assert the inapplicability of a recommendation to the specific case or will claim that the particular recommendation was irregular or ultra vires.

As a matter of practical effect, then, national decision-makers do not feel able to ignore the pronouncements embodied in soft forms by reason only of this softness. They cannot, therefore, be entirely devoid of a sense of commitment or obligation. Indeed if this were the case we might wonder at the need felt by some states to append reservations to resolutions.[60]

Regardless of form, the expectations of compliance will also depend on the nature of the content. Recalling the earlier observation that the content variable runs across the form variable, there should be no surprise at the conclusion of the United Nations Centre on Transnational Corporations as to effects vis-à-vis content:[61]

> A formally binding instrument may be of limited effect if its provisions are so formulated as to allow a very large margin of discretion to those to whom it is addressed. On the other hand, the actual impact of the provisions of a not normally binding instrument may be enhanced if they are precise and specific and allow little leeway for differing interpretations.

Recalling the observation of Schreuer concerning compliance with resolutions of international organisations this actual impact might be said to result from the increased difficulty in distinguishing a provision in relation to the specific case where the content of that provision is precise.

Rationalised in a more positive way, the precision of the content might be said to fulfil an interpretative function in relation to the loose content of existing provisions in formally binding instruments. This approach was taken by the United States State Department in federal proceedings concerning the interpretation of a treaty provision that allowed certain enterprises to "engage . . . executive personnel . . . of their choice". The State Department sought to convince the court that this did not give a right to discriminate on sex, religious or ethnic grounds by pointing out:[62]

59 Schreuer "Recommendations and the Traditional Sources of International Law" (1977) 20 Germ. Yearbook Int. L. 103.

60 "It is evident that the formulation of reservations tends to demonstrate the obligatory nature of the resolution in the eyes of the majority of states, the esculpatory clauses being meaningless otherwise." Dupuy, op.cit. n.14, 253.

61 U.N. Centre on Transnational Corporations, Issues Involved in the Formulation of a Code of Conduct, U.N. Doc. E/C 10/17 (1976), 37 para. 159.

62 Letter of L. R. Marks, Deputy Legal Advisor, U.S. Dept. of State, on file in *Avigliano* v. *Sumitomo Shoji America Inc.* (1979) 473 F. Supp. 506; quoted in Baade op.cit. n.13, 35.

> Both the Japanese and United States Governments have subscribed to a number of international declarations calling on multinational enterprises to respect human rights and avoid discrimination . . . . These are not binding, but they reinforce our view that Article VIII should not be read as conferring a license to disciminate.

Again, another of the fears that prompted South Africa to abstain from voting for the Universal Declaration of Human Rights — that it would become an authoritative interpretation of Charter provisions[63] — appears well-founded.

Accepting, then, that in terms of out of court effect on national decision-makers, expectations of compliance can flow from dialogue embodied in both soft and traditionally legal combinations of form, content and procedure variables and that these expectations are the product of a sense of obligation, does the addition of the legal element establish anything more about the substance of the expectation, or the certainty of compliance? And if it doest, is the extra simply a matter of degree, or is a difference of kind involved?

Some differences of practical significance can be identified. A legal/non-legal form distinction is likely to be decisive in questions of automatic domestic implementation. Even if the actual implementation record for provisions in soft form is high, it will be rare indeed for a constitutional guarantee of automatic incorporation to extend beyond traditional legal forms. Yet the fact that some international obligations enter the domestic legal system with greater certainty and by fast track procedure, while for others the route is perhaps more circuitous, would seem to be simply a matter of degree — namely, degrees of certainty of domestic implementation.

If an attempt were made to avoid the application of an obligation by terminating its existence, this would perhaps reveal a qualitative difference between legal and non-legal obligations in terms of the expectation of its duration. In the earlier discussion of flexibility it was assumed that soft forms might be more easily superseded. Yet this was not to suggest that legal forms were immutable. Notwithstanding the general rule, such as expressed in article 42 of the Vienna Convention on the Law of Treaties[64] that termination of treaty obligations is possible only in accordance with the provisions of the treaty itself or with other accepted legal rules, the extent of these other rules[65] and the frequent practice of including a termination provision in treaties makes it impossible to generalise on the expectation of duration. The reality would seem to be much as DeGaulle has been reported to remark — international agreements "are like roses and young girls; they last while they last."[66] And while they do last, Schachter comments, " . . . even nonbinding agreements can be authoratative and controlling for the parties."[67]

The focus moves finally to compliance and non-compliance. As a motivating factor in determining what response will be made, there is no doubt that the

63 Green op.cit. n.48.
64 U.N. Doc. A/Conf. 39/27.
65 The Vienna Convention itself provides some eleven articles under the heading "Termination and Suspension of the Operation of Treaties", ibid., Part V, s.3.
66 Quoted in Schachter op.cit. n.47, 304. The original source was cited as a letter in *The Economist,* London, 18 March 1972, 6.
67 Idem.

perceived legal nature of an obligation has an impact. In terms of Schachter's conditioning factors it perhaps fits best in the psychological box. When a course of conduct, or lack of it, surfaces as a dispute, this impact translates into the "perceived legitimacy of their positions", an important element in the process of negotiating a solution.[68]

The legal nature of a provision, however, is only one of many factors determining actual compliance and not necessarily the decisive one. Again, the addition of a legal element would appear to be a matter of degree — here, degrees of intensity of compulsion. Even within a range of accepted legal rules this conclusion remains valid. Consider, for example, article 53 of the Vienna Convention. The existence of a peremptory norm which prevails over a conflicting treaty provision illustrates that some derogation of treaty rules is to be expected and even required. The intensity of compulsion is clearly quantitatively different.

It is when the examination looks at a later stage, the event of non-compliance, that a fundamental distinction arises. As a matter of principle and logic the non-observance of a legal obligation gives rise to legal responsibility or, more commonly understood domestically, illegality. And to carry the logic forward, non-compliance with a non-legal obligation does not have this effect. This basic distinction has led some to conclude that "[t]he non-observance of soft commitments could hardly be qualified as an objective international delinquency"[69] and that non-legal obligations " . . . cannot be the basis of a decision of a court of law."[70]

The next step, therefore, is to consider the effects in court of soft law obligations notwithstanding that the judicial forum is often the least utilised method of settling disputes at an international level. Before embarking on a brief and selective survey of the jurisprudence of the International Court some examples from outside that forum warrant attention.

A. Air Services Arbitration (United States v. France)[71]

The tribunal here, although considering an arbitral award, comprised of three distinguished international lawyers,[72] was requested by the terms of the *compromis* to decide the questions put to it " . . . in accordance with applicable international law and in particular with the provisions of the agreement."[73] The tribunal was thus fulfilling a judicial function.

The agreement was a bi-lateral air services agreement (in terms of traditional forms, a treaty) that regulated the manner in which air carriers of the two parties

68 Bilder "The Anglo-Icelandic Fisheries Dispute" [1973] Wis. L. Rev. 37,130-131, where it was pointed out that in relation to the dispute " . . . international norms appear to have had an important influence in shaping the way in which each of the two countries has characterised the dispute, the objectives each has sought, and the tactics each has pursued."

69 Seidl-Hohenveldern op.cit. n.52, 205.

70 Bothe op.cit. n.56, 87.

71 *Case Concerning the Air Services Agreement of 27 March 1946 (United States v. France)* (1978) 54 I.L.R. 304.

72 Riphagen, *President;* Ehrlich and Reuter, *Arbitrators.*

73 Compromis of Arbitration, supra n.71, 312.

could change gauge within their respective territories. The validity of a a Pan Am gauge change in the territory of a third state was at issue, within the French of the view that as the agreement did not expressly permit gauge changes in third states they must be prohibited. The United States, on the other hand, argued that the change was consistent with the fundamental objective of the agreement, namely, to promote air travel at the cheapest rates consistent with sound economic principles.

This fundamental objective was said to spring from section IV of an annex to the agreement which comprised a set of "basic guidelines for regulating capacity on the authorised routes". Far from a series of prohibitory norms these guidelines expressed the positive goal of fostering and encouraging cheap air travel, recognised concurrent rights in relation to each country's carriers, and generally failed to combine language sufficiently specific and imperative to give the impression of creating measurable obligations in legal terms.

Yet, in rejecting the contention that there was total freedom to effect gauge changes in third states the tribunal held that ". . . the Agreement includes a variety of conditions concerning services by carriers of the Parties", that ". . . [t]he capacity provisions in Section IV of the Annex . . ." are one set of conditions and that "[i]t would undercut the terms of the Agreement to permit a change of gauge for the *sole* purpose of enabling a carrier to act inconsistently with one or more of these conditions."[74] Distilling from the agreement as a whole the concept of continuous service the resulting criteria for permissible gauge changes was consequently framed in terms of the service being continuous and with a proviso that the change of gauge was not being used ". . . simply as a basis for action inconsistent with provision in the Agreement —most obviously the capacity provisions in Section IV of the Annex."[75]

In the absence of more specific rules the guidelines were, therefore, of vital importance in determining the permitted conduct of the parties. Even the dissenting opinion of the French member, M. Reuter, in conceding that the constructive approach of the majority may be permissible where it corresponds with the intention of the parties, but that this could not be the case where the treaty is silent, provides support for the constructive use made of the guidelines on the basis that their very presence in the agreement suggests neither silence nor an intention that they be meaningless.

B. The Shimoda *Case*[76]

The 1963 decision of the Tokyo District Court in the *Shimoda* case casts some light on the range of authoritative materials upon which a judicial body might draw in relation to form. An issue in this claim by victims of the Hiroshima and Nagasaki atomic bombings was whether the use of atomic devices on inhabited cities was contrary to international law.

74 Supra n.71, 332, para.58.
75 Ibid., 333, para.63.
76 *Shimoda* case; Decision of the Tokyo District Court, 7 December 1963. A convenient text is located in *The Strategy of World Order* (Falk & Mendlovitz eds., World Law Fund, New York, 1966) Vol. 1, 314-354. References to the case will be references to that text.

Faced with a lack of applicable customary or treaty law the Court nevertheless managed to identify the norms and standards it considered relevant by reference to formalised dialogue that, in terms of the above discussion, were embodied in traditionally non-legal forms. Referring to the Draft Rules of Air Warfare 1923 the Court observed:[77]

> The Draft Rules of Air Warfare cannot directly be called positive law, since they have not yet become effective as a treaty. However, international jurists regard the Draft Rules as authoritative with regard to air warfare. Some countries regard the substance of the Rules as a standard of action by armed forces, and the fundamental provisions of the Draft Rules are consistently in conformity with international laws and regulations, and customs at that time.

The Court concluded that ". . . the prohibition of indiscriminate aerial bombardment on an undefended city and the principle of military objective, which are provided for by the Draft Rules, are international customary law . . .".[78] Thus, while the Draft Rules did not themselves create the prohibition they provided the Court with sufficient evidence of the content of customary international law.

C. International Court of Justice

From the above it is not unreasonable to suggest that both the soft content and non-legal form senses of soft law are capable of a certain legal effect in judicial proceedings. The nature of this effect can be further pursued through a brief excursion into the jurisprudence of the International Court.

With regard to form it should first be noted that a legal/non-legal distinction, if it exists, need not coincide with the designation accorded the form by the parties to it or with the earlier mentioned categories of traditional legal form. In the *Eastern Greenland* case[79] the Court recognised that international law obligations flowed from an oral declaration, the Ihlen Declaration, of the Norwegian Government. Recent affirmation of this possibility can be found in the *Nuclear Tests* cases where the Court held the New Zealand and Australian claims to be without object following a formal announcement by the French President to the effect that atmospheric nuclear testing would cease.[80] On a slightly different tack, but nevertheless pertinent here, a manifesto from the King of Sardinia to his customs authorities directing them to withdraw a customs line was given by the Court in the subsequent *Free Zones* case "the character of a treaty stipulation".[81]

But what of the effect of accepted soft forms? In the *Icelandic Fisheries Jurisdiction* case[82] the Court was presented with a delimitation dispute where the applicable legal norms were far from clear and were simultaneously under debate

77 Ibid., 339-340.
78 Ibid., 340.
79 *Legal Status of the South-Eastern Territory of Greenland* (1933) P.C.I.J. Series A/B, No. 53.
80 In fact the Australian and New Zealand actions were treated as separate. The judgment in the New Zealand action is reported at [1974] I.C.J. Rep 457.
81 *Free uones of Upper Savoy and the District of Gex* (second phase) (1930) P.C.I.J. Series A, No. 24 17.
82 *Fisheries Jurisdiction (United Kingdom* v. *Iceland)* [1974] I.C.J. Rep. 1.
of the United Nations, art. 10. (Emphasis added).

at the third United Nations Law of the Sea Conference. Of these proceedings five of the majority, in a joint separate opinion, commented that while it was accepted that they were *de lege ferenda* — law in the making — " . . . it is not possible in our view to brush aside entirely these pronouncements of States and consider them devoid of all legal significance."[83]

What, then, is the nature of this legal significance? Once an uncertainty, a conflicting and discordant state practice, is admitted, " . . . the impact of the aforesaid official pronouncements, declarations and proposals must undoubtedly have an unsettling effect on the crystallisation of a still evolving customary law on the subject."[84] Earlier in the same opinion the concepts of an exclusive fishing zone and of preferential rights in favour of coastal states were held to have crystallised as customary law on the basis of the general consensus revealed[85] at the second Law of the Sea Conference, most particularly in a resolution passed at the 1958 Conference[86] and a joint amendment presented to the 1960 Conference.

Without wishing to overstate the Court's willingness to translate into customary law provisions in what are by definition mere recommendations,[87] there is surely here a measure of endorsement for the position taken by Judge Tanaka when he commented in the *North Sea Continental Shelf* case:[88]

> The role played by the existence of a world-wide international organization like the United Nations, its agency the International Law Commission, and their activities generally do not fail to accelerate the rapid formation of a customary law.

In the earlier *South-West Africa* cases he had expanded on this process;[89]

> . . . each resolution, declaration, etc., being considered as the manifestation of the collective will of individual participant States, the will of the international community can certainly be formulated more quickly and more accurately as compared with the traditional method of the normative process.

Rather clearer is the Court's use of resolutions in the interpretation of treaty obligations. As it emphasised in its 1971 Advisory Opinion concerning Namibia (South-West Africa), " . . . an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation."[90] Part of this picture was found in the form of United Nations Resolution 1514(XV), the Declaration on the Granting of Independence to Colonial Countries, held to be an important development showing that self-

83 Ibid., 48.
84 Idem.
85 Ibid., 23, para.52.
86 Resolution on Special Situations Relating to Coastal Fisheries, 450 U.N.T.S. 62.
87 "The General Assembly may discuss any questions or matters within the scope of the present Charter . . . and . . . may make *recommendations* to the Members of the United Nations or to the Security Council or to both on any such question or matters": Charter of the United Nations, art. 10. "Emphasis added".
88 Dissenting opinion of Judge Tanaka, [1969] I.C.J. Rep. 177.
89 Dissenting opinion of Judge Tanaka, [1966] I.C J. Rep. 292.
90 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970),* advisory opinion, [1971] I.C.J. Rep. 16,31.

determination was the ultimate object of the sacred trust.[91] Again in the more recent *Western Sahara* advisory opinion the Court referred to resolution 1514(XV). The principle of self-determination in article 1(2) of the Charter was said to be enunciated in the Declaration.[92]

The Court would appear to have taken aboard the attitude expressed by Judge Lauterpacht in the *South-West Africa (Voting Procedure)* advisory opinion 1955:[93]

> It would be wholly inconsistent with sound principles of interpretation as well as with highest international interest, which can never be legally irrelevant, to reduce the value of the Resolutions of the General Assembly . . . and to treat them, for the purpose of this Opinion and otherwise, as nominal, insignificant and having no claim to influence the conduct of the Members.

The legal relevance for South Africa, the mandatory power, was said to entail a legal obligation to give due consideration in good faith to the recommendation and to provide an explanation if it was decided to disregard it.[94] Judge Lauterpacht then addressed the possibility of actual illegality flowing from the repeated disregard of resolutions where[95]

> the cumulative effect of the persistent disregard of the articulate opinion of the Organisation is such as to foster the conviction that the State in question has become guilty of disloyalty to the Principles and Purposes of the Charter.

This reference to the first chapter of the Charter suggests not only that resolutions may provide authoritative guidance in the interpretation of vague treaty obligations but also that notwithstanding the content abstractness of these vague principles there is an "imperceptible line"[96] beyond which impropriety becomes illegality.

The distillation of measurable obligations from general principles in the Charter has also provided the Court with the solutions to two, more recent, contentious cases. In both the *North Sea Continental Shelf* and *Icelandic Fisheries* cases the parties were held to be under a duty to negotiate a settlement to their dispute. This obligation was said to flow, in the earlier case, from " . . . a special application of a principle which underlies all international relations, and which is moreover recognised in Article 33 of the Charter . . . as one of the methods for the peaceful settlement of international disputes."[97]

In both cases the Court provided guidelines[98] by which the parties could define

91 Idem.
92 [1975] I.C.J. Rep. 12,31.
93 Separate opinion of Judge Lauterpacht, [1955] I.C.J. Rep. 122.
94 Ibid., 118.
95 Ibid., 120.
96 Idem.
97 *North Sea Continental Shelf (F.R. Germany* v. *Denmark; F.R. Germany* v. *Netherlands)* [1969] I.C.J. Rep. 47. In the later case the Court commented simply that obligatory negotiations "correspond to the Principles and provisions of the Charter"; [1974] I.C J. Rep. 32, para.75.
98 The tag "guideline" is primarily used in the *Fisheries Jurisdiction* case. The obligatory inter-party negotiations would benefit by " . . . the above appraisal of their respective rights, and of certain guidelines defining their scope"; [1974] I.C.J. Rep. 33, para.78.

their respective rights. In so doing, it rejected the single mathematical rule argued for in each case — the equidistance rule and the fifty-mile exclusive fishing zone. Yet labelling the guidelines as such was not to suggest they could be legally disregarded. Indeed, one judge spoke in terms of legal guidelines.[99] Clearly, in this setting, guidelines simply denote a rule of a more complex nature — one that reflects the fact that in a balancing of interests situation no single rule is capable of yielding an absolute answer.

In the *Icelandic Fisheries* case the use of a "reasonable regard" criteria found in article 2 of the High Seas Convention led Judge Dillard to comment;[100]

> The 'norm' expressed by this Article is couched in the language of a 'standard' and not that of a 'rule' (in the narrow sense). This means that a court, or any other decision-maker has more flexibility in applying it than if it required an exercise in what is called 'jural syntax' [the systematic ordering of rights and obligations]. The use of 'standards' permits some accommodation of the need for a 'general norm' permitting a tolerable degree of predictability with the need to adjust to the peculiarities of a special situation . . . .

The narrow sense to which Judge Dillard refers is a reference to the analysis of Roscoe Pound.[101] Rules of this kind were said by Pound to be " . . . precepts attaching a definite detailed legal consequence to a definite, detailed state of facts."[102] Yet Judge Dillard is here suggesting that a legal consequence may flow from an application of the standard to a particular situation. The difference being that the nature of a standard makes its application somewhat more conditional on an appreciation of the facts.

It is perhaps time to draw together some common threads by identifying some recurring kinds of effects under three broad heads.

First, there are those provisions which are said to create independent normative criteria from which legal rights and obligations flow directly. The unilateral declaration examples suggest that form is not per se of decisive importance, while the use made of general principles embodied in traditionally legal instruments, particularly the Charter, shows that generality of content is likewise no disqualification to the creation of legal obligations. Content that is, in Judge Dillard's terms, couched in the language of a standard would also fit in this category. Certainly, on the domestic scene, criteria such as the reasonable man standard in the law of negligence are no less legal criteria against which actions can be measured, in a given case, to determine legality or illegality.

Second, there is what might be called an evidentiary effect in that formulated dialogue may provide the material evidence of the existence of customary law. In the court setting this can be seen as an attempt to recognise the significance of new and alternative forms within the framework of traditional sources. Yet recalling the International Court's recognition of the general consensus, a more accurate analysis might be that the dialogue in these alternative forms is fulfilling a more

99 Separate opinion of Judge Dillard [1974] I.C.J. Rep. 71.
100 Supra n.82, 56-57, in footnote 1.
101 Pound op.cit. n.9.
102 Ibid., 482.

active evolutionary role under the guise of a passive evidentiary one. In this regard Dupuy[103] speaks of revolutionary custom which involves the factual projection of the political will, frequently formulated in declarations and resolutions, rather than the classical notion of a juridical consciousness (the opinio juris) evolving from the repetitive existence of the factual element (the practice).

The ultimate example of this reversal is where the expression of political will through soft forms is so overwhelming as to create, to use a term coined by Professor Cheng in relation to space law, instant custom. Here there is no pretence of anything other than the dialogue embodied in soft forms providing independent normative criteria. The pretence is rather in the attempt to fit this reality into the concept of custom at all. In creating the paradox of instant custom, as Jennings notes, ". . . we should have taken the hint that perhaps it was instant because it was not custom."[104]

Yet, whatever the choice to rationalise this effect, the end result is a propensity for soft law, particularly in the sense of obligations embodied in soft forms, to be transformed into customary law. Even treaties, their essentially contractual nature inhibiting widely accepted effects *erga omnes*,[105] lack this hardness unless they too are seen to be evidence of customary law.

Finally, it remains to identify what has already been referred to as an interpretative effect. The views of United States State Department officials in the *Federal Discrimination* case and the fears of the South African Government faced with the Universal Declaration of Human Rights can be recalled. In the court setting there is once again a recognition within the framework of traditional sources of the possibility of soft law providing authoritative guidance in the interpretation of an existing legal relationship. It can occur in a number of ways. The content of an obligation arising from an abstract legal principle may be rendered considerably more effective by a subsequent precise formulation of the obligation, albeit in soft form. The relationship between the Charter and the Universal Declaration has already been mentioned in this light. A second way in which dialogue has fulfilled an interpretative function is suggested in the use made of the capacity provisions in the *Air Services* arbitration. Here, instead of specific content loaning its precision to prior legal principles, there is the use of general principles to interpret and fill the gaps in a relationship otherwise governed by specific rules.

In the earlier case the provision's capacity as independent normative criteria is robbed solely by its embodiment in soft form. Here there seems little point in splitting hairs over whether the non-legal instrument is bestowing the legal principle with precision, or whether that principle is lending to the precise formulation the weight of legality. On the other hand, the ability of capacity provision guidelines to act as independent normative criteria is frustrated in a different way. They do not

103 Op.cit. n.14.

104 Jennings "What is International Law" (1981) 37 Annuaire suisse de droit international 59,71.

105 The general rule regarding third States in Vienna Convention art. 34, for example, provides: "A treaty does not create either obligations or rights for a third State without its consent."

apply to a factual situation to produce a direct result or determine some right or obligation. Rather, they are measures against which the scope of legal rights and obligations can be set. When conduct is called into question it becomes relevant whether the action was consistent with these guiding principles.

Friedmann recognised this distinction when he classified the general principles of law into three broad categories, the first being " . . . principles of approach and interpretation to legal relationships of all kinds."[106] In setting these seemingly genuine interpretative tools against " . . . substantive principles of law sufficiently widely and firmly recognised in the leading legal systems of the world to be regarded as international legal principles",[107] Friedmann was not suggesting they are any less a legal source under article 38(1)(c). And the importance placed on the capacity provisions in the *Air Services* arbitration would hardly support the translation of this qualitative difference in function into a qualitative difference in legal character.

Where does this lead to? A supposed distinction in the juridical effects of both senses of soft as opposed to hard law has not materialised with the clarity that would have rendered further discussion unnecessary. Certainly, the importance in a judicial forum of being able to rationalise reliance on soft law in terms of traditional legal theory has been illustrated. But then this phenomena has been noted in the practice of states already.

It might be possible to rationalise the forgoing in terms of a distinction between formal and material sources of law.[108] Yet if the distinction is, as Pound suggests,[109] between the authoritative and the subjective elements in the judicial process, we can hardly write off the above uses made of soft law as unauthoritative. Pound, himself, treats as authoritative; principles (of the Friedmann first category), standards and conceptions, together with rules (in the narrower sense).[110]

IV. CONCLUSION

When, at the beginning of this century, Westlake[111] sought to prove the existence of international law with the logic that law exists where society exists consequently proof of international law lies in the fact of international society, there surely was an early hint of the need to view law alongside the particular society in which it operates. That minds moulded in national societies are now applied to an analysis of law in international society should be reason enough to demand a constantly open mind. The transfer of domestic conceptions of law to international society without some accompanying consideration of domestic and international societies themselves would be meaningless.

106 Friedmann op.cit. n.1, 196.
107 Idem.
108 Salmond *Jurisprudence* (11th ed., Sweet & Maxwell, London, 1957) ch. V; see also Hart *The Concept of Law* (Clarendon Press, Oxford, 1961), 246.
109 Op.cit. n.9.
110 Ibid., 482-485.
111 *The Collected Papers of John Westlike on Public International Law* (Oppenheim ed. Cambridge University Press, Cambridge, 1914) ch. 1.

The passage from Professor Friedmann with which this paper began therefore takes on added significance for it provides not only a suggested function for international law but also some insight into the nature of the society in which that law exists. It is a society of nations, jointly responsible for the control of their mutual existence. No higher organ is delegated this responsibility to the extent of the state in national societies. Law in the domestic sense of an exercise of state power over the individual is therefore frequently an inappropriate analogy. It depicts a hierarchical society with law, and the courts which administer the law, functioning as agent for the state somewhere above the individual.

Rather more appropriate on the plane that is international society is the notion of a law between states, mutually determined and administered and, as Friedmann points out, an out of court law. As a law between states the origins of sovereignty and effectiveness tensions that provided background reasons for the diverse combinations of form, content and procedure in the expression of those "laws" can be seen.

The discussion of effects also illustrates the reliance on domestic conceptions. In searching for qualitative distinctions which would make possible a decision as to the "legal" nature of a particular norm a debate was entered in which two schools of thought have already attracted many advocates. On the one view " . . . legality like virtue is not a matter of degree" and while we may feel compassion there should be no uncertainty when the fallen damsel has indeed fallen.[112] Echoing a positivist notion of legal obligation which requires the consent of states to be bound as a matter of law this view demands a focus on a legal/non-legal dividing line according to the perceived intention with which the obligation was accepted. Yet for others the issue is indeed one of degree, dependant on attitudes, expectations and compliance. Law is here sought to be analysed as a process of authoritative decision-making, a process that is not limited to purely legal inputs or concerned solely with decision-making in a judicial forum.

Which view is preferred may ultimately reflect the individual perception of international society itself. Indeed when the complexity of international and domestic societies is considered the value of both analyses to elements of each society is apparent. Nevertheless in the co-operative endeavour of states in the areas to which Professor Friedmann refers the writer is not convinced of the legal anarchy which those, such as Weil,[113] predict in the trend towards an acceptance of relative normativity.

A final word is called for on the use and abuse of terms. This paper has not been wholly concerned with matters of terminology yet it has pervaded the discussion throughout. It is appropriate that "guidelines" has been a term under debate because that, in effect, is the role of terminology itself. Yet, even as guides to the nature of the concept they label, these terms provide an incomplete picture when viewed in isolation from their context. The point has already been made

112 Gross "Problems of International Adjudication and Compliance with International Law: Some Simple Solutions (1965) 59 Am. J. Int. L. 48,56.

113 Weil "Towards Relative Normativity in International Law" (1983) 77 Am. J. Int. L. 413.

with respect to law in international society and the difficulty of distinguishing domestic conceptions of law goes some way to explaining the adoption of the term "soft law" to label certain obligations evident in international society that fit uneasily with these domestic conceptions.

The term "guideline", evoking responses both to content, as general directions, and effect, as in some way voluntary, similarly demands an awareness of context. Principles of interpretation, which are nonetheless legal principles with application to legal relationships can be contrasted with those guidelines in the sense of codes of conduct which, while ostensibly voluntary by reason of form, need not, and in fact generally do not, style their content as general directions or broad principle. Alongside these can be placed the guidelines which the International Court directed as the basis for negotiated settlement. These were simply more complex rules to be applied by the parties themselves, yet the validity of any settlement was no less dependent on international law. Recalling Glanville Williams' suggestion that law be treated as the symbol for an idea which varies with the user of the symbol it is not unreasonable to apply the same analysis to the other terms under discussion and to conclude that the dieas vary not only in the mind of the user but also with the context of their use.