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International Law as Progress and Prospect

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Meinem *Vater* und meiner *Mutter*
in Dankbarkeit gewidmet.

Sie lehrten mich, in weiten Kreisen zu denken,
ohne die Wurzeln zu vergessen,
aus denen das Leben herauswächst.

Soft Law – Norms in the Twilight between Law and Politics

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I. Introduction

Social norms of varying character and relevance influence the behaviour and decisions of actors participating in international relations. As far as their binding quality is concerned, such social norms range from purely moral or political commitments to strictly legal obligations.

Yet between these fairly clear-cut categories exists a wide range of other rules, the legally binding character of which has been deliberately and sometimes explicitly denied by their drafters, but which nevertheless cannot be considered mere moral or political directives. In this category fall the resolutions of international organizations, programmes of action, the texts of treaties which are not yet in force or are not binding for a particular actor, interpretative declarations to international conventions, non-binding agreements and codes of conduct, recommendations and reports adopted by international agencies or within international confer-

ences as well as similar instruments and arrangements used in international relations to express commitments which are more than just policy statements but less than law in its strict sense. These instruments and norms all share a certain proximity to law and certain legal relevance, but at the same time they are not legally binding per se as a matter of law.

Extra- or paralegal norms in the sense described can be found in all fields of law, but they are of particular importance in international relations. The reasons are obvious: generations and philosophies of international law overlap; political, economic and cultural disruptions within the international community contribute to the structural weakness of contemporary international law; and international law does not recognize a common superior legislator or a central, compulsory jurisdiction. As a consequence, international actors often have resort to the use of norms which surround the legal principles and rules constituting the core of international order without being law themselves.

1. Forms of extralegal norms

Within the traditions of social science, social philosophy and law, various categories of norms have been distinguished that aim to regulate human conduct. The existence of numerous and varied social norms has not been denied, but no agreement about their precise character has ever been reached. Depending on the context of attempts at categorisation, emphasis has been laid on a wide range of criteria, such as the aim and precise wording of rules, or the circumstances in which they have evolved – for example the quality and rank of organs involved, or the procedures used for expressing consent, the nature and strength of their implementing mechanisms as well as the scope and degree of acceptance. In the present context it seems sound to accept that in a general way, norms represent the expectations held by a certain community. The normative nature of such expectations may vary and manifest itself to differing degrees and at different stages: Either with regard to the content of a norm, to its authority, or to the level of its enforcement. Thus, some norms might be considered minor in importance, but are nevertheless strenuously enforced (such as parking offences); other norms might be considered of paramount importance yet

are not addressed by law-enforcement at all (such as sincerity, or thoughtfulness).

Lord McNair coined the term «soft law» to describe «instruments with extra-legal binding effects».¹ More generally, soft law is used in legal literature to describe principles, rules and standards governing international relations which are not considered as stemming from one of the sources of international law² enumerated in Art. 38(1) of the Statute of the International Court of Justice.³ But to what extent is soft law – despite the fact that its legal character has been specifically ruled out – relevant for the international legal system? In many respects, the concept of soft law and its significance are controversial.

¹ Compare JEAN D'ASPREMONT, *Softness in International Law: A Self-Serving Quest for New Legal Materials*, EJIL 2008, p. 1081.

² As to Soft Law in general, see MICHAEL BOTHE, *Legal and Non-Legal Rules – A Meaningful Distinction in International Relations?*, in: *Netherlands Yearbook of International Law* 1980, p. 65 ff.; CLEMENS JABLONER and WOLF OKRESEK, *Theoretische und praktische Anmerkungen zu Phänomenen des «Soft Law»*, in: *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* 1983, p. 217 ff.; WOLFGANG HEUSEL, *«Weiches» Völkerrecht*, Baden-Baden 1991; Wolfgang E. Burhenne (ed.), *International Environmental Soft Law*, Dordrecht 1992; W. MICHAEL REISMAN, *The Concept and Function of Soft Law in International Politics*, in: Emmanuel G. Bello and Bola A. Ajibola (eds), *Essays in Honour of Judge Taslim Olawale Elias*, Dordrecht 1992, p. 135 ff.; WOLFGANG E. BURHENNE and MARLENE JAHNKE (eds), *International Environmental Soft Law: Collection of Relevant Instruments*, Dordrecht 1993; FRANCESCO FRANCONI, *International «Soft law»: A Contemporary Assessment*, in: Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice, Essays in Honour of Sir Robert Jennings*, Cambridge 1996, p. 167 ff.; JAN KLABBERS, *The Redundancy of Soft Law*, in: *Nordic Journal of International Law* 1996, p. 167 ff.; MIREILLE DELMAS-MARTY, *Trois défis pour un droit mondial*, Paris 1998; HARTMUT HILLGENBERG, *A Fresh Look at Soft Law*, EJIL 1999, p. 499 ff.; DINAH SHELTON (ed.), *Commitment and Compliance – The Role of Non-Binding Norms in the International Legal System*, Oxford 2000; KARL ZEMANEK, *Is the Term 'Soft Law' Convenient?* In: Gerhard Hafner, Gerhard Loibl, Alfred Rest, Lilly Sucharipa-Behrmann and Karl Zemanek (eds), *Liber Amicorum Professor Ignaz Seidl-Hohenveldern*, The Hague 2000, p. 843 ff.; MIREILLE DELMAS-MARTY, *Le flou du droit – du code pénale aux droits de l'homme*, Paris 2004; John J. Kirton and Michael J. Trebilcock (eds), *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment, and Social Governance*, Aldershot 2004; SALEM H. NASSER, *Sources and Norm of International Law: A Study on Soft Law*, Berlin 2008.

Annexed to the Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945).

States as the principal international actors often resort to extralegal norms in order to avoid the disadvantages which are, in their view, usually connected with the creation of legally binding commitments. To put it more concretely, extralegal norms can serve as a compromise between sovereignty and the need to establish rules to govern international relations. Such rules represent social norms where the expectation of compliance is of lesser significance. If a State violates such soft law norms, condemnation will be less swift and severe than when it violates a legal norm. Therefore, States often choose this form of norms if they want to create a *modus vivendi*, to guide their international behaviour in a flexible way, and to avoid entering a binding commitment. By doing so they can maintain a large degree of freedom of action while improving the basis for international cooperation. (However, it must be noted that a high level of compliance is not a distinctive quality of hard law: The compliance pull, and as a consequence compliance itself, of a specific soft law norm can be significantly higher than the one of hard law norms.) Another reason for resorting to soft law is uncertainty about the future development of technical knowledge, including economic, ecological, and scientific factors. The unpredictability of such developments may prevent States from entering into legal commitments. In such situations, soft law provides an appropriate means to formulate shared expectations at a lower level.

Soft law in the sense referred to here has to be distinguished from similar instruments such as gentlemen's agreements and codes of conduct. Gentlemen's agreements, understood in a restrictive sense, may be considered legally non-binding agreements concluded by statesmen or diplomats or other actors in international life; they are seen as limited to the persons involved in the agreement. In contrast, soft law is not only relevant to the natural person who is acting, but also for the State whom it represents. The term codes of conduct⁴ is, in a limited sense, sometimes applied to written sets of rules used in transnational business relations of private organizations or companies. Soft law, on the other hand, is produced by subjects of inter-

⁴ See for instance, Michael Lang, Joseph Schuch und Claus Staringer (Hrsg.), *Soft law in der Praxis: Corporate Governance Codes, internationale Bilanzierungsregeln, Richtlinien und Rechtsauskünfte der Finanzverwaltung, Code of Conduct der EU, Kommentare der OECD*, Wien 1995.

national law. While codes of conduct may or may not be legally binding, it is a specific feature of soft law that it is distinct from legally binding norms.

2. Features of soft law

It is not easy to define soft law in a precise sense. It does not represent a legal concept with a clearly determinable scope and content. It is more of a catchword, symbolizing a specific form of social rules in the penumbra of international law. To put it abstractly, soft law as a phenomenon in international relations covers all those social rules generated by States or other subjects of international law which are not legally binding but which are nevertheless of special legal relevance.

Four aspects seem intrinsic to the current concept of soft law. Firstly, soft law generally expresses common expectations concerning the conduct of international relations, as it is often shaped by, or arises within, the framework of international organizations. Secondly, soft law is created by subjects of international law – in contrast to commercial customs and rules such as codes of conduct set up by private organizations or companies. Thirdly, soft law rules have not – or not entirely – passed through all stages of the procedures prescribed for international law-making; they do not stem from a formal source of law and thus lack binding legal force. Fourthly, soft law – despite its legally noncommittal quality – is characterized by a certain proximity to the law, and above all by its capacity to produce certain legal effects.

II. Categories of Soft Law

The above enumeration outlines two major categories of soft law: resolutions (i.e. recommendations or decisions of international organizations), and non-binding parts of legally binding agreements.

1. Resolutions of international organizations

Resolutions, recommendations or decisions made by international organizations⁵ have, as a general rule, a non-binding character, unless their binding force is provided for in the constitutive treaty, or when such resolutions reflect principles or rules enshrined in recognized sources of international law. Yet despite their generally non-binding character, resolutions of international organizations may be of legal relevance. An eminent example is provided by the Universal Declaration of Human Rights,⁶ which was adopted on December 10, 1948 by the United Nations General Assembly (UN GA Res. 217(III)). It was the first universal declaration of human rights and incorporated some of the most important basic values of the international legal order. Yet in spite of its high moral and political authority, it was, in legal terms, proclaimed merely in the form of a non-binding recommendation, with several important member States abstaining. The fact that it is nevertheless considered soft law is to be attributed to its proximity to law. It provided – historically speaking – the immediate base for subsequent legally binding universal treaties as well as the evolution of rules of customary international law for the protection of Human Rights. In addition, the Universal Declaration of Human Rights is capable of producing legally binding effects within the internal sphere of the United Nations. For example, unequal treatment of women and men, as forbidden by the Universal Declaration of Human Rights, is to be considered illegal as far as the treatment of personnel of the United Nations is concerned. The Declaration is thus capable of producing legal effects internally while having been adopted as an instrument with a programmatic or hortatory character vis-à-vis the member States.

⁵ On the acts of international organizations, see THILO MORHARD, *Die Rechtsnatur der Übereinkommen der Internationalen Arbeitsorganisation*, Frankfurt am Main 1988; STEFAN SCHWAGER, *Empfehlungen internationaler Organisationen besonders auf dem Gebiet der europäischen Raumordnung*, Basel 1990; JOCHEN ABR. FROWEIN, *The Internal and External Effects of Resolutions by International Organizations*, *ZaöRV* 1989, p. 778 ff.; MICHEL DJIENA WEMBOU, *Réflexions sur le rôle des résolutions dans l'élaboration du droit international par les organes politiques de l'ONU*, in: *Revue Hellénique de Droit International* 1992, p. 95 ff.; JOSEPH GOLD, *Interpretation: The IMF and International Law*, London 1996.

⁶ Universal Declaration of Human Rights, UN General Assembly Resolution 217 A (III) (10 December 1948) GAOR 3rd Session Part I Resolutions 71.

Other important examples of soft law in the sense here described are provided by certain measures taken within the framework of the European Communities and the European Union.⁷ In their founding treaties, the European Communities were instituted as supranational organizations equipped with organs having well-defined powers. Thus the Treaty of Nice provides in Art. 249⁸ that in order to carry out their task, the European Parliament, the Council and the Commission, shall jointly make regulations, issue directives, take decisions, make recommendations or deliver opinions. Among the instruments set out in this provision, recommendations and opinions have a non-binding or soft law character. Looking at Community practice, soft law may also be discovered, whether enacted separately or jointly by different organs, under various headings such as interpretative declarations, programmes, resolutions and reports. These instruments can be categorized according to their form, their content or the organs from which they emanate. What they all have in common is the intention of their drafters to establish standards outside the formal sources of law. Apart from their role in the field of the European Communities, soft law measures are the main instruments of action provided for in the Treaty on the European Union, particularly in its second pillar (Common Foreign and Security Policy) and in its third pillar (Justice and Home Affairs).

In this context, mention should also be made of the role of soft law in international economic law. International organizations and institutions such as the Organisation for Economic Co-operation and Development (OECD)⁹ or the United Nations Conference on Trade and Development

⁷ See MICHAEL BOTHE, *Soft Law in den Europäischen Gemeinschaften?* in: Ingo von Münch (Hrsg.), *Staatsrecht, Völkerrecht, Europarecht, Festschrift für Hans-Jürgen Schlochauer*, Berlin 1981, p. 761 ff.; LINDA SENDEN, *Soft Law in European Community Law*, Oxford 2004; GERDA FALKNER, OLIVER TREIB and MIRIAM HARTLAPP, *Complying With Europe: EU Harmonisation and Soft Law in the Member States*, Cambridge 2005.

⁸ Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community, European Union Official Journal C 321 E/1 of 29 December 2006.

⁹ See THEODOR SCHWEISFURTH, *Die juristische Mutation der KSZE – eine internationale Organisation in statu nascendi*, in: Ulrich Beyerlin, Michael Bothe, Rainer Hofmann und Ernst U. Petersmann (Hrsg.), *Recht zwischen Umbruch und Bewahrung: Völkerrecht, Europarecht, Staatsrecht, Festschrift für Rudolf Bernhardt*, Berlin 1995, p. 213 ff.; HANNES TRETTER, *Von der KSZE zur OSZE: Einführung in die*

(UNCTAD) have tried to influence the economic policy of States by introducing so-called codes (which should be distinguished from the codes of conduct previously mentioned, which emanate from private initiatives). These codes aim at influencing the conduct of multinational enterprises or regulating the transfer of technology. Despite the fact that such codes are not legally binding, supervision procedures have been devised to ensure that they are in fact put into action. In other words: Soft law is sometimes coupled with hard procedures. In the case of the OECD guidelines for multinational enterprises, a special committee has the power to control whether the code is respected and to adjust the code if necessary to suit current developments. Here, we see soft law which is enforced perhaps more stringently than many norms of «hard law».

Yet International Organizations not only create soft law through the traditional means of resolutions, but through frequent inter-governmental conferences as well.¹⁰ The outcome of such conferences are soft law acts which are borne, to a greater or lesser extent, by the participating actors and which can be the first step on the way to adopting hard law. In 1992, for example, the UN Conference on Environment and Development established the Rio Declaration on Environment and Development as well as the Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forest. These legally non-binding agreements have been coupled with the legally binding Convention on Climate Change and the Convention on Biological Diversity. This mixture of complex agreements results from the intention of combining the highest reachable level of legally binding norms with the highest level of legally non-binding rules, with the latter often serving as a stepping stone to the former. The same phenomenon can be observed at conferences such as the Vienna World Conference on Human Rights in 1993, the Cairo Conference on Population and Development in 1994, the Copenhagen World Summit for Social Development in 1995, the World Conference on Women held in Beijing in 1995, and the United Nations

für den Schutz der Menschenrechte relevanten Teile des Budapester KSZE-Dokuments 1994, EuGRZ 1995, p. 296 ff.

¹⁰ See CHRISTIAN TOMUSCHAT, *The Concluding Documents of World Order Conferences*, in: Jerzy Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski*, The Hague 1996, p. 563 ff.

Millennium Summit in 2000. All these conferences have confirmed a trend in international relations towards finding a substitute for treaty law as the leading instrument to regulate the complexities of social development at the universal level.

2. Non-binding inter-State agreements

The second major category of international soft law norms consists of non-binding agreements or non-binding parts of legally binding agreements concluded by States. Perhaps the best-known example is the Final Act of the Helsinki Conference for Security and Cooperation in Europe.¹¹ This agreement signed in 1975 was negotiated at the highest diplomatic level between the European States, the Soviet Union, the United States and Canada. The Conference of 1975 was followed by other conferences within the framework of the CSCE and, under the name of Organisation for Security and Cooperation in Europe (OSCE), has morphed into an international institution of sorts. Its significance was enhanced in the years since the fall of the Soviet Union and the diminishing Russian influence over the former Warsaw Pact States. Despite its rather precise content, the Final Act was concluded as a legally non-binding agreement. This follows clearly from the statements made at the Conference; Prime Minister Wilson, for instance, in his concluding speech called the Final Act a «moral commitment», not an international treaty.¹² Its legally non-binding character is further underlined by the absence of any subsequent ratification or adoption procedures in the participating States where such procedures would be constitutionally prescribed for the conclusion of international treaties; nor was the Final Act included in the UN Treaty Registry. Undoubtedly, it was not intended to establish binding rules under international law, but nevertheless, it aimed at creating some sort of obligation to ensure that the States concerned would base their conduct on the provi-

¹¹ Helsinki Final Act of 1 August 1975, available at <http://www.osce.org/mc/13017.html>.

¹² Part of the text of the speech of Harold Wilson, Prime Minister of Great Britain, at the Helsinki Conference is available at <http://www.osaarchivum.org/files/holdings/300/8/3/text/99-5-10.shtml>.

sions of the Final Act, and on the follow-up documents subsequently adopted.

In the field of disarmament,¹³ the Declaration of the Soviet Union and the United States of May 5, 1971 provides another example for the phenomenon of soft law. This declaration preceded the Strategic Arms Limitation Talks (SALT), which led to the SALT-1 Treaty of June 21, 1973. In the Declaration, the United States and the Soviet Union defined those subjects upon which the subsequent agreement was envisaged to have effect. It thus provided the basis for the SALT-1 Treaty, which in turn represented a milestone in the field of disarmament: Representatives of the United States and the Soviet Union solemnly agreed on basic principles of negotiation on the further limitation of strategic offensive arms. By now, soft law has taken on a role of considerable importance in the disarmament process. Thus, for example, on January 11, 1989 the States parties to the 1925 Geneva Protocol adopted a resolution which served as basis to the UN Convention of September 3, 1992 on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction.¹⁴

But Soft law does not occur solely in the form of non-binding agreements. It can also form part of binding treaties. For example, many treaties contain clauses of a highly abstract, non-committal character, which are not intended to be binding for the contracting parties. Sometimes treaties include provisions which provide for further negotiations, or which call upon the implementing agencies to take into account the relevant and current scientific standards, or to have regard to due diligence. These clauses often represent soft law in what are otherwise binding treaties. At the same time, they might offer a gateway for the later «hardening» of legal provisions: Either the subsequent negotiations for which they provide lead to the adoption of hard law, or the general terms they refer to (such as «due diligence») acquire a specific and enforceable meaning.

¹³ RICHARD L. WILLIAMSON, *Hard Law, Soft Law, and Non-Law in Multilateral Arms Control: Some Compliance Hypothesis*, in: *Chicago Journal of International Law* 2003, p. 59 ff.

¹⁴ *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction* of 3 September 1992 (opened for signature on 14 January 1993, entry into force on 29 April 1997), 1974 UNTS 45.

III. Fundamental Challenges posed by the Soft Law Phenomenon

The legal quality of soft law raises fundamental questions, namely whether this notion implies a sort of relativity of the concept of international law, and whether soft law should constitute a source in its own right in addition to the traditional sources of international law.

1. Relativity of the concept of international law?

The very concept of soft law seems to suggest that in international relations, no exact distinction can be drawn between social norms of a legal and non-legal character. Yet this perception would question the established dichotomy between law and non-law, and might, as a corollary, lead to the denial of the very existence of international law as a set of rules and principles in international relations.

Given the peculiar nature of international law, such an assumption cannot be dismissed easily. As a general rule, international law is generated by consent, and its authority depends on the willingness of the actors involved to play their part in international relations, and to comply with the rules they established. In comparison with domestic law, the line between law and non-law often seems blurred on the international level. In fact, one influential American school of thought – the New Haven approach, which is rooted in legal realism – considers various attempts to classify social rules in international relations to be unnecessary. According to this school, the crucial point is not the classification of a social norm, but its influence on the foreign policy of States and other subjects of international law. This view corresponds with the fact that in international relations, the main focus is on the content, and not on the legal status of a specific norm.

Plausible as such a theory may seem, it nevertheless has to be questioned. First, it is juridically inconceivable to split and quantify the term «law». A norm is either legally binding or it is not, and it can either be invoked in a legal forum or not. There is nothing in between: law cannot be more or less binding. Thus, the term «soft law» does not – legally speak-

ing – make any sense, because a norm is either a postulate, or it is hard law in its strict sense.

Another reason to maintain the distinction between law and other social rules is that the very authors of a non-binding rule often emphasize its non-binding character. The Universal Declaration of Human Rights of 1948, for instance, was drafted by the UN General Assembly as a recommendation. Its adoption would never have taken place if its authors had opted for the form of a legally binding treaty: The objections to the Declaration, and the subsequent abstention, by the Soviet Union leave little doubt in this respect.¹⁵ The same may be said about the OECD guidelines and the Final Act of Helsinki; the will of the consenting States was limited to the approval of a legally non-binding instrument. In such cases the form of a legally non-binding commitment proved the appropriate device to reach consensus, with States clearly unwilling to go further and to give up any further freedom. The consent covered the content of the postulated principles, but not their legally binding force. In other words, the choice of a specific legal form for an agreement normally corresponds with, and reflects, the will of its authors to endow it with a specific authority. For that reason, the question whether an act in international relations has legal quality or not must not be considered a mere formalism. Rather, it mirrors the extent to which States consider themselves bound by what they agree to. A third reason to maintain the dualism of law and non-law is the fact that the juridical qualification of a specific norm can be decisive for the implementation of, and the compliance with, the norm. Domestic courts as well as international courts generally base their decisions on law which they consider to be binding. In court proceedings, a party can only be found to have breached a legal obligation or not – *tertium non datur*. Furthermore, specific counter-measures under international law such as reprisals can only be applied in response to wrongful acts in the sense of breaches of established rules of international law.

¹⁵ Report of the Third Committee, 183rd Plenary Meeting, December 10, 1948, UN Doc. A/777, p. 923.

2. Broadening the concept of international law?

While it has been stated here that the dualism of law and non-law should not be abandoned, the question remains whether soft law could be added as an additional source to the three traditional sources of international law. This question must also be answered in the negative. It is true that the codification of international law is a cumbersome and lengthy task, and that customary international law may prove inadequate in coping with the rapid changes in international relations. Nevertheless, nowadays international organizations exist which provide a framework for harmonizing legal opinions, and which can work out legal projects in a relatively short time. Through the General Assembly, the international community is equipped with a most important communication centre and a modern infrastructure permitting immediate interaction. International governmental organizations provide for a modern form of diplomacy which the former Secretary of State of the United States Dean Rusk called «parliamentary diplomacy».¹⁶ Such organizations have multiplied the possibilities for elaborating and concluding treaties, and have facilitated the process of developing customary law in a way that there is actually no need to acknowledge soft law as an independent, fourth source of international law. If there is a real need for legal action, international law as such can be adapted within due time. The acknowledgment of an additional source of international law would amount to further wishful thinking instead, when what is actually called for is stabilizing and keeping expectations on a realistic and realisable level. It seems to be more appropriate to consider soft law acts as indications of the meaning behind, or the stages in, the development of international law, rather than as international law itself.

IV. Special Legal Relevance of Soft Law

When trying to determine the specific legal relevance of soft law, three aspects should be distinguished: the immediate legal effects of soft law, its

¹⁶ DEAN RUSK, *Parliamentary Diplomacy: Debate v. Negotiation*, in: *World Affairs Interpreter* 1955, p. 121 ff.

role as a constitutive element in the process of development of international law, and the relationship of soft law and rule of law in international relations.

1. Immediate legal effects

Soft law norms may have immediate legal effects in the field of good faith; they can also contribute to shaping and developing binding norms; and soft law may prove helpful as a means of a (purposive) interpretation of international law.

First and foremost, soft law is of particular relevance in the field of good faith. This does not mean that somehow, good faith transforms soft law into binding law. After all, the pertinent norms have been deliberately denied legal character by the parties choosing soft law as the appropriate form for a specific agreement or an otherwise specific act of practice. The principle of good faith requires relevant actors not to contradict their own conduct. For example, they cannot invoke the illegal character of acts which they have themselves approved, and they are precluded from claiming that soft law norms, or subsequent actions based on them, interfere illegitimately in their internal affairs. Thus, the principle of good faith – despite the fact that it does not change the non-legal nature of soft law as such – has the effect of legally protecting expectations produced by soft law norms insofar as it is justified by the conduct of the parties concerned.

Another important aspect of soft law concerns its contribution to the shaping and development of existing international law. For example, resolutions of international organizations may be considered as shaping and solidifying the legally binding obligations which the founding treaty of the respective organization contains. Because resolutions indicate how the basic treaty is generally understood by the contracting parties, they can be used to clarify and develop the meaning of the treaty itself. Furthermore, soft law may be regarded as an indication of the existence as well as of the content and scope of a principle of customary international law. In this context, the Military and Paramilitary Activities in and against Nicaragua

Case (*Nicaragua v United States of America*)¹⁷ may be instructive. In the context of this case, UN General Assembly Res. 3314 of December 14, 1974 contained a definition of aggression on which the International Court of Justice relied as evidence of a rule of customary international law. According to this rule, sending armed bands, irregulars or mercenaries to carry out acts of armed force against another State is to be regarded as an armed attack in the sense of customary international law, as long as these acts are of equal importance as those normally conducted by regular forces.

With regard to interpretation, there are two aspects of the legal relevance of soft law which must be distinguished. First, it has to be emphasised that soft law acts are important indications with a view to the interpretation of international law. Legal principles which are not formulated in binding treaties or are not clearly part of customary law may be contained in extralegal norms. In this sense, soft law helps to clarify, or to give a more concrete form to, international law.

Apart from the function of soft law in interpreting international law, it may also be of crucial importance when interpreting municipal law. Recommendations of organs of international organizations such as the United Nations, the International Labour Organisation or the Council of Europe may guide and support domestic courts, administrations and legislative authorities in the process of interpretation and application of inner-State law. Particularly noteworthy is the role of soft law in decisions taken by domestic courts in the sphere of discretionary clauses or indeterminate legal concepts of constitutional, administrative and private law. Soft law may thus intrude into the internal sphere of States and help define the meaning of the principles and rules laid down in municipal law. Codes, memoranda and similar soft law acts can so become part of municipal legal orders.

It should be mentioned in this context that the phenomenon of soft law may cause problems with regard to constitutional systems of competence. According to the division of power embodied in State constitutions, the treaty making power is, as a general rule, vested in the executive as well as in legislative bodies. By opting for soft law as a non-binding instrument of international relations, governments have a means to avoid parliamen-

¹⁷ Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), ICJ Reports 1984, p. 392.

tary or other democratic influence on, or interference with, the elaboration of international agreements. Thus, the constitutional system of competence may be circumvented. Bearing in mind that it is up to each constitutional system to prevent such misuse, it can nevertheless be stated that, in general, legislative powers in the sphere of foreign policy should not be undermined by State authorities taking resort to soft law.

2. Elements in the development of international law

The various forms of soft law and their respective effects on international and municipal law have been described above. Soft law can play a major role in the evolution of both these legal orders. It often represents a step in the evolving process of international law. As mentioned above, the Universal Declaration of Human Rights provided the basis for the Human Rights Covenants of 1966¹⁸ as well as other human rights treaties which are binding as a matter of law. The Declaration of Outer Space adopted by the UN General Assembly in 1963¹⁹ was followed by the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies of 1967.²⁰ It goes without saying that soft law norms may also form essential stages in the process of evolution – or deconstruction – of customary international law. Their law-shaping potential is relevant for the *opinio juris* as well as the State practice as constitutive elements of customary international law. Furthermore, soft law acts can be used as a source of inspiration or as building-blocks when creating new municipal law. The UN Universal Declaration of Human Rights has been incorporated fully or in part into numerous domestic constitutional orders. It also seems that the Final Act of Helsinki provided the source for Art. 29 of the Constitution of the Soviet Union of

¹⁸ International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

¹⁹ UN General Assembly Resolution 1963 (XVIII) of 13 December 1963 (International co-operation in the peaceful uses of outer space).

²⁰ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies of 27 January 1967, 610 UNTS 205.

1977. Similarly, the United States adapted their immigration laws as a consequence of the Final Act. An important aspect of this particular proximity of soft law to the legal order proper can thus be seen in the way that it serves as a model in the process of international as well as municipal law-making. Once soft law norms are created, they provide the frame for future reaffirmation or elaboration. This situation is completely different from instances where debates and decisions about new projects have not yet been influenced by already-formulated common expectations. The mere existence of norms in international relations – whether binding or not – allow the world players to refer immediately to these norms, thus avoiding some of the lengthy discussions necessitated by every law-making process. Soft law can thus be considered the result of a consultation process preceding legislation proper: The pressure groups and parties involved have had an opportunity to make their views known and find a consensus, on which they can build when trying to establish binding rules.

3. Interrelationship of soft law and the rule of law in international relations

Different connections may be noted between soft law and international law. On the one hand, international law may contain principles which are also helpful in the field of soft law. The methods of interpretation provided for in the Vienna Convention on the Law of Treaties of 1969,²¹ or legal principles designed to resolve conflict rules may, for instance, be applied by analogy with regard to emanations of soft law. Whereas soft law may have the function of pre- or proto-law in the law-creating process, it also seems to be characterized, as far as its structure and function is concerned, by certain para-legal features.

More importantly, soft law has a complementing and strengthening function within the international legal order. There is a gap between the obvious need for norms in international relations and the limited possibilities of international law with its rudimentary problem-solving capacity. Soft law is an appropriate means to fill this gap, at least partly. Thus, treating soft law merely as a degradation of international law seems rather one-

²¹ Vienna Convention on the Law of the Treaties of 23 May 1969, 1155 UNTS 331.

sided and shows a lack of insight into the specific character of the system of international norms. Informal norms such as soft law are able to stabilize expectations and to contribute to holding the anarchic elements in international relations together. Soft law, as well as law *stricto sensu*, provides a means to determine politics by the establishment of principles. When a legal solution to a specific problem in international relations cannot be reached, extralegal norms often provide a practical substitute or a basis for developing legally binding norms.

V. Recent Developments

For the past decade private actors have increasingly tried to influence the process of creation of national and international legal norms. They frequently set up groups of internationally recognized experts who work out standards in domains where the law is not (yet) fully developed and adopt them as recommendations. These recommendations appear to have a normative quality. Thus, for instance, in September 1999 a group of experts established by the OESC High Commissioner on National Minorities drafted and adopted the Lund Recommendations on the Effective Participation of National Minorities in Public Life.²² The Lund Recommendations were preceded and followed up by recommendations in various other fields (such as the Hague Recommendations on the Education Rights of National Minorities of 1996, the Oslo Recommendations regarding the Linguistic Rights of National Minorities of 1998, or the Warsaw Guidelines of 2001 to Assist National Minority Participation in the Electoral Process)²³. Similarly, the 1990 Turku Declaration of Minimum Humanitarian Standards,²⁴ drawn up by a number of eminent jurists upon invitation by the Institute for Human Rights of the Åbo Akademi in Turku, Finland, provided important impetus to the important issue of internal armed con-

²² The Lund Recommendations on the Effective Participation of National Minorities in Public Life of September 1999, available at: <http://www.osce.org/hcnm/publications.html>.

²³ All recommendations are available at: <http://www.osce.org/hcnm/publications.html>.

²⁴ Declaration of Minimum Humanitarian Standards, 30 November – 2 December 1990, available at: http://web.abo.fi/institut/imr/publications/publications_online-text.htm.

flicts. Even though not formally adopted by subjects of international law, these documents may have a specific legal significance: They provide national legislators with guidance on topics which traditionally belong to the *domain réservé* of States or in which States enjoy a wide margin of appreciation; thus, these documents may have a certain influence on the creation of national law. Accordingly, the Lund Recommendations, *inter alia*, supply States with options on how to enact the rather vague Art. 15 of the European Framework Convention for the Protection of National Minorities²⁵ (regarding the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them). Since such norms are not established by subjects of international law, they are not part of soft law as such. Rather, they are acts of standard-setting and may therefore be considered as placed even below the level of soft law. As such they do not put in question the traditional way of norm generation in public international law, but rather supplement it.

VI. Summary

The term soft law lacks precision and is to some extent misleading. It seems to blur the line between binding and non-binding norms in international relations. Nevertheless, the relativity of the concept of international law, which is for some observers implied in the notion of soft law, must be rejected: The fundamental distinction between law and non-law should not be abandoned. Soft law should not be considered as an independent, formal source of international law, which extends the scope of the international order in its traditional sense.

The concept of soft law – in spite of its misleading name – represents an important phenomenon in international relations: a complex of norms lacking binding force but, producing significant legal effects nevertheless. Soft law is of particular importance where good faith needs to be protected. It may also prove helpful in developing, interpreting and clarifying

²⁵ Framework Convention for the Protection of National Minorities of 1 February 1995, CETS 157.

international as well as municipal law. Furthermore, it often provides a model formula for the drafting of international and municipal law, and it contains elements which contribute to the evolution of international law.