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INTERNATIONAL LAW IN " HER INFINITE VARIETY "

By

R. R. BAXTER

It is generally understood today—although lawyers not trained in international law may still rebel against the idea—that principles or rules of international law have a real existence and create obligations for States and individuals, even though they may not be enforced by sanctions. That legal norms occupy a place in international law, even though they do not create rights or duties, is a more radical assertion, but one, I believe, which may be defended.

Of course, the great majority of norms which are laid down in international agreements are susceptible of enforcement through the well-known mechanisms, including resort to international tribunals and national courts, which ensure respect for these obligations. But there are norms of various degrees of cogency, persuasiveness, and consensus which are incorporated in agreements between States but do not create enforceable rights and duties. They may be described as " soft " law, as distinguished from the " hard " law consisting of treaty rules which States expect will be carried out and complied with. If one State undertakes to pay another a stipulated sum of money in settlement of certain claims or a State by treaty accepts limitations on its power to tax aliens, it is expected that those duties will be carried out.

The differences among various norms of customary international law, in terms of degree of acceptance, of precision, of relevance, are well understood. We speak of a " regional rule of international law," of a " principle of Socialist international law," of an " emergent principle of international law," of an " obsolete rule of international law," of a " generally accepted rule of international law," or even of a " rule enunciated in British practice." The same variety of texture is to be found in international agreements, in which two or more States have agreed upon the formulation of certain norms that will be given application between or amongst them.

Judge Baxter

As this article (a revised version of the Third F. A. Mann Lecture, delivered in Lincoln's Inn Old Hall, London, on Oct. 16, 1979) was passing through the Press, the Institute learned, with the greatest regret, of the untimely death of Judge Baxter. He had been for many years Professor of International Law at Harvard University and Editor in Chief of the *American Journal of International Law*. He was appointed to the International Court of Justice in 1978. His passing will be mourned by all those who knew him, either through personal contact, his writing or his great influence in many fields of International Law.

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I use the term " international agreements " advisedly in order to avoid the somewhat technical sense given to the term " treaty " in the Vienna Convention on the Law of Treaties.[1] I do not confine myself to those " international agreements concluded between States in written form and governed by international law," which, under the terms of Article 26, are " binding upon the parties " to them and " must be performed by them in good faith." I intend to use the term in a much wider sense as comprehending all those norms of conduct which States or persons acting on behalf of States have subscribed to, without regard to their being binding, or enforceable, or subject to an obligation of performance in good faith.[2] These written instruments run the gamut from treaties, in the strict sense, through declarations of policy, joint communiqués or resolutions of the General Assembly, to commitments of varying character made on the highest levels of government down to the lowest. It seems well to refer to the norms contained in international agreements, because one instrument may contain both provisions creating precise legal obligations and norms of such a vague and general character that it is clear that they were not intended to be enforced.

We may start this examination of " soft " or " weak " law with one category of international agreements which have by some authorities been recognised to have a peculiar character. Treaties whereby States enter into alliances, or agree to co-ordinate their military action, or declare the neutrality of an area, or lay out their agreed policies for the future (such as the Atlantic Charter or the Yalta Agreement) have sometimes been characterised as " political treaties." [3] The usual view has been that these agreements should not be put in a separate legal category, subject to rules peculiar to this class of treaties. No such terminology is employed in the Vienna Convention on the Law of Treaties. But there is an awareness that these agreements are particularly vulnerable to the operation of *rebus sic stantibus*, provided they are not dispositive, in the sense of establishing boundaries or the status of territory or containing other territorial dispositions. If a State refuses to come to the aid of another under the terms of an alliance, nothing can force it to. It was never expected that the treaty would be " enforced." Similarly, if a State changes its policy and leaves the alliance, only political or economic arguments can bring about a reversal of the State's position. A change in a government's orientation must therefore be regarded as " a fundamental change in circumstances." If it is not, no

[1] Opened for signature at Vienna, May 23, 1969; UN Doc. A/CONF. 39/27 (1969); (1969) 63 Am.J.Int.L. 875.

[2] I am indebted to Professor Oscar Schachter for his illuminating editorial comment, "The Twilight Existence of Nonbinding International Agreements," (1977) 71 Am.J.Int.L. 296.

[3] McNair, *The Law of Treaties* (1961), pp. 501–502, 513.

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legal doctrine can explain or make consistent with the law what will actually happen in fact.

The Vienna Convention makes no reference to " political treaties " and it would have been surprising if it had, because it would have added to the complexity of the law and would have supplied a basis for escape from treaty obligations which might have been susceptible of abuse. But these " political treaties " nevertheless are kept alive by perceptions of mutual advantage and by political and economic forces. They are as *legally* fragile as are the joint communiqués and joint declarations in which heads of States or foreign ministers describe the agreement they have achieved on policies to be pursued by the States concerned. They, together with some forms of political treaties, are merely joint statements of policy which will remain alive only so long as the States concerned see it to be in their mutual interest to concert their policies. One simply cannot think of " violations " of such instruments.

Other treaties, dealing with sensitive matters of national security, provide for an easy way out and thus create " obligations " of such a fragility that legal enforcement may be difficult or even impossible. Instead, a violation of the agreement may simply give an aggrieved party the option of terminating its own performance and of resorting to conduct otherwise forbidden by the instrument. The force making for compliance is that violation of the agreement may bring the whole structure tumbling down.

For example, the Nuclear Test Ban Treaty of 1963 [4] provides that " each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country." [5] Three months' notice is required. What the provision amounts to is that violation of the treaty by a treaty partner or other events, as determined by a party, justify it in withdrawing from the treaty. The right of denunciation, going far beyond the right of termination of a treaty because of a " material breach," is the threat that holds the parties to their obligations. To take a second instance, the Geneva Protocol of 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare [6] is subject to a reservation, made by a number of the major military powers, whereby they reserve the right to employ chemical warfare against a State which has used gas in violation of the Protocol or against any State allied with the first user. The effect is that a whiff of a gas by one State in a conflict, possibly acting under a claim that the particular use of gas is not unlawful, can effectively bring the

[4] Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water, signed at Moscow, Aug. 5, 1963, Great Britain T.S. No. 3; (1964) 480 U.N.T.S. 43.

[5] Art. IV.

[6] Done at Geneva, June 17, 1925, Great Britain T.S. No. 24 (1930) 94 L.N.T.S. 65.

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Protocol to an end.[7] The permitted action goes far beyond what would be allowed under the doctrine of reprisals. Again, the obligation can only be described as a fragile one, because the bonds of the agreement can plausibly be severed through a valid or baseline claim of wrongdoing.

Both of these two forms of international agreement—political treaties and agreements from which easy release is available—do carry some measure of obligation, although they may not be enforceable in the strict legal sense.

A provision of a treaty sometimes calls for negotiations looking to the conclusion of further, more detailed agreements. A treaty establishing a common market or a free trade area may require elaboration through a number of more detailed international agreements. The Treaty of Rome, establishing the European Economic Community, contains a number of provisions looking to the conclusion of further agreements by the parties.[8] The Montevideo Treaty instituting a Latin American Free Trade Area calls for negotiations among the Contracting Parties with a view to drawing up schedules for the reduction or elimination of customs duties and other restrictions.[9] These individual provisions are *pacta de contrahendo*, which cannot be enforced if the parties do not reach agreement. There is no way in which an agreement can be forced upon them and there is likewise no way in which they can be compelled to negotiate. The assertion that the duty to negotiate or to conclude an agreement implies a duty to negotiate in good faith is an empty one. Unless appropriate machinery has been set up, no court or other agency can determine whether a State has or has not negotiated in good faith and what the duty to negotiate in good faith requires. In the relations of States, a complaint that negotiations have not been carried on in good faith is mere rhetoric.

Closely related to the obligation to negotiate or to conclude an agreement are norms of treaties which are, on the international level, non-self-executing in the sense of requiring further more detailed treaties in order to give effect to the principal treaty. Article 105 of the United Nations Charter, dealing with the privileges and immunities of the Organisation, its officials, and representatives of member States, is such a provision; it has been carried into effect through the Headquarters

[7] Baxter and Buergenthal, " Legal Aspects of the Geneva Protocol of 1925," (1970) 64 Am.J.Int.L. 853, 871–873.

[8] Treaty Establishing the European Economic Community, signed at Rome, Mar. 25, 1954, Great Britain T.S. No. 1 (1973) Pt. II, 294 U.N.T.S. 17. While the Treaty of Rome looks primarily to the adoption of regulations and directives (*e.g.* Art. 87 on giving effect to Arts. 85 and 86, dealing with rules on competition in the Common Market), it also speaks of agreements to be concluded (*e.g.* Art. 135 regarding agreements on freedom of movement for workers from associated countries and territories).

[9] Treaty establishing a Free-Trade Area and Instituting the Latin American Free-Trade Association, signed at Montevideo, Feb. 18, 1960, Art. 4, in A. J. Peaslee, *International Governmental Organizations: Constitutional Documents* (Rev. ed. 1974), Pt. I, p. 1090.

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Agreement [10] and the Convention on the Privileges and Immunities of the United Nations.[11] Whether Article 105 could do the job single-handedly is open to serious doubt; it clearly calls for amplification.

And certain provisions of treaties are merely hortatory. They call for co-operation by States to achieve certain purposes. As Judge Dillard wrote in his separate opinion in the *Appeal Relating to the Jurisdiction of the ICAO Council* (*India* v. *Pakistan*):

> ... (M)ultilateral treaties establishing functioning institutions frequently contain articles that represent ideals and aspirations which, being hortatory, are not considered to be legally binding except by those who seek to apply them to the other fellow.[12]

An illuminating instance of such hortatory treaty provisions—the more significant for its replacing fixed legal obligations—is Article IV of the Second Amendment to the Articles of Agreement of the International Monetary Fund of 1976, section 1 of which states:

> Recognising that the essential purpose of the international monetary system is to provide a framework that facilitates the exchange of goods, services, and capital among countries, and that sustains sound economic growth, and that a principal objective is the continuing development of the orderly underlying conditions that are necessary for financial and economic stability, each member undertakes to collaborate with the Fund and other members to assure orderly exchange arrangements and to promote a stable system of exchange rates. In particular, each member shall:
>
> (i) endeavour to direct its economic and financial policies toward the objective of fostering orderly economic growth with reasonable price stability, with due regard to its circumstances;
> (ii) seek to promote stability by fostering orderly underlying economic and financial conditions and a monetary system that does not tend to produce erratic disruptions;
> (iii) avoid manipulating exchange rates or the international monetary system in order to prevent effective balance of payments adjustment or to gain an unfair competitive advantage over other members; and
> (iv) follow exchange policies compatible with the undertakings under this section.[13]

The quoted section is not altogether devoid of content, since each member undertakes to co-operate with the Fund and with other members, and section 2 calls upon members to notify the Fund of its exchange arrangements in fulfilment of its obligations under section 1. But in the absence of institutional machinery or other means of review ing what the parties have done, a party's refusal to follow the exhortations or recommendations of the treaty cannot be met with any measures

[10] Agreement regarding the Headquarters of the United Nations, signed at Lake Success, June 26, 1947, 61 U.S. Stat. 3416, U.S. T.I.A.S. 1676, 11 U.N.T.S. 11.

[11] General Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly, Feb. 13, 1946, Great Britain T.S. No. 10 (1950) 1 U.N.T.S. 16.

[12] I.C.J. Reports (1972), p. 46 at p. 107, n. 1.

[13] Adopted Mar. 24, 1976, and entered into force Apr. 1, 1978, Great Britain T.S. No. 83 (1978), p. 5; (1976) 15 *Int. Legal Materials* 546, 548–549. See Hugo J. Hahn, " Aufwertung und Abwertung im Internationalen Recht," in *Fragen des Rechtes der Aug- und Abwertung* (1979) 20 *Berichte der Deutschen Gesellschaft für Völkerrecht* 1 at pp. 59–77.

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of compulsion. It must of course be conceded that exhortations or recommendations or agreements to " endeavour " or to " seek " lift the subjects dealt with in such norms out of the domestic jurisdiction of States and make them proper objects of international concern.

The three types of norm in international agreements—the *pactum de contrahendo*, the non-self-executing article of a treaty requiring further agreements to give it effect, and the hortatory provision—have the common characteristic of not creating legal obligations which are susceptible of enforcement, in whatever sense the concept of " enforcement " is employed. They are all " soft " law.

I now turn to another type of arrangement, international in character, which is difficult to fit into the existing structure of the law, especially as it is reflected in the Vienna Convention on the Law of Treaties. This form of agreement has caused particular internal difficulties in the United States, and I hope that I may be pardoned for saying a few words about US foreign relations law and the continuing struggle between the Congress—in particular the Senate—and the President over the conduct of foreign relations. Although the issues are domestic ones, they do have important international implications.

During and after the conflict in Vietnam in particular, the Congress became aware of the fact that the President of the United States had, in the perception of various senators and representatives, made commitments on behalf of the United States which were of the utmost seriousness but had not been submitted to the Senate as " treaties " in the constitutional sense for the approval of that body. These commitments sometimes had been kept secret and were only grudgingly or through " leaks " brought to the attention of the Congress and the public. The Congress complained that it was in general not being kept properly informed about the " international agreements other than treaties " (or " executive agreements," as they are sometimes called) concluded by the United States. The outcome was the enactment of legislation which, as it currently reads, requires the Department of State to transmit " the text of any international agreement (including the text of any oral international agreement, which agreement shall be reduced to writing), other than a treaty, to which the United States is a party " to the Congress within 60 days of the conclusion of the agreement. Any department or agency which enters into an agreement on behalf of the United States must send it to the Department of State within 20 days.[14] The inquiries made prior to the enactment of this legislation in 1972, and the implementation of the act in subsequent years, brought to light a great volume of working-level agreements or arrangements made by various government departments of the United States in the course of routine dealings, of a co-operative character, with

[14] The so-called " Case Act," P.L. 92–403, as amended, 1 U.S.C. 112b (1979).

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foreign governments.[15] These had not been published in *Treaties and Other International Agreements of the United States* and they had not been recorded with the United Nations under Article 102 of the Charter. Some were concluded in implementation of agreements which had been approved by the Senate or by the Congress.

Further concern about the commitments of the United States was awakened by the disclosure that President Nixon and President Thieu of the Republic of Vietnam had exhanged letters in 1972 in connection with the conclusion of the Paris ceasefire agreements.[16] In these letters President Nixon made such statements as "I repeat my personal assurances to you that the United States will react very strongly and rapidly to any violation of the agreement," and "Should you decide, as I trust you will, to go with us, you have my assurance of continued assistance in the post-settlement period and that we will respond with full force should the settlement be violated by North Vietnam." These may have been merely statements of policy, they may have reflected only the views of President Nixon, they may not be international agreements because of their unilateral character, but the fact that such statements had been made, and made secretly, created alarm in the Congress and excitement in the press.

The international significance of the agreements which were brought to light in the United States during the seventies is that there must be a vast mass of agreements, commitments, and correspondence between governments, between the ministries of different governments, and between officials of different governments in which undertakings of one sort or another are made—to co-operate in some scientific work, to purchase and pay for supplies, to give effect to the terms of a treaty, to produce a prisoner at a particular time for the authorities of another State, to exchange information. The dealings between two governments co-operating in one sort of endeavour or another will inevitably lead to masses of correspondence, in which subordinate officials may make promises or commitments. The definition of "treaty" in the Vienna Convention leaves completely unclear how far down on the scale of international dealings the law codified in that treaty must apply. And if a very broad interpretation were given to "every treaty and every international agreement," as that term appears in Article 102 of the Charter, the Secretariat would be buried in immense masses of paper, far surpassing the volume of treaties now registered, already so large in number that the United Nations has fallen far behind in their publication.

[15] Congressional Oversight of Executive Agreements: Hearings on s. 3475 before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 92nd Cong., 2d Sess. 552–627 (1972).

[16] Letters from President Nixon, dated Nov. 14, 1972, and Jan. 5, 1973, in Congressional Oversight of Executive Agreements, 1975: Hearings on s. 632 and s. 1251 before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 94th Cong., 1st Sess. 323, 325 (1975).

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If then there exists this vast sub-structure of intergovernmental paper, it is probably fair to say that States have no intention of " enforcing " most of these undertakings made by other governments or their ministries or officials. The forces that make for compliance with such instruments are manifold, but essentially non-legal. Bureaucrats follow through on what they have said that they would do through force of bureaucratic habit—an analogue to what has sometimes been referred to as the " law habit." They do so in order to maintain the credit-rating of their government or ministry. They do so because they do not want to upset the existing structure of co-operation. They do not, in the generality of cases, purport to do so because the undertakings constitute binding legal instruments—" treaties " within the meaning of the Vienna Convention. Governments would deny that the papers were designed to create legal obligations and that the officials who signed them were qualified to speak for the State.

The totality of these " arrangements "—these undertakings—constitute another form of " soft law," complied with in fact but not under the coercion of the principle of *pacta sunt servanda* or any other rules of customary international law.

It must not be overlooked that States do set up by agreement machinery of co-operation and co-ordination which does not have the complexity of international organisations and of agencies of international co-ordination such as the International Joint Commission, Canada–United States.[17] In 1959, the Justice Minister of Canada and the Attorney-General of the United States set up an Antitrust Notification and Consultation Procedure in order to avoid some of the problems that had arisen out of unilateral measures taken by one State which had affected the interests of the other.[18] The OECD set up in 1967, by what was technically a Recommendation of the Council, a similar procedure for the exchange of information and the co-ordination of action.[19] These may not be " treaties " in the technical sense, but they do form part of the agreed machinery by which governments avoid or soften clashes of interest. They have more of the character of agreed procedures of international public administration than of law, yet they do belong to the domain of law in a qualified sense that makes it impossible to bring them within any of the existing categories of international law.

[17] Established by Art. VII of the Treaty between Great Britain and the United States relating to the Boundary Waters and Questions Arising along the Boundary between the United States and Canada, signed at Washington, Jan. 11, 1909, Great Britain T.S. No. 23 (1909).

[18] Hearings on the International Aspects of Anti-trust before the Subcommittee on Anti-trust and Monopoly of the Senate Committee on the Judiciary, 89th Cong., 2d Sess., Pt. 1, at p. 453 (1967): 6 Whiteman, *Digest of International Law* (1968) p. 159; see Campbell, " The Canada–United States Antitrust Notification and Consultation Procedure " (1978) 66 Can. Bar Rev. 459.

[19] Recommendation of the Council concerning Co-operation between Member Countries on Restrictive Business Practices affecting International Trade, OECD Doc C(67)53(Final) (1967). (1969) 8 *Int. Legal Materials* 1309.

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All of the forms of " soft," " fragile," or " weak " law of which I have until now spoken have been about for some time. They reflect familiar accommodations to familiar problems. They serve the needs of States for agreed methods of co-operation, within a system made up of what are presumptively enforceable legal obligations, creating rights or privileges or licences for the one party and duties for the other.

But in recent years, States have on a number of occasions undertaken the preparation of instruments which deliberately do not create legal obligations but which are intended to create pressures and to influence the conduct of States and to set the development of international law in new courses. I have to speak with a certain imprecision because it is of the very essence of these agreements that their legal impact is designedly left unclear. More often than not, this happens under the stress of international negotiations in which the parties cannot agree upon clear rules or principles to be followed.

The most interesting instance of this phenomenon is the Helsinki Accords, emerging from the Conference on Security and Co-operation in Europe and signed on August 1, 1975.[20] Anyone reading the instrument from the beginning for the first time would be under the impression that he was reading a treaty. It is true that there are provisions that are not self-executing. For example:

> The participating States will settle disputes among them by peaceful means in such a manner as not to endanger international peace and security, and justice.
>
> . . .
>
> For this purpose they will use such means as negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice including any settlement procedure agreed to in advance of disputes to which they are parties.[21]

There are *pacta de contrahendo*, as witness the following:

> The participating States... will consider favourable the conclusion, in appropriate cases, of specific bilateral agreements concerning various problems of mutual interest in the fields of commercial exchanges and industrial co-operation, in particular with a view to avoiding double taxation and to facilitating the transfer of profits and the return of the value of the assets invested.[22]

Elsewhere, the parties " agree to the following aims of co-operation " or " express their intention to encourage " some welcome development, like more tourism.[23] But interspersed among the various points of this agenda for action are norms that appear at first glance to be intended to create legal obligations:

> The participating States regard as inviolable all one another's frontiers as well

[20] Final Act of the Conference on Security in Europe, signed at Helsinki, Aug. 1, 1975, (1975) 14 *Int. Legal Materials* 1292.

[21] Declaration on Principles Guiding Relations between Participating States, Sec. V., p. 1295.

[22] Co-operation in the Field of Economics, of Science and Technology and of the Environment, Sec. 3, p. 1304.

[23] *Ibid.*, Sec. 6, p. 1310.

as the frontiers of all States in Europe and therefore they will refrain now and in the future from assaulting those frontiers.[24]

There are very precise provisions, down to numbers of troops, distances, and numbers of days, on the prior notification of major military manoeuvres.[25] And there are stipulations, considered by many to be of primary importance, on human rights, such as family visits:

In order to promote further development of contacts on the basis of family ties the participating States will favourably consider applications for travel with the purpose of allowing persons to enter or leave their territory temporarily, and on a regular basis if desired, in order to visit members of their families.[26]

Reunification of families, marriage between citizens of different States, and travel for personal or professional reasons are dealt with in similar terms.[27]

Working conditions are to be improved for journalists. " The participating States . . . intend "—the use of the word " intend " sends a tremor of doubt through the reader—to do such things as " examine in a favourable spirit and within a suitable and reasonable time scale requests from journalists for visas." [28]

The blow falls at the end. In the final provisions appears the following:

The Government of the Republic of Finland is requested to transmit to the Secretary-General of the United Nations the text of this Final Act, which is not eligible for registration under Article 102 of the Charter of the United Nations, with a view to its circulation to all of the members of the Organisation as an official document of the United Nations.[29]

The reference to Article 102 of the Charter on the registration of " every treaty and every international agreement " indicates that the Final Act is not to be considered as a treaty or international agreement which, in the language of the Vienna Convention, is " binding upon the parties to it and must be performed by them in good faith." Before this crucial provision of the Final Act, the parties had declared their resolve:

. . . to pay due regard to and implement the provisions of the Final Act of the Conference:
(a) unilaterally in all cases which lend themselves to such action;
(b) bilaterally, by negotiations with other participating States;
(c) multilaterally, by meetings of experts of the participating States, and also within the framework of existing international Organisations, such as the United Nations Economic Commission for Europe and UNESCO, with regard to educational, scientific and cultural co-operation.[30]

[24] Declaration on Principles Guiding Relations between Participating States, Sec. III, p. 1294.
[25] Document on Confidence-building Measures and Certain Aspects of Security and Disarmament, Sec. 1, p. 1298.
[26] Co-operation in Humanitarian and Other Fields, Sec. 1 (*a*), p. 1313.
[27] *Ibid.*, Secs. 1 (*b*)–(*d*), p. 1314.
[28] *Ibid.*, Sec. 2 (*c*), p. 1317.
[29] At p. 1325.
[30] Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF. 48/14 and Corr. 1 (1972), (1972) 11 *Int. Legal Materials* 1416.

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and in the final words of the Act, the Parties declare " their determination to act in accordance with the provisions contained in the above texts."

What is to be made of these contradictory signals? The political reasons for them are well known. Some States were uneasy about the recognition of existing frontiers in Europe; others were concerned about taking on legal obligations with respect to the treatment of their nationals. This mode of drafting was perhaps inevitable under the circumstances. There is internal evidence that on the scale between obligation and the absence of obligation, the provisions about military manoeuvres come close to obligation or may even be obligatory. At the other extreme, expressions of the intentions of the parties could be construed as nothing more than declarations about what the parties then planned to do—and intentions may change. It would be inappropriate for me to attempt to resolve these questions here and now. I must content myself with the reflection that the generality of the provisions of the Helsinki Accords create something less than strict legal obligations but are not lacking in legal influence or impact—a theme to which I must return later.

A yet weaker form of norm—obligation is too strong a word—is visible in the Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm in 1972. The two principal segments of this Declaration consist of " Principles " and " Recommendations " constituting an Action Plan for the Human Environment.

The Principles are in large measure declaratory and non-normative: for example " Economic and social development is essential for ensuring a favourable living and working environment for man . . . " [31] There are, however, several principles that purport to speak in terms of international law, such as—

> States have, in accordance with the Charter of the United Nations and the principles of international law, 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 or of areas beyond the limits of national jurisdiction.[32]

In other instances, States are enjoined to co-operate or to conclude agreements—weak forms of exhortation and of *pacta de contrahendo*.

The Recommendations in the Declaration call upon the United Nations and States to take various steps, but here too there are statements which seem to move the law forward. The Declaration gives the impression that the Conference was attempting to broaden and to direct and to consolidate developing forms of international environmental law. To take only one instance, Recommendation 51, dealing with water resource management, says that—

[31] Principle 8.
[32] Principle 21.

> Nations agree that when major water resource activities are contemplated that may have a significant environmental effect on another country, the other country should be notified well in advance of the activity envisaged. . . .

This statement of what " nations agree " reflects what had already been declared in a private effort of codification of the law of international drainage basins, the " Helsinki Rules " adopted by the International Law Association some years before.[33] At the least, the articulation of this norm in what is admittedly only a recommendation serves to strengthen a norm which had been expressed previously and which has not infrequently been invoked since the Stockholm Declaration of 1972. The Principles and Recommendations which are cast in normative terms would carry much less weight if they had appeared out of the blue and had not been heard of thereafter. As it is, they form part of the fabric of a developing international law of the environment.

Having dealt with an instrument—the Helsinki Accords—which reflects differing degrees of obligation in what was spelled out not to be a treaty or international agreement, and an instrument—the Stockholm Declaration—which is certainly not a treaty but which did arise out of a conference of States and does state certain norms. I now come to treaties which purport to lay down rules governing the behaviour of States towards their nationals or towards aliens. These rules may, however, be so ambiguous or vaguely stated that they will do little or nothing to control the conduct of States, unless they are fleshed out by the decisions of courts or other agencies.

Professor Kalshoven has recently called our attention to some of the defects in international norm-setting in the sphere of human rights.[34] Article 6, paragraph 1 of the International Covenant on Civil and Political Rights provides that " every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." [35] He points out that

> Consultation of the *travaux préparatoires* makes it abundantly clear that not only does the Article not abolish the death penalty, but the protection of the " inherent right " is, but for the opening sentence, for all practical purposes left to domestic legislation; even the prohibited arbitrary deprivation of life is found to coincide, in the eyes of most governments, with deprivation of life in contravention of domestic law.[36]

No derogation from this norm is permitted in " time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed," [37] the most extreme form of which would be war,

[33] Helsinki Rules on the Uses of the Waters of International Rivers, Art. XXIX, International Law Association, *Report of the Fifty-second Conference Held at Helsinki, Aug.* 14 *to Aug.* 20, 1966, (1967), p. 477 at p. 518.

[34] " International Concern with Human Rights: Can It Be Effective? " (1978) 21 *German Yearbook of International Law* 119.

[35] Adopted by Gen. Ass. Res. 2200 (XXI), Dec. 16, 1966; 21 GAOR, Supp. No. 16, at 52; UN Doc. A/6316 (1966); Great Britain T.S. No. 6 (1977).

[36] At p. 129.

[37] Art. 4, para. 1.

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whether international or non-international. And yet as a matter of cruel fact, these are the very circumstances in which " arbitrary deprivations of life " take place on a huge scale, more often than not at the hands of persons acting on behalf of one State or another.

Another instance of ineffectual norm-making arises in the context of nationality. Article 15 of the Universal Declaration of Human Rights [38] states that " everyone has the right to a nationality," but the only reference to this subject in the International Covenant on Civil and Political Rights is the statement in Article 24 on the protection of children that " every child has the right to acquire a nationality." Nationality law is vast and complex, already the subject of many treaties and even of some customary international law, and it cannot be expected that one brief sentence will play any effective role in the protection of those who are born without nationality or who are deprived of their nationality.

These instances, drawn from the law of human rights, are representative of a widespread phenomenon of papering over international differences and of avoiding hard problems with generalisations that carry little or no legal consequences. Thousands of other such empty formulae could be found in the corpus of treaties and international agreements registered with the UN Secretariat. If meaning is to be given to such propositions, it must come through the conduct of States or the action of international institutions set up to administer the arrangements made under a treaty.

The question of how much persuasive or coercive force is to be given to an international instrument can be presented to the draftsmen quite directly. The Commission on Transnational Corporations, assisted by the Centre on Transnational Corporations, has undertaken the task of preparing a code of conduct for multinational corporations.[39] There are a number of possibilities as to the form that such a code of conduct might take: a multilateral treaty, a declaration at the conclusion of a diplomatic conference establishing the text of the code, or a resolution of the General Assembly.[40] It would be a gross oversimplification to say that a treaty would be binding, whereas a declaration at a conference or a declaration or resolution of the General Assembly would not be binding. A multilateral convention could lay down rules immediately binding on both States and transnational corporations, or it could

[38] Gen. Ass. Res. 217 (III), Dec. 10, 1948; 3 GAOR Res. 71; UN Doc. A/810 (1948).

[39] See Commission on Transnational Corporations, Intergovernmental Working Group of the Whole on the Code of Conduct, *Transnational Corporations: Material Relevant to the Formulation of a Code of Conduct: Report of the Secretariat*, UN Doc. E/C. 10/18 (1976).

[40] The possibilities open to the Commission are described and analysed in Davidow and Chiles, " The United States and the Issue of the Binding or Voluntary Nature of International Codes of Conduct regarding Restrictive Business Practices " (1978) 27 Am.J.Int.L. 247.

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incorporate principles and rules to which the parties would be required to give effect. The convention could consist of familiar binding legal rules. But it is also possible that a treaty could be adopted which would only establish guidelines with which neither States nor transnational corporations nor individuals would be required to comply. A convention so drafted would nevertheless in general apply pressure on States and corporations—just as would, for that matter, a declaration or resolution incorporating guidelines. The Centre on Transnational Corporations in studying this whole matter said of a declaration issued at the end of a conference:

> Such a declaration does not have the legal status of an international agreement as long as the participants have not specifically undertaken obligations under it. Yet, the procedures followed for the adoption of the instrument, including formal negotiations and solemn adoption, lend to the instruments a certain authority and create expectations concerning the participants' adherence to its principles.[41]

The decision as to whether to go the route of a treaty, on the one hand, or that of a resolution or declaration, on the other hand, is thus not a clear-cut one.

" Voluntary " guidelines have been tried in the past. The OECD Guidelines for Multinational Enterprises, which were adopted in 1976, were—

> recommendations jointly addressed by Member countries to multinational enterprises operating in their territories. These guidelines, which take into account the problems which can arise because of the international structure of these enterprises, lay down standards for the activities of these enterprises in the different Member countries. Observance of the guidelines is voluntary and not legally enforceable. However, they should help to ensure that the operations of these enterprises are in harmony with national policies of the countries where they operate and to strengthen the basis of mutual confidence between enterprises and States.[42]

Voluntary though the guidelines be, they have nevertheless been invoked in disputes between multinationals and trade unions. One of the first instances was a dispute between Badger (Belgium), a subsidiary of a small engineering design subsidiary of Raytheon, an American firm, and the union representing the workers in the Belgian firm, which Raytheon had decided to close. The guidelines on industrial relations figured in the resumption of negotiations between the firm and the union, which were ultimately brought to a successful conclusion.[43]

The impact of voluntary guidelines is strongly influenced by the institutional context in which they operate. The OECD provided that its Committee on International Investment and Multinational Enterprises should periodically review the operation of the 1976 guidelines, although

[41] *Op. cit. supra* n. 38 at para. 296, p. 87.
[42] Para. G, Annexed to Declaration on International Investment and Multinational Enterprises, June 21, 1976, (1976) 15 *Int. Legal Materials* 969 at p. 970.
[43] " Badgered," in *The Economist*, June 4, 1977, at p. 93.

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it did not " reach conclusions on the conduct of individual enterprises." [44] The machinery to implement any code of conduct resulting from the work of the Commission on Transnational Corporations would give the voluntary guidelines more or less coercive force—more, for example, if a body were established to look into the conformity of corporate behaviour with the guidelines.

Even voluntary guidelines would be taken by developing countries as authorising the enactment of national legislation giving effect to the guidelines. If a guideline provides that a company ought to provide certain types of information to the countries in which it does business, a number of those countries might be expected to make the production of such information compulsory and would use the guideline as authorisation. If, on the other hand, assistance were needed from the country where the transnational corporation had its headquarters, that cooperation with other countries could be secured only on the basis of a binding guideline, which would probably also have to be implemented through a supplemental instrument to be fully operational and effective.

As I stated at the outset of this article we are perfectly at home with the idea that rules or norms or principles of customary international law may have varying impact, may be accepted by few or by many, may be enforceable in greater or less degree, may change—in short, that they are protean. Written international understandings, to which States signify their assent in one way or another, have, by contrast, commonly been divided into two categories—those norms that are binding and those norms that are not. My thesis has been that the differences are not qualitative but quantitative—that different norms carry a variety of differing impacts and legal effects.

I have touched only incidentally on the resolutions of international organisations. One form of orthodoxy is that the resolutions of the General Assembly, other than those relating to the finances and internal workings of the United Nations and possibly those interpreting the terms of the Charter, are not binding and are only recommendations. It is said to follow from this proposition that if the States voting in favour of a declaration or resolution purporting to lay out norms of international law intended to be bound by these norms, they would have incorporated them in a treaty and have become parties to the treaty.

The question of the legal effect of the provision on nationalisation of foreign property in the Charter of Economic Rights and Duties of States has given rise to much controversy. The clause in issue reads:

> Each State has the right . . .
>
> (c) To nationalise, expropriate or transfer ownership of foreign property in which case appropriate compensation should be paid by the State

[44] Decision of the Council on Inter-governmental Consultation Procedures on the Guidelines for Multinational Enterprises, paras. 1 and 3, (1976) 15 *Int. Legal Materials* 977.

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> adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalising State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.[45]

The contending parties and their battle lines are well known. The Charter was adopted by a vote of 120 in favour to six opposed (industrialised countries and capital exporters), with 10 abstentions. So far as the dissenters and abstainers are concerned, the Charter could be taken as binding only if it were declaratory of the existing customary international law, which the dissenters contended it was not. But as among those who voted in favour of the Charter, the understanding *inter se* approaches the level of legal effectiveness that a treaty has. It is no answer to say that the provisions on nationalisation have materially less weight than if they had been incorporated in a treaty, because the question of a treaty on this particular subject had never arisen.

On the other hand, there are resolutions of the General Assembly which serve as way-stations on the road to the conclusion of a treaty. The Universal Declaration of Human Rights,[46] it was understood, would be given more concrete form in the two Human Rights Convenants. The Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space of 1963 [47] gave way to the Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space,[48] in which many articles are indentical with provisions of the Declaration. If it is intended that the norms of the resolution are to be amplified or given concrete form in a treaty, the persuasiveness of the resolution in its bearing on those who voted for it is correspondingly diminished. Again, the legal impact on States of an instrument to which those States have subscribed depends on the context in which the instrument was agreed to and on the assumptions that underlay it.

What I have said about the instruments to which States subscribe—treaties, declarations, statements of policy, final acts, resolutions of international organisations, and other forms of expression of agreement—will, I hope, have persuaded the reader that it is excessively simplistic to divide written norms into those that are binding and those that are not. Provisions of treaties may create little or no obligation, although

[45] Gen. Ass. Res. 3281 (XXIX), Dec. 12, 1974, Art. 2, para. 2 (*c*); 29 GAOR, Supp. No. 31, at p. 51, UN Doc. A/9631 (1975).

[46] As cited *supra* n. 38.

[47] Gen. Ass. Res. 1962 (XVIII), Dec. 13, 1963; 18 GAOR Supp. No. 15, at 15, UN Doc. A/5515 (1964).

[48] Done at Washington, London, and Moscow, Jan. 27, 1967, Great Britain T.S. No. 10 (1968); 610 U.N.T.S. 205.

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inserted in a form of instrument which presumptively creates rights and duties, while, on the other hand, instruments of lesser dignity may influence or control the conduct of States and individuals to a certain degree, even though their norms are not technically binding. It is inevitable that in the course of negotiation and compromise, those who write international instruments will set down on paper whatever will secure agreement, even though the resulting product may not fall into the neat categories to which lawyers are addicted. The lawyer's task is not only to interpret the resulting consensus but also to make understandings between States as flexible an instrument as possible in order to encourage agreement. He does no service to the establishment of order if he adopts an either-or posture.

Since each " weak " or " soft " or " fragile " norm in written form will carry a different legal impact, falling short of obligation in the strict sense, generalisations are difficult. The following assertions about such norms seem to be supportable:

1. If some sort of written norm has been consented to by the States involved, the future course of discussion, negotiation, and even agreement will not be the same as they would have been in the absence of the norm.

2. Once a matter has become the subject of such a norm, the matter can no longer be asserted to be one within the reserved domain or domestic jurisdiction of the State. As the Permanent Court said in its advisory opinion on Nationality Decrees Issued in Tunis and Morocco, " The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations." [49] And one way in which international relations develop is through agreement.

3. The norm will establish new standards of relevance for the negotiations between the parties. Certain arguments will be ruled out. Economic considerations, under Article 5 of the Definition of Aggression adopted by the General Assembly [50] after so much travail, are ruled out as a possible justification for the use of force against a State. That clearing of the ground is helpful, even though the definition may not be of material assistance in determining whether an act of agression has taken place.

4. The norm will establish the legal framework within which the dispute about its application may be resolved. It will establish presumptions, indicate the prevailing trend of opinion, provide a guiding principle which may have a certain inherent appeal for the parties, and channel negotiation and settlement into legal and orderly paths.

[49] (1923) P.C.I.J., Ser. B, No. 4 at p. 24.
[50] Gen. Ass. Res. 3314 (XXIX), Dec. 14, 1974; 29 GAOR, Supp. No. 31, at 143, UN Doc. A/9631 (1975).

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The lawyer is indeed a social engineer and in that role, he must be able to invent or to produce machinery that will assist in the resolution of disputes and differences between the States. He must be prepared to fine-tune the law, to exploit its capacity for adaption to the needs of the parties, and to promote movement and change. One of the ways in he can do so is by understanding the infinite variety of ways in which legal norms may reflect different intensities of agreement.