(2000)). On ICANN, see Gomez (2006).

SECTION 5. "SOFT LAW"

A. "SOFT LAW" AS A CONTESTABLE CATEGORY

The global administrative law discussed in the prior section includes some forms of law-making arising from non-legally binding instruments. When normative standards are embodied in an instrument other than a binding treaty, they are sometimes referred to as "soft law," a form of "international law-making that is designed, in whole or part, not to be enforceable." See Reisman, The Supervisory Jurisdiction of the International Court of Justice, 258 Rec. des Cours 9, 180–82 (1996); Reisman, The Concept and Functions of Soft Law in International Politics, in 1 Essays in Honor of Judge T.O. Elias 135 (Omotola ed. 1992). Yet soft law may entail some legal effects, and may well elicit compliance even in the absence of direct mechanisms for enforcement. In still another usage, "soft law" could refer to vague, weak, or hortatory terms of an international instrument.

Some question the coherence or even the existence of the category of "soft law." For the critics, there is either legal obligation or there is not; obligation cannot or should not be a matter of degree. To this effect, see the much-noted article by Prosper Weil excerpted in Chapter 2; see also Raustiala, Form and Substance in International Agreements, 99 A.J.I.L.

581, 586–91 (2005). On the other hand, as a descriptive matter one can discern processes through which norms that were initially formulated in non-binding form have gradually accrued greater authority through non-coercive means. Just as General Assembly resolutions, which are formally non-binding, can contribute to the crystallization of legal norms, normative development can likewise occur in multiple arenas in which the initial norm-formulation is not intended to establish binding law. For a review of the issues involving "soft law" and references to relevant literature, see Shelton, Normative Hierarchy in International Law, 100 A.J.I.L. 291, 319–22 (2006).

A collaborative project of the American Society of International Law seeks to understand the uses of soft law and to identify factors that may make soft law effective in influencing international behavior. The project takes up case studies in diverse areas: environment and natural resources (General Assembly ban on driftnet fishing, codes of conduct on pesticides and chemicals, agreed measures concerning Antarctica); trade and finance (e.g., money laundering); human rights (protection of minorities, labor standards, principles for corporate investment in repressive societies such as South Africa under apartheid); and multilateral arms control (missile control technology regime, physical protection of nuclear materials, and land mines). The contributors also consider whether there is a conceptual distinction between binding and non-binding norms or rather a continuum. See Commitment and Compliance: The Role of Non–Binding Norms in the International Legal System (Shelton ed. 2000). See also Alvarez, International Organizations as Law–Makers 248–57 (2005).

B. AGREEMENTS NOT INTENDED TO BE LEGALLY BINDING

SCHACHTER, THE TWILIGHT EXISTENCE OF NONBINDING INTERNATIONAL AGREEMENTS

71 A.J.I.L. 296 (1977) (some footnotes omitted)

International lawyers generally agree that an international agreement is not legally binding unless the parties intend it to be. Put more formally, a treaty or international agreement is said to require an intention by the parties to create legal rights and obligations or to establish relations governed by international law. If that intention does not exist, an agreement is considered to be without legal effect ("sans portée juridique"). States are, of course, free to enter into such nonbinding agreements, whatever the subject matter of the agreement. However, questions have often arisen as to the intention of the parties in this regard. The main reason for this is that governments tend to be reluctant (as in the case of the Helsinki Final Act) to state explicitly in an agreement that it is nonbinding or lacks legal force. Consequently inferences as to such intent have to be drawn from the language of the instrument and the attendant

circumstances of its conclusion and adoption. Emphasis is often placed on the lack of precision and generality of the terms of the agreement. Statements of general aims and broad declarations of principles are considered too indefinite to create enforceable obligations and therefore agreements which do not go beyond that should be presumed to be nonbinding.[9] It is also said, not implausibly, that mere statements of intention or of common purposes are grounds for concluding that a legally binding agreement was not intended. Experience has shown that these criteria are not easy to apply especially in situations where the parties wish to convey that their declarations and undertakings are to be taken seriously, even if stated in somewhat general or "programmatic" language. Thus, conflicting inferences were drawn as to the intent of the parties in regard to some of the well-known political agreements during the Second World War, notably the Cairo, Yalta, and Potsdam agreements.[10] No doubt there was a calculated ambiguity about the obligatory force of these instruments at least in regard to some of their provisions and this was reflected in the way the governments dealt with them.[11] After all, imprecision and generalities are not unknown in treaties of unquestioned legal force. If one were to apply strict requirements of definiteness and specificity to all treaties, many of them would have all or most of their provisions considered as without legal effect. Examples of such treaties may be found particularly among agreements for cultural cooperation and often in agreements of friendship and trade which express common aims and intentions in broad language. Yet there is no doubt that they are regarded as binding treaties by the parties and that they furnish authoritative guidance to the administrative officials charged with implementation. Other examples of highly general formulas can be found in the

9. O'Connell, [International Law, (2d ed. 1970)] at 199–200. But other jurists have noted that vague and ill-defined provisions appear in agreements which do not lose their binding character because of such indefiniteness. See P. Reuter, Introduction au Droit des Traités 44 (1972); G.G. Fitzmaurice, Report on the Law of Treaties to the International Law Commission. [1956] 2 Y.B.Int. Law Comm. 117, UN Doc. A/CN.4/101 (1956). The latter commented that "it seems difficult to refuse the designation of treaty to an instrument—such as, for instance, a treaty of peace and amity, or of alliance even if it only establishes a bare relationship and leaves the consequences to rest on the basis of an implication as to the rights and obligations involved, without these being expressed in any definite articles." Id.

10. Statements by officials of the British and U.S. Governments indicated that they did not consider the Yalta and Potsdam agreements as binding. * * * A contrary point of view was expressed in 1969 by a representative of the USSR at the Vienna Conference on the Law of Treaties. He declared that the Yalta and Potsdam agreements as well as the Atlantic Charter provided for "rights and obligations" and laid down "very important rules of international law." UN Doc. A/Conf. 39/11 Add. 1, at 226 (para. 22). Sir Hersch Lauterpacht considered that the Yalta and Potsdam agreements "incorporated definite rules of conduct which may be regarded as legally binding on the States in question." 1 Oppenheim, International Law 788 (7th ed. H. Lauterpacht, ed. 1948). On the other hand, Professor Briggs suggested that the Yalta agreement on the Far Eastern territories may be considered only as "the personal agreement of the three leaders." Briggs, The Leaders' Agreement of Yalta, 40 AJIL 376, at 382 (1946).

11. The Yalta Agreement was published by the State Department in the Executive Agreements Series (No. 498) and was also published in U.S. Treaties in Force (1963). However, in 1956 the State Department stated to the Japanese Government in an aide-mémoire that "the United States regards the so-called Yalta Agreement as simply a statement of common purposes by the heads of the participating governments and * * * not as of any legal effect in transferring territories." 35 Dept. State Bull. 484 (1956). But see Briggs, supra note 10, for statements by the U.S. Secretary of State that an agreement was concluded by the leaders.

Still another kind of legal question may arise in regard to nonbinding agreements. What principles or rules are applicable to issues of interpretation and application of such agreements? As we have already seen, customary law and the Vienna Convention do not "govern" the agreements. But if the parties (or even a third party such as an international organ) seek authoritative guidance on such issues, it would be convenient and reasonable to have recourse to rules and standards generally applicable to treaties and international agreements insofar as their applicability is not at variance with the nonbinding nature of these agreements. For example, questions as to territorial scope, nonretroactivity, application of successive agreements, or criteria for interpretation could be appropriately dealt with by reference to the Vienna Convention even though that Convention does not in terms govern the agreements. * * * It may be useful, however, to indicate what may reasonably be meant by an understanding that an agreement entails a political or moral obligation and what expectations are created by that understanding.

Two aspects may be noted. One is internal in the sense that the commitment of the state is "internalized" as an instruction to its officials to act accordingly. Thus, when a government has entered into a gentlemen's agreement on voting in the United Nations, it is expected that its officials will cast their ballots in conformity with the agreement though no legal sanction is applicable. Or when governments have agreed, as in the Helsinki Act, on economic cooperation or human rights, the understanding and expectation is that national practices will be modified, if necessary, to conform to those understandings. The political commitment implies, and should give rise to, an internal legislative or administrative response. These are often specific and determinate acts.

The second aspect is "external" in the sense that it refers to the reaction of a party to the conduct of another party. The fact that the states have entered into mutual engagements confers an entitlement on each party to make representations to the others on the execution of those engagements. It becomes immaterial whether the conduct in question was previously regarded as entirely discretionary or within the reserved domain of domestic jurisdiction. By entering into an international pact with other states, a party may be presumed to have agreed that the matters covered are no longer exclusively within its concern. When other parties make representations or offer criticism about conduct at variance with the undertakings in the agreement, the idea of a commitment is reinforced, even if it is labelled as political or moral.

* * *

The fact that nonbinding agreements may be terminated more easily than binding treaties should not obscure the role of the agreements which remain operative. De Gaulle is reported to have remarked at the signing of an important agreement between France and Germany that international agreements "are like roses and young girls; they last while they last." As long as they do last, even nonbinding agreements can be authoritative and

controlling for the parties. There is no *a priori* reason to assume that the undertakings are illusory because they are not legal. To minimize their value would exemplify the old adage that "the best is the enemy of the good." It would seem wiser to recognize that nonbinding agreements may be attainable when binding treaties are not and to seek to reinforce their moral and political commitments when they serve ends we value.

NOTES

1. *Helsinki Final Act.* Schachter refers to the Helsinki Final Act as an example of a "nonbinding" agreement. The states that endorsed it in 1975 shared that view. See Russell, The Helsinki Declaration: Brobdingnag or Lilliput?, 70 A.J.I.L. 242 (1976). The Helsinki Final Act is reprinted in the Documents Supplement and it may be interesting to examine its terms in light of Schachter's criteria, and also to compare it to admittedly binding treaties covering similar subject matter, such as the International Covenant on Civil and Political Rights.

2. *Evolution of Nonbinding Pledges into Hard(er) Obligations.* Is it possible that an agreement that was "nonbinding" at its inception could attain binding force through later developments? Consider in this regard the evolution of the processes begun at Helsinki in 1975, when the Conference on Security and Co-operation in Europe was initiated and its Final Act was adopted: these processes led some fifteen years later to the establishment of the Organization for Security and Co-operation in Europe, with its complex institutions created in the 1990s and its increasingly "legal" functions. Could such developments alter the normative quality of the original Helsinki Final Act?

3. *Dimensions of Agreement Design.* Kal Raustiala has identified three dimensions of the design of international agreements: (1) legality, meaning the choice between legally binding and non-legally binding accords; (2) substance, meaning the degree of deviation from the status quo that an agreement demands (which may be shallow or deep); and (3) structure, referring to mechanisms for monitoring and enforcement. The trade-offs between these elements can help illuminate the choices involved in negotiating and implementing interstate bargains. Raustiala, Form and Substance in International Agreements, 99 A.J.I.L. 581, 586–91 (2005). See also Guzman, The Design of International Agreements, 16 E.J.I.L. 579 (2005).

C. POLITICAL DECLARATIONS AND CONCERTED ACTS

Governments engage in concerted acts of various kinds that express common understandings and positions but which are not recognized as treaties or customary law. Such acts may be expressed informally, as in a communiqué after an exchange of views. On occasion they are expressed in formal instruments, such as the Final Act of the Helsinki Conference in 1975. Political declarations have been used instead of treaties in processes of settling major disputes. For example, at the end of the Second World

War, the most important understandings relating to territorial disposition and post-war organization were expressed in declarations at the Yalta, Potsdam and Cairo Conferences.

It has been suggested that the so-called purely political instruments may have legal consequences. Schachter considers that as such instruments are official acts of states, they are evidence of the positions taken by states and "it is appropriate to draw inferences that the States concerned have recognized the principles, rules, status and rights acknowledged. This does not mean that 'new law' or a new obligation is created. However, where the points of law are not entirely clear and are disputed the evidence of official positions drawn from these instruments can be significant." Schachter, International Law in Theory and Practice, *supra*, at 129. A non-legal text may also over time become customary law on the basis of state practice and *opinio juris*. That consequence does not depend on the original intent of the parties to the instrument.

What are the implications of non-compliance with a non-legal declaration? Schachter suggests:

> States entering into a non-legal commitment generally view it as a political (or moral) obligation and intend to carry it out in good faith. Other parties and other States concerned have reason to expect such compliance and to rely on it. What we must deduce from this, I submit, is that the political texts which express commitments and positions of one kind or another are governed by the general principle of good faith. Moreover, since good faith is an accepted general principle of international law, it is appropriate and even necessary to apply it in its legal sense.

Id. at 130.

A significant practical consequence of the "good faith" principle is that a party which committed itself in good faith to a course of conduct or to recognition of a legal situation would be estopped from acting inconsistently with its commitment or adopted position when the circumstances showed that other parties reasonably relied on that undertaking or position.

These problems were considered by the Institut de Droit International in 1983. See Reports of 7th Commission (Virally, rapporteur) and Comments of Members. 60–I Ann. de l'Institut de Droit Int. 166–374 (1983) and 60–II Ann. de l'Institut de Droit Int. 117–54. (1984). See also Schachter, "Non–Conventional Concerted Acts" in International Law, Achievements and Prospects 265–69 (Bedjaoui ed. 1991).

SECTION 6. UNILATERAL ACTS

Although the Vienna Convention on the Law of Treaties applies to agreements "between States" (Article 1)—that is, between two or more of them—unilateral declarations of states can also form the basis for obligations on the plane of international law. The legal consequences of