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# Some Thoughts on the Making of International Law

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## Abstract

*In their timely and thought-provoking book, Alan Boyle and Christine Chinkin explore contemporary methods of making international law. With the expansion of international law, and its increased specialization, it is no longer the case that it is 'made' by a finite number of entities (states) through a handful of intergovernmental processes. Instead, international law is made in a large number of fora, including a variety of multilateral processes, tribunals and the organs of international organizations. In addition, although states remain the primary makers of international law, they are joined by other participants such as international organizations and judges, as well as entities which are influential in the making of international law, including non-governmental organizations and even individuals. The authors' approach is to seek to draw generalized inferences from an analysis of the processes, both within and beyond the United Nations, which led to the adoption (or not) of several significant international instruments and other documents. Although their treatment of the subject-matter is not without its difficulties, it nonetheless provides a useful overview, which should be of interest to the academic and practitioner alike. The book is also significant for the fact that, in reviewing the range of modern international law instruments, the authors inadvertently provide an insight into the modern sources of international law, particularly as regards the significance of the interplay between different types of law-making instruments.*

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*The present writer offers his perspective on the treatment of the question of participation in international law-making, the impact of NGOs in the making of international law, consensus-based decision-making, the role of innovation in securing consensus, and the concept of 'soft law'.*

## 1 Introduction

In their timely and thought-provoking book, *The Making of International Law*, Alan Boyle and Christine Chinkin explore contemporary multilateral and other methods of making international law. The underlying hypothesis is that the decentralized nature of international law today is reflected in the broad ranging and disparate set of methods and procedures by which international law is created. To that one might add that the extent of such activities is also a function of the expansion of modern international law. Put simply, it is no longer the case that international law is 'made' by a finite number of entities (states) through a handful of intergovernmental processes. Today, international law is made in a large number of fora, including multilateral processes, tribunals and the organs of international organizations. In addition, although states remain the primary makers of international law, they are joined by other participants such as international organizations and judges as well as entities which are influential in the making of international law, including non-governmental organizations (NGOs) and even individuals. That these activities are increasingly disparate, with different rules and practices being developed in different areas, by a number of entities, with little by way of coordination, reflects the decentralized approach to the making of international law.

The authors simultaneously set out to provide a comprehensive overview of the extensive variety of such activities being undertaken at the turn of the 21st century, while also attempting an analysis of new trends. Their focus is primarily on written law, particularly international treaties but also including the negotiation of other instruments of a non-binding character (so-called 'soft-law'). Their approach is to attempt to draw generalized inferences from an analysis of the processes, both within and beyond the United Nations, which led to the adoption (or not) of several significant international instruments and other documents. This includes multilateral law-making through intergovernmental processes such as at diplomatic conferences and in treaty bodies, as well as some of the activities of the United Nations in the codification and progressive development of international law, under Article 13(1)(a) of the Charter of the United Nations, including those of the Sixth Committee of the General Assembly and the International Law Commission. Such approach has its limits, in that it may simply not be possible to always find order among a smorgasbord of activity, and ends up proving exactly the point that there is not much by way of coherence. Nonetheless, it is a useful undertaking, especially for practitioners involved in one of the 'corners' of law-making, and who might benefit from exposure to different techniques and approaches adopted by their counterparts elsewhere.

There is a second, more subtle, theme underlying the book which, perhaps because of its controversy, is of particular interest to the international lawyer. While it is indicated, in the preface, that no attempt was made to discuss the sources or theories of international law, the authors nonetheless offer a profound insight, namely that 'contemporary international law is often the product of a subtle and evolving interplay of law-making instruments'.<sup>1</sup> In other words, this is not merely a book about how international law is made today. It also seeks to demonstrate the importance of an appreciation of the law-making process in obtaining a fuller understanding of international law itself. This leads to an analysis of the significance of so-called 'law-making' instruments including 'soft law', the resolutions of the United Nations Security Council and 'law-making treaties'.<sup>2</sup> A similarly modern treatment is given to law-making by international courts and tribunals. Although not without controversy, their conclusion that the traditional positivist conception of international courts and tribunals, as simply applying the law and not making it, is not sufficiently rigorous in understanding the impact of their jurisprudence on modern international law,<sup>3</sup> is probably correct. All of this analysis is particularly interesting since, despite the denial of its authors, it provides an insight into the contemporary sources of international law, with the exception of customary international law, which (somewhat unfortunately, but understandably) was expressly set aside.

Although the strength of the book certainly lies in the attempt at a comprehensive review of the broad range of international law-making activities, it comes at the cost of an analysis which, more often than not, focuses on sketching general details while overlooking some of the specifics or nuances which make a certain activity or practice significant for the drawing of conclusions on the making of international law. While much could be written, it is proposed to limit this article to the following issues by way of illustration of this basic point: states as participants in international law-making, the impact of NGOs in the making of international law, consensus based decision making, the role of innovation in securing consensus, and the concept of 'soft law'. The following thoughts are intended primarily to supplement what is, generally speaking, a well researched and presented exposition.

## 2 States as Participants in International Law-making

In a book which, admittedly, does not always follow the conventional treatment of the topic of the creation of international law (on balance, one of its strong points), the chapter entitled 'participants in international law-making'<sup>4</sup> is the most curious since it is devoted entirely to the role played by NGOs. While (as is discussed below) their activities certainly merit consideration, to leave out other categories of participants, such as intergovernmental organisations (which are dealt with separately in other

<sup>1</sup> At vi.

<sup>2</sup> At 210–262.

<sup>3</sup> See the discussion at 266–269.

<sup>4</sup> *Ibid.*, chapter 2.

chapters) and states (which remain the most important category of participants), is to provide a somewhat skewed vision of modern international law-making activities. At best this suggests that, in the minds of the authors, there is not much new or specific to be said about the role of states *as participants*<sup>5</sup> in contemporary law-making, which is disappointing. It may have been interesting, for example, for there to have been more contemplation of the problem (also referred to in passing below) – or, at least, the increasingly prevalent perception – of there being ‘too many’ states today for the successful undertaking of treaty negotiations. Reference might have been made to some of the consequences of such phenomenon, including the practice of negotiating through the vehicle of agglomerations of states. While regional groupings have existed for some time in the United Nations, the undertaking of treaty negotiations through such groupings is an increasingly prevalent development. Furthermore, in a multipolar world, the traditional groupings, such as the United Nations regional group system, are increasingly showing signs of stress with the emergence of other established regional<sup>6</sup> or sub-regional groups<sup>7</sup>, especially those which transcend existing groups,<sup>8</sup> or by less established groupings such as that of the ‘likeminded states’ which played a key role in the negotiation of the Rome Statute of the International Criminal Court.<sup>9</sup>

### 3 Non-governmental Organizations as Participants in International Law-making

The authors consider the increasingly influential role of NGOs in the making of international law by providing examples of where civil society actors have played a significant role in processes leading to the creation of new international law.<sup>10</sup> However, their presentation minimizes the fact that while NGOs today enjoy greater access to intergovernmental negotiations, such privileges are by no means uniform nor universally guaranteed. Part of the difficulty relates to complexities arising from the nature

<sup>5</sup> Certainly the entire book is about the activities of States, but there is almost no analysis of their role as participants in the process.

<sup>6</sup> Such as the European Union and the African Union.

<sup>7</sup> Some sub-regional groupings are organized on the basis of membership in regional international organizations, for example, the ASEAN member States, the Caribbean Community (CARICOM), and the RIO Group of Latin American States, while others are more in the nature of political alignments. The latter include the Nordic States, the CANZ (Canada, Australia and New Zealand), and the GUUAM Group (Georgia, Ukraine, Uzbekistan, Azerbaijan and Moldova), which, at times, seek to negotiate on a common platform.

<sup>8</sup> In addition to long-standing such groupings, such as the G77 and the Non-aligned Movement, both of which are made up of States from various regional groups, reference can also be made to the increasing practice of European states to develop a common position at the level of the European Union, which, with the accession of several Eastern European States and Cyprus, now has a presence in three regional groups (Western Europe and Other, Eastern Europe and Asia). In some cases, such cross-region groupings are arranged around an international organization. Examples include the League of Arab States and the Organization of the Islamic Conference, which has, in recent times, become increasingly active in treaty negotiations.

<sup>9</sup> UNTS 2187, 3.

<sup>10</sup> At 62–81.

of their participation. In the absence of a generally agreed political theory of the participation of civil society in international affairs, there is no common understanding on the exact role to be played by NGOs in the law-making process. It is not uncommon for writers to employ a narrative which essentially blurs the distinction between NGOs participating as 'pressure-groups' lobbying for a particular cause or outcome to an intergovernmental negotiation, and that of NGOs as actual participants in the decision-making process.<sup>11</sup> The problem is that the states largely understand the role of NGOs as being the former, while much of what is written about civil society suggests the latter. Furthermore, for all the talk of legitimacy bestowed by NGOs, more is known, generally speaking, about the positions of states than the motives and backing of most NGOs. Nor is it always clear, from the political perspective, why it is that NGOs (which in many cases do not enjoy a formal mandate from the constituency whose interests they claim to represent) necessarily enjoy greater legitimacy than, for example, governments elected through mass democratic processes.

Such ambiguity which is prevalent in much of the thinking on the role of NGOs in the making of international law simultaneously minimizes the difficulties many NGOs face in gaining basic access to negotiation processes, and overstates the role they play in decision-making. It is still the case that, even though NGOs have, on occasion, been granted formal participation rights, these remain the exception to the rule and are generally limited in scope and subject to the will of states which nonetheless retain the monopoly on decision-making – a position the authors themselves take when concluding that a NGO participation right does not presently exist.<sup>12</sup> In fact, generalized participation rights remain few and far between. Boyle and Chinkin employ a narrative which leaves the reader with the incorrect impression that ECOSOC consultative status granted to an NGO automatically grants it similar rights in the General Assembly of the United Nations.<sup>13</sup> On the contrary, there is no equivalent mechanism for the General Assembly, and while the practice of its Committees may vary, it is not the practice of the Sixth Committee to recognize the ECOSOC consultative status of NGOs for purposes of the Committee's meetings. Instead, the grant of special participation privileges to

<sup>11</sup> A distinction perhaps not sufficiently clearly made in the authors' discussion of a potential NGO right of participation, at 54–57. For example, while it is noted that in some cases observer status has been granted to NGOs (without the right to vote), it is not made clear that there may exist different classes of observer status, and that that extended to non-member States or international organizations may carry with it additional privileges than that granted to NGOs. For a more comprehensive treatment, see A.-K. Lindblom, *Non-Governmental Organizations in International Law* (2005), 479–486. For an example of a 'super' observer status, including additional privileges, see that granted by the United Nations to the Holy See by GA Res. 58/314, 1 July 2004.

<sup>12</sup> At 57 ('it seems premature to assert that there is a right to access and participation').

<sup>13</sup> In their section on 'NGOs and the UN' (at 52–54), after discussion of ECOSOC consultative status, established by article 71 of the Charter of the United Nations, it is maintained that 'ECOSOC is thus the "gatekeeper" between NGOs and the UN', at p. 52, without specifying that that would be primarily for purposes of the deliberations of ECOSOC, and not necessarily the other principal organs of the United Nations.

NGOs<sup>14</sup> in the work of the Sixth Committee is undertaken *ad hoc* and typically on the basis of a General Assembly resolution expressly making provision therefor.<sup>15</sup> Part of the reason for this is that, historically speaking, NGOs have shown little or no interest in the work of the Sixth Committee (or that of the International Law Commission), and, accordingly, it has not been necessary to put standing procedures equivalent to ECOSOC consultative status in place. This is not a unique situation: it is common for the participation of civil society representatives (if at all) in most contemporary negotiating conferences to be regulated piecemeal, typically through some mechanism adopted by the conference or entity itself.

Furthermore, notwithstanding the significance of the participation of NGOs in specific recent multilateral negotiations alluded to in the book,<sup>16</sup> the majority of international law-making today still occurs with little or no participation of civil society. In fact, the itinerant nature of the participation of NGOs in the global legal stage poses particular practical difficulties: whereas participating states are typically familiar with other states, they are usually confronted by a different set of NGOs (if any) at major international negotiations. NGO participation in the Rome process (leading to the establishment of the International Criminal Court) was spearheaded by entities different from those involved in the landmines convention process, for example, or for that matter those involved in the environmental, trade or disarmament fields. This, on balance, works against NGOs, as a community, by limiting the possibility of establishing sustained relationships with decision-makers. Even among NGOs involved in a structured arrangement such as the consultative status granted by ECOSOC, a minority are interested in, or have the resources to, pursue a multi-sectoral advocacy platform, or even to sustain involvement in a particular issue over the long term. The successful NGOs (defined as a function of influence exerted over the outcome of a negotiation), are invariably those which establish longer-term working relationships with states (or certain groups of states), whether on a single issue or across a theme of issues. They become known quantities and are increasingly accepted as partners in the process.

<sup>14</sup> While reference is made, at 54–57, to the possibility of attending, and intervening in, public meetings and circulating documentation, perhaps the most important privilege granted to NGOs is access to the floor and, accordingly, to the negotiating delegates themselves.

<sup>15</sup> This was the case, for example, with the participation of the NGO Coalition for the International Criminal Court in the work of the General Assembly (including its Sixth Committee), which was undertaken on the basis of specific provisions in the applicable General Assembly resolutions. See, for example, GA Res. 53/105, 8 December 1998, operative paragraph 7.

<sup>16</sup> At 67–77. Although the focus of analysis of the role of NGOs usually falls on those (typically more established) entities involved in advocating particular positions, there are also other types of NGOs which play equally important roles. For example, while it is not uncommon for academics to be involved in advocacy, they also serve a useful function as recorders of the legislative history of a negotiation. This was the case with the establishment of the International Criminal Court where the official records of the Rome Conference were supplemented by a number of scholarly writings, some of which filled a particular niche by describing the context in which particular negotiations took place, or by recording ‘backroom’ informal processes which resulted in the eventual adoption of particular texts. See, e.g., R.S. Lee (ed.), *The International Criminal Court: the making of the Rome Statute, Issues, Negotiations, Results* (1999), and R.S. Lee and H. Friman (eds.), *The International Criminal Court Elements of Crimes and Rules of Procedure and Evidence* (2001).

Another complexity – also not fully explored in the book – is that the label ‘NGO’ is a collective noun. It serves as container for a broad ranging constellation of entities with different structures, mandates and working procedures. Grouping major NGOs, with significant access to decision-makers and resources, within the same category as smaller NGOs is to ignore a certain reality in the influence of NGOs on intergovernmental negotiations. It is also not advisable to overlook the way NGOs categorise themselves or seek to distinguish themselves from others. For example, the authors refer to the Red Cross as an NGO,<sup>17</sup> whereas the International Committee of the Red Cross (ICRC) and the International Federation of Red Cross and Red Crescent Societies (IFRC), in their literature and instruments, typically do not include themselves within the category of NGOs.<sup>18</sup> Indeed, the Red Cross is a particularly illustrative case in point. While at times its operations are NGO-like, both the ICRC and IFRC maintain formal relationships with Governments (there are Red Cross or Red Crescent national societies in most countries of the world), typically on the basis of specific legal agreements. Furthermore, the Red Cross Movement is subject to state oversight through the vehicle of an intergovernmental conference; giving it a distinctly quasi-international organization flavour. In addition, the ICRC and the IFRC have been granted observer status in the General Assembly of the United Nations (which would include the right to participate as an observer in the work of the Sixth Committee), a status, in the practice of the Assembly, more typically extended either to non-member states or international organizations.

## 4 Consensus-based Decision Making

The book is particularly compelling in its treatment of the role played by the consensus adoption procedure in the contemporary making of international law. In a multi-polar international community of almost 200 states, resorting to voting is, generally speaking, a risky strategy. Furthermore, no state relishes being placed in the position of having to vote against a new development in the law. The consensus adoption procedure is, accordingly, key to the successful functioning of the contemporary international law-making process. In fact, for some topics, such as the international regulation of anti-terrorism activities, consensus is a goal in itself. The work on treaty-making in this area is a key aspect of the establishment of an international political consensus in the fight against terrorism. Indeed, it is hoped that in a future revision of the book (if one were to be contemplated) more might be said about the process of achieving consensus, including, for example, the role played by the commentaries adopted by the International Law Commission and the regional group system of the United Nations, as well as the fact that the rules of procedure of the United Nations General Assembly (and those of contemporary diplomatic conferences) favour decision making by consensus.

<sup>17</sup> At 42.

<sup>18</sup> See, for example, the World Disasters Report 2007, International Federation of Red Cross and Red Crescent Societies, at 108 ([a]gencies involved in disaster preparedness and response, including UN agencies, NGOs, and the International Federation of Red Cross and Red Crescent Societies’).

There is, though, a more nuanced point to be made about the making of international law generally: the practice of consensus adoption is, to a significant degree, a function of the context in which the negotiation of a new treaty is taking place. This is a point alluded to indirectly in the book where the authors refer to the problem of the timing of the negotiation of the Multilateral Agreement on Investment as a factor in its eventual failure.<sup>19</sup> It is submitted that timing is merely one aspect of the broader question of context. The anti-terrorism treaties offer an example. For many years attempts at negotiating such agreements at the United Nations languished. However, with the end of the cold war, and shift in political landscape, aided by handshakes on the White House lawn, a window of opportunity emerged at which point three anti-terrorism treaties were negotiated at the United Nations in quick succession – two of which were rapidly adopted with the third following several years later.<sup>20</sup> That the work on a comprehensive convention on terrorism is currently making limited progress is due, in part, to the shift in the prevailing political context and to the fact that the focus of efforts in the fight against terrorism has moved to the Security Council since the attacks of 11 September 2001.

To the authors' analysis of the question of adoption by a vote, as opposed to consensus,<sup>21</sup> it could be added that, in reviewing the practice of voting, it is important to consider the negotiating history of instruments in their entirety, and not just their final outcomes. While it is increasingly rare for a vote to be taken at the final stage of adoption (a recent prominent exception being the adoption by vote of the Rome Statute of the International Criminal Court, in 1998), votes do also occur at interim stages of the negotiating process. These range from 'indicative' voting in order to ascertain the inclination of the room (a practice found, for example, in the Drafting Committee of the International Law Commission), to the taking of binding decisions by a vote. While many are procedural in nature, interim votes are also, on occasion, taken on substantive matters. For example, during the negotiation of article 44(5) of the Vienna Convention on the Law of Treaties<sup>22</sup> a vote was taken on whether it was possible to sever the provisions of a treaty which conflicted with an existing peremptory norm.<sup>23</sup> More recent such votes of significance include the vote in the Drafting Committee of the International Law Commission, in 2001, to include article 26 of the articles on the Responsibility of States for internationally wrongful acts<sup>24</sup> ('State Responsibility articles') on

<sup>19</sup> At 76–77.

<sup>20</sup> The International Convention for the Suppression of Terrorist Bombings, 15 December 1997, UNTS 2149, 256; the International Convention for the Suppression of the Financing of Terrorism, GA Res. 54/109 annex, 9 December 1999; and the International Convention for the Suppression of Nuclear Terrorism, GA Res. 59/290, annex, 13 April 2005.

<sup>21</sup> At 141–160.

<sup>22</sup> UNTS 1155, 331.

<sup>23</sup> See *Official Records of the United Nations Conference on the Law of Treaties, Second session*, 1969, p. 77, Summary Record of the Sixteenth Plenary Meeting, at para. 56 (a proposal by Finland, which would have permitted the separability of a treaty conflicting with a peremptory norm, was defeated by 66 votes to 30, with nine abstentions).

<sup>24</sup> *Yearbook of the International Law Commission*, 2001, vol. II (Part Two), para. 76. See also GA Res. 56/83, 12 December 2001, annex, as corrected by UN document A/56/49(Vol. I)/Corr. 4.



the non-applicability of circumstances precluding wrongfulness to obligations arising under peremptory norms; and the procedural vote in the Sixth Committee, in 2003, on a proposal to negotiate a convention to prohibit all forms of human cloning. The latter proposal was defeated by one vote (80 to 79, with 15 abstentions). Had the proposal succeeded, the United Nations would today be involved in the negotiation of a major international treaty based on the assumption that the destruction of a human embryo at the earliest stages of development constitutes the destruction of life.<sup>25</sup>

## 5 The Role of Innovation in Securing Consensus

Consensus is also not always easy to achieve exactly because of the number of states, and regional groupings, involved in any typical negotiation. While it is appreciated that it is not feasible to dwell on all the details of specific negotiations in a book covering a broad range of activities, the authors nonetheless lose site of the significance of some such details to the fact that the making of international law is an organic process involving an admixture of the affirmation of existing procedures with a healthy blend of innovation. It is not necessarily that some of the factual analysis in the book of what took place is incomplete, but that the authors at times place the emphasis on issues more of academic interest while failing to comment on those aspects which were considered by the actors involved to be of direct significance; and which, interestingly, reveal a certain degree of flexibility and innovativeness in contemporary international law-making processes.

One such example relates to the authors' treatment of the International Law Commission's adoption of the State Responsibility articles in 2001,<sup>26</sup> and their subsequent consideration by the Sixth Committee later that year. The Commission, in adopting the articles, adopted a double recommendation whereby the General Assembly was to first take note of the articles, and attach them to a resolution, and then, at a later stage, to consider the possibility of convening an international conference with a view to concluding a treaty.<sup>27</sup> It should be noted that the standard practice of the Commission upon adopting draft articles, as required by its Statute,<sup>28</sup> and contrary to what is suggested in the book,<sup>29</sup> is to recommend the adoption of an international convention.

<sup>25</sup> See Arsanjani, 'Negotiating the UN Declaration on Human Cloning', 100 *AJIL* (2006) 164, and Pronto, 'Consideration at the United Nations of an International Prohibition on the Cloning of Human Beings', 20 *LJIL* (2007) 239.

<sup>26</sup> At 183–185.

<sup>27</sup> *Yearbook of the International Law Commission*, 2001, vol. II (Part Two), paras. 72–73.

<sup>28</sup> Statute of the International Law Commission, adopted by GA res. 174 (II), 21 November 1947, as amended by res. 485 (V), 12 December 1950, 984 (X), 3 December 1955, 985 (X), 3 December 1955, and 36/39, 18 November 1981, art. 23.

<sup>29</sup> The authors assert (at 180) that the recommendation that the General Assembly merely take note of articles was simply an application of the Commission's Statute. However, a distinction is drawn in the Statute between reports and draft articles prepared by the Commission: while under article 23 of its Statute, the Commission can recommend that the General Assembly take note of reports, or refrain from taking any action at all, with drafts articles the Commission is required to recommend the conclusion of a convention or the convocation of a diplomatic conference for the same purpose.

The recommendation adopted by the Commission for the State Responsibility articles constituted a deviation from its prior practice, and, importantly, was understood as such by the Commission itself.

The recommendation emerged in response to a last-minute significant difference of opinion in the Commission on the course of action to recommend to the General Assembly. Consensus was preserved through a compromise recommendation structured in two parts. On the one hand it satisfied those members who preferred not to have the articles reopened through a treaty negotiation by recommending that the Assembly simply take note of (as opposed to actually adopting) the articles. The second part of the recommendation addressed the concerns of the constituency in the Commission which preferred the treaty route, by also recommending that the General Assembly nonetheless eventually take up the question of whether to convene an international conference to negotiate a treaty. From their perspective, even if not immediate, the eventual outcome would have been the same as if the Commission had unequivocally recommended a treaty negotiation, since the most the Commission can hope for, in any event, is for the Assembly merely to consider the Commission's recommendation that a treaty be adopted. This was exactly what the second part of the recommendation sought to achieve.

Significantly, the compromise was made possible by a particular innovation introduced in the recommendation, namely that the Assembly not only take note of the draft articles and commend them to governments, but that it also attach the articles to the General Assembly resolution in question. This was a reference to an innovation which the Sixth Committee had itself established the previous year. Up until that point, the attachment of legal texts to General Assembly resolutions had been reserved solely for treaties or declarations and other non-binding texts *negotiated and formally adopted* by the General Assembly. In 2000, the General Assembly, on the recommendation of the Sixth Committee, adopted a new practice by taking note of the adoption by the Commission the previous year of the draft articles on nationality of natural persons in relation to the succession of States, and attaching the text of those draft articles in an annex to the resolution<sup>30</sup> so as to give them universal publication, without any prior negotiation among states. Although the articles were not formally endorsed by the Assembly they nonetheless, in the eyes of the governments, acquired a status different from the draft prepared by the Commission, as they were now attached to a General Assembly resolution in a manner usually reserved for formally adopted instruments. Indeed, their title shifted from the 'draft articles' adopted by the Commission, to the 'articles' taken note of by the General Assembly. Through this new practice, borne out of a compromise to secure consensus in the Sixth Committee, the General Assembly had established a new category of international law instrument taking a form more typically reserved for a negotiated instrument, such as a treaty or declaration, while enjoying a status closer to a restatement of customary international law (as referred to below). Such outcome suited the Commission too as it retained the integrity of the text while giving it a quasi-*imprimatur* from the General Assembly together with a greater level of publicity.

<sup>30</sup> GA Res. 55/153, 12 Dec. 2000.

When it came to the formulation of the recommendation of the Commission for the State Responsibility articles, the Sixth Committee's 2000 compromise solution provided a useful precedent. For the detractors of the treaty solution, recommending that the Assembly merely take note of the State Responsibility articles was too minimalist a course of action. On the other hand, formal adoption by the General Assembly, in the form of a treaty or declaration, without re-negotiation or amendment, was unrealistic. The option of the Assembly giving the articles a quasi-imprimatur by attaching the draft to a General Assembly resolution, provided a viable *via media*. Under such reasoning, it would have the same or similar effect on the law as a law-making treaty or declaration, with the added benefit of avoiding a risky negotiation.

In doing so the Commission deviated from the standard approach to the codification of international law. Whereas almost all of the past codification exercises undertaken by the Commission envisaged eventual adoption in the form of a legally binding instrument, a plurality in the Commission turned this logic on its head by taking the view that codification did not necessitate a treaty and that the treaty course would be too risky.

It is at this point that one wishes that the authors had not merely reiterated<sup>31</sup> the standard refrain about why pursuing the treaty option for the State Responsibility articles was not considered advisable, namely: (1) that should such a treaty attract a low number of parties, it could trigger the 'de-codification' of established rules of international law on state responsibility; and (2) that a treaty negotiation process might dilute the significance of the Commission's work on state responsibility, thus potentially upsetting the balance found in the Commission's draft by, for example, threatening the continued inclusion of some of the more controversial provisions such as those on countermeasures and those on serious breaches of peremptory norms of international law. Of all the arguments against a treaty-based process, those two, in the view of this writer, were the least convincing.

First, the idea that the low ratification of a treaty would be detrimental to its legal effect as a matter of general international law misses the point that law-making treaties<sup>32</sup> do not necessarily need universal adherence to be deemed as such. Certainly the Vienna Convention on the Law of Treaties does not enjoy its central importance to the structure of international law because of the number of states that are parties to it. In fact, it languished for many years with relatively low ratification.<sup>33</sup> Furthermore, there may be a variety of reasons why states decide (or not) to become a party to a law-making treaty, unrelated to their assessment of the extent to which the treaty, or

<sup>31</sup> At 182–183.

<sup>32</sup> On 'law-making treaties', see Jenks, 'The Conflict of Law-Making Treaties', 30 *BYBIL* (1953) 403, R. Jennings and A. Watts, *Oppenheim's International Law* (1996), 6th ed., 1203–1206, I. Brownlie, *Principles of Public International Law* (2003), 6th ed., at 12–14 ('[s]uch treaties create legal obligations the observance of which does not dissolve the treaty obligation ... [they] create *general* norms for the future conduct of the parties in terms of legal propositions, and the obligations are basically the same for all parties'). (emphasis in original)

<sup>33</sup> By 1990, it had only attracted 56 parties. See United Nations Treaty Collection, online at <[untreaty.un.org](http://untreaty.un.org)>.

provisions thereof, reflects the existing law. It may be that they consider only part of a law-making treaty as reflecting customary international law, or that the treaty provides clarifications of the law or specific mechanisms for its application which justifies states becoming parties to it.

As to the concern that a negotiation would have unnecessarily upset the balance in the draft articles, it is worth recalling that the Vienna Convention on the Law of Treaties does not command the position in the international law of today that it does because it was based on a draft prepared by the Commission, but because it underwent the crucible of an inter-state negotiation. The same might also be said for a number of other conventions developed on the basis of the Commission's drafts, most recently the Rome Statute and the Convention on Jurisdictional Immunities of States and their property.<sup>34</sup> International law is still 'made' by states, and not by entities such as the International Law Commission. It is not useful to simply assume that states would not take a treaty negotiation seriously and would risk destabilizing the law.

Having said so, at a more fundamental level, the above two arguments typically cited for the Commission's opposition to a treaty negotiation for the State Responsibility articles betray the fact that there existed in the Commission a modicum of insecurity as to the existence of a uniform model of international law, as might have existed in early years. Why this was interesting, and accordingly why it might have been treated in more depth, was because the momentary deviation from the standard model of codification revealed a level of frustration with the emphasis on a treaty-based system of international law. Perhaps at the root of this lay a certain chafing at the constraints imposed by the contractual nature of treaties (even when 'law-making' in nature), mixed with some dissatisfaction at the limited options in the traditional forms of codified international law, as well as concerns about the viability of undertaking major law-making treaty negotiations in a multi-polar world of almost 200 states.

Furthermore, for this writer, a more persuasive argument for postponing the adoption of the State Responsibility articles in treaty form was that, despite 46 years of work, the articles could, at best, only provide a 'snapshot' of a continuously evolving field. Indeed, while the Commission was not without some blame for the duration of the consideration of the topic, a significant reason for it related to the continuing shift in the law. Had the articles been adopted in the 1950s or 1960s, they would have looked significantly different than the text adopted in 2001, and may not have been relevant to the law of today. Accordingly, 'freezing' the topic in a treaty would have been to impede the development of the law.<sup>35</sup> The Commission's goal in 2001,

<sup>34</sup> GA Res 59/38, annex, 2 December 2004.

<sup>35</sup> This is also increasingly a problem, for example, for the Vienna regime on the law of treaties which, when adopted in 1969, was based on the vision of international law as being predominantly a bilateralist undertaking, and where the concept of 'fragmentation' as a reality of international law was largely not considered. On the fragmentation of international law, see: International Law Commission, Report of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, *Official Records of the General Assembly at its Sixty-first Session, Supplement No. 10, 2006 (A/61/10)*, paras. 241–251, and United Nations doc. A/CN.4/L.682 and Corr. 1.

therefore, was modest: simply to establish a systematic structure within which the law could continue to develop.

In summary, the significance of the recommendation of the Commission was that it amounted to a sort of post-modernist take on the codification of international law, which minimized the importance of treaties while preferring the development of the law through the continuing development of customary international law.<sup>36</sup> The irony in this is that, at a time of the dominance of the treaty-based system (in comparison with the prevailing situation, for example, at the turn of the 20th century where most international law was based on custom), the International Law Commission took the position that the treaty-making process was not immediately<sup>37</sup> appropriate for the codification of one of the cornerstones of international law.

## 6 Soft Law

It remains a matter of some puzzlement for this writer that, despite the sophistication of contemporary international law, the vague dichotomy between hard and soft law, which has no formal basis in the law, is still frequently resorted to. At its core the distinction is that between written law which is legally binding ('hard' law) and that which is not. The problem is that the binary nature of the distinction unnecessarily skews the conclusions drawn as to the normative value to be attached to texts falling within the latter category. There is some difficulty in grouping a set of guidelines or best practices developed in a very specific technical context with, for example, the Rio Declaration on Environment and Development,<sup>38</sup> which enjoys a different qualitative nature and significance. To be fair, the authors recognize this implicitly by pointing to the normative content of some soft law texts,<sup>39</sup> albeit while providing little guidance on how to determine the existence of such normative content, or as to the consequences of such differentiation among non-binding texts. Furthermore, despite pointing to the complexity inherent in the concept, they nonetheless employ it extensively in the book.

Part of the difficulty lies in the lack of precision arising from the reflexive use of the moniker 'soft-law' for any body of rules which are not adopted in traditional legally binding forms. For example, the International Law Commission would probably find it strange to read the authors' characterization of the State Responsibility articles as 'soft law',<sup>40</sup> given the permissive non-binding nature assigned to such type of 'law'. Nor, for that matter, has the International Court of Justice, and other judicial instances

<sup>36</sup> See too: J. Alvarez, *International Organizations as Law-makers* (2005), at 311–312.

<sup>37</sup> It was, however, understood that at some point in time the law of state responsibility would reach a level of maturation sufficient to justify codification in treaty form (this was made explicit in the reference in the recommendation to the eventual possibility of the holding of a diplomatic conference).

<sup>38</sup> *Report of the United Nations Conference on Environment and Development*, Rio de Janeiro, 3–14 June 1992 (United Nations publication, Sales No. E.93.I.8 and Corrigena), vol. I: Resolutions adopted by the Conference, resolution 1, annex I.

<sup>39</sup> At 211–229.

<sup>40</sup> At 182.

which have cited the articles on several occasions since their adoption in 2001,<sup>41</sup> or Governments in the Sixth Committee,<sup>42</sup> treated the draft articles as constituting ‘soft law’ in the traditional sense. Quite the contrary, although some elements of progressive development are to be found, the articles contain a number of well-established rules of international law which could hardly be termed ‘soft’. Indeed, the possibility of such characterization of the articles, resulting in an ostensible diminishing of the legal value of well-established principles, was exactly one of the concerns raised by those members in the Commission who sought a more secure basis for the articles in the form of a legally binding convention.<sup>43</sup>

As discussed above, the Commission, or at least those members not supporting adoption in treaty form, wanted as authoritative a text as possible short of subjecting it to a treaty negotiation process. The better characterization of the articles might be that found in the concept of ‘expository codification’, referred to in the Commission on several occasions, including during the adoption of the State Responsibility articles.<sup>44</sup> The idea being that there may be different types of codification exercises: in some cases the act of codification is more substantive involving the clarification of rules and, where necessary, making choices including discarding or mitigating long-held legal positions without, that is, straying into the realm of progressive development. In other situations codification is merely ‘expository’ in nature, in the sense that a *renvoi* is being provided to an existing body of law. For example, article 36 of the State Responsibility articles refers to the principle of compensation as a form of reparation for injury, without seeking to codify the extensive body of rules on the determination of compensation.<sup>45</sup> As such, the articles become a sort of abbreviated guide to the

<sup>41</sup> For a survey of references to the Articles on Responsibility of state for internationally wrongful acts, since their adoption by the International Law Commission in 2001, see United Nations doc. A/62/62 and Corr. 1 and Add. 1.

<sup>42</sup> See the relevant summary records of the debate in the Sixth Committee of the General Assembly on the topic at the sixty-second session of the General Assembly, in 2007, in United Nations docs. A/C.6/62/SR. 12, 13, 27 and 28. See too United Nations doc. A/62/63 and Add. 1.

<sup>43</sup> *Yearbook of the International Law Commission, 2001*, vol. II (Part Two), para. 65.

<sup>44</sup> See International Law Commission, Report of the Chairman of the Drafting Committee, 2001, in *Yearbook of the International Law Commission, 2001*, vol. I, Summary Record of the 2681st meeting, at paras. 72, 81, and 102. Special Rapporteur Ian Brownlie has referred to the concept of an ‘expository draft’ on a number of occasions, most recently in his Third Report on the Effects of Armed Conflicts on Treaties, United Nations doc. A/CN.4/578, at paras. 34, 39, and 63 (noting that a particular provision, while not strictly necessary, ‘was useful in an expository draft’). The idea of an ‘expository code’ can be traced to the early years of the work of the International Law Commission. See, for example, International Law Commission, Fourth Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur, *Yearbook of the International Law Commission, 1965*, vol. II, e.g., at para. 6 (where the Special Rapporteur, in referring to a provision noted that ‘[i]f this paragraph is to a large extent *expository*, its retention seems advisable as a prelude to the important provisions ... in the next paragraph’) (emphasis added).

<sup>45</sup> Another example is art. 44 of the State Responsibility articles, which sets out in a similarly expository fashion, the two international law requirements for the admissibility of certain types of claims (involving diplomatic protection), namely nationality of claims and exhaustion of local remedies. In the commentary to the provision, it is noted that ‘[n]o attempt was made at a) detailed elaboration of the nationality of claims rule or the exceptions to it’ and that the article ‘does not attempt to spell out comprehensively the scope and content of the exhaustion of local remedies rule, leaving this to the applicable rules of international

relevant rules of international law. This is similar to the idea, which has, on occasion been raised in the Commission,<sup>46</sup> that it prepare a 'restatement' of the rules of international law, similar to the American restatement.<sup>47</sup> It is submitted that these ideas also closely describe the intention of states when adopting the General Assembly resolution in 2001 taking note (and attaching) the State Responsibility articles, without reference to the legally binding nature of their contents.

The problem with the soft–hard law conception of international law is also exactly that it pivots around the issue of legal 'bindingness'. It is difficult to analyse the general international law rules on the responsibility of states as being 'binding' on states in a contractual sense. Instead, their legal validity is rooted in the fact that they, as secondary rules, form a part of the architecture of international law, and accordingly apply by operation of the law itself. For example, the rules on reparation are not 'binding' on states in the traditional sense, but exist (to the extent that states have not expressly modified them *inter se*) as legal constraints on the action of states following the determination of the existence of an internationally wrongful act. Accordingly, what matters is not whether the rules are 'binding' on states *stricto sensu*, but rather whether they exist for the parties as a matter of law, and, if so, what their content is. In other words, while the focus on the binding nature of a legal text might work in the context of the contractual type of international law, it does not accord with the public law nature of much of international law. Instead, it might be more productive to analyse public law texts, such as the State Responsibility articles, in terms of, for example, their opposability to states, than through the prism of hard versus soft law. The important consideration being whether such rules actually constrain the actions of states in practice or not.

## 7 Conclusion

Contemporary international law is made through a wide variety of processes and by a growing number of entities and individuals. Not even states, only few of which have the resources (or the willingness) to follow all such processes, always have a grasp of

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*law*' (emphasis added), *Yearbook of the International Law Commission, 2001*, vol. II (Part Two), paras. (2) and (5) to the commentary to article 44, respectively. It is submitted that this goes at least part of the way to answering the question as to why the Commission had not made an explicit exception in article 44 to invocations of responsibility raised under article 48 (dealing with the invocation of responsibility by a state other than an injured state in cases, *inter alia*, of breaches of erga omnes obligations). See Scobbie, 'The Invocation of Responsibility for the Breach of "Obligations under Peremptory Norms of General International Law"', 13 *EJIL* (2002) 1201, 1215; and Vermeer-Künzli, 'A Matter of Interest: Diplomatic Protection and State Responsibility *Erga Omnes*', 56 *ICLQ* 553–582. It was not an oversight. Rather the Commission did not attempt formulating a definitive position on the matter, preferring to leave it to the applicable rules of international law (including, presumably, any future rules).

<sup>46</sup> See, for example, the discussion in 1998 on the form possible form of the outcome of the work on the topic 'Unilateral acts of states', *Yearbook of the International Law Commission, 1998*, vol. II (Part Two), at para. 196. See too Alvarez, *supra* note 37, at 312.

<sup>47</sup> American Law Institute, *Restatement of the Law*, 3rd edn, Foreign Law of the United States (1987).

the full range of such activities. At the same time, the lack of a unified approach to the making of international law (through, for example, a centralized legislative authority) has meant that law-makers have increasingly felt less constrained by existing practices and procedures. This has allowed greater space for innovation, as states, and other entities involved in law-making, seek to establish or tailor rules for specific problems or aspects of international life. Evolution and change in procedures and processes has become relatively common. A complete analysis of contemporary international law-making requires an appreciation of the role that such innovativeness and change plays in what still remains a somewhat parochial undertaking.<sup>48</sup> The significance of such characteristics of modern international law-making is that they have played no small part in the 'organic' growth of the law in recent times, including growth in the new *types* of law, such as non-binding law which nonetheless has the effect of constraining the actions of states, and law generated from courts and the organs of international organizations. The picture of international law at the turn of the 21st century is, as confirmed by Boyle and Chinkin's interesting book, increasingly one of ferment and unwillingness to be constrained by the formalism of the past.

<sup>48</sup> Indeed, one of the aspects which is raised in the book (at 290–292, in the context of the role of lawyers) but is insufficiently emphasized, is the extent to which particular individuals have exercised disproportionate influence over outcomes, whether as members of state delegations or as legal experts of the International Law Commission or of one of the Treaty Bodies, or members of an NGO.