

INTERNATIONAL GUIDELINES AND PRINCIPLES

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Contents

1. Introduction
 2. Role of Soft Law in International Environmental Law
 3. Status of Principles in International Environmental Law
 4. Environmental Principles
 - 4.1. 1972 Stockholm Declaration
 - 4.2. 1992 Rio Declaration
 - 4.3. Article 3 Climate Change Convention
 - 4.4. 'Core' Principles
 - 4.4.1. 'No Harm' Principle (Principle 21)
 - 4.4.2. Precautionary Principle
 - 4.4.3. Principle of Integration
 - 4.4.4. Common but Differentiated Responsibilities
 5. Conclusion
- Glossary
Bibliography
Biographical Sketch

Summary

The development of environmental principles has been an intrinsic part of the wider development of international environmental law and policy. Environmental principles have provided a focus for the international community in its attempt to achieve environmental protection and sustainable development. Such principles have been included in numerous international agreements and non-binding documents. However, many issues surrounding such principles remain unclear.

What do we mean when we refer to something as a 'principle' rather than giving it some other title, such as 'rule' or 'right'? Are environmental principles legal, or are they simply political? And if they are legal, what form do they take? This paper seeks to address such general issues before going on to discuss some of the more important compendia and lists of environmental principles that have been developed, such as the 1972 Stockholm Declaration, the 1992 Rio Declaration and Article 3 of the 1992 UN Framework Convention on Climate Change.

Four 'core' principles are then examined in greater detail, namely the 'no harm' principle (the notion that States must not harm the environment outside its territory), the precautionary principle, the integration principle and the principle of common but differentiated responsibilities.

1. Introduction

One particularly noticeable aspect in the development of international environmental law, and one that is, to some extent, unique in international law, is its reliance on so-called ‘principles’, such as the precautionary principle. These principles range from those with a purely environmental focus to those relating to wider issues of sustainable development and the needs of developing States. This is not intended to take anything away from other areas of international law, such as human rights law, but simply to say that in respect of terminology, international environmental law has generally used the notion of ‘principle’ (rather than ‘rule’ or ‘right’) to describe its basic concepts. An analysis of some of the more important environmental principles is the main subject of this paper. However, it is important also to discuss some of the general issues relating to the use of principles in international environmental law.

The evolution of environmental principles has been an intrinsic part of the wider development of international environmental law. Of particular importance has been the inclusion of these principles in non-binding texts such as the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment, and the three non-binding texts agreed at the 1992 United Nations Conference on Environment and Development, namely, the Rio Declaration, Agenda 21, and the Statement of Principles on Forests. This process has been assisted by the adoption of a number of compendia of environmental principles, such as the Commission on Sustainable Development’s Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development and the World Conservation Union’s Draft International Covenant on Environment and Development, both of which were published in 1995. Environmental principles have also been included within a number of multilateral environmental agreements. The 1992 United Nations Framework Convention on Climate Change, for example, at Article 3, has a list of principles that are to guide the Parties in their implementation of the Convention.

However, despite collectively referring to them as ‘principles’, it is apparent that not all principles share the same legal status. Whereas some reflect rules of customary international law (ie. rules of international practice accepted as law, which are binding on the international community), others very clearly do not, or at least, not yet. It is therefore relatively clear that many of the principles of international environmental law do not have, or have not yet acquired, a formal legal status. This raises two very important preliminary issues. The first is the role of non-binding texts (or ‘soft law’) in the development of international environmental law. And the second is the question as to what legal form such principles would take if, in fact, they did possess normative status? The plan of this paper, therefore, is to discuss these general issues, before analysing some of the more important principles of international environmental law.

2. Role of Soft Law in International Environmental Law

It is axiomatic that international environmental law, as a body of international law, must be created through one of the traditional law-making procedures of the international legal system. These law-making processes, more commonly referred to as the sources of international law, circumscribe the situations when a measure of the international

community will be regarded as having legal force. (See Mechanisms to Create and Support Conventions, Treaties and other Responses)

One aspect of international law-making that is of particular interest in international environmental law is that of 'soft law'. Soft law is a highly controversial subject in international law. It is a generic term to describe those documents, which whilst not having legal force in the traditional sense, have an influence beyond mere political rhetoric. It is an issue that raises many theoretical and practical problems. There is no standard definition of soft law; in fact, such documents vary incredibly in terms of their nature and form. However, those documents that are usually considered as falling within soft law include codes of practice, recommendations, resolutions, guidelines, and declarations of principles. There is also a question as to whether certain vague provisions of international treaties should also be seen as soft law.

In terms of traditional approaches to international law, soft law is paradoxical; its critics would claim meaningless. How can something be law if is not legally binding? 'Soft law', as a term of art, is therefore relatively unhelpful, as it is the juxtaposition of two words which, when combined, are incompatible, if not nonsensical. However, there are those who see benefit in the use of non-binding documents and argue that the term conveys a moral, if not a legal, authority. And, of course, the use of soft law has not only been a feature of international environmental law; the development of many, if not most, areas of international law has at some point relied on such non-binding documents.

There are numerous reasons proposed for the increasing reliance by the international community on soft law, though surely the most important is that it allows consensus to develop between opposite positions, where otherwise it may not. In essence, soft law allows States to negotiate a document with the knowledge that they will not be bound by its provisions. There are a number of possible reasons why this may be the case. First, States may be willing to attempt to meet more stringent standards than exist at present but are unwilling to be legally bound by such a commitment as they are unsure whether they will be able to comply. The high standards set are therefore goals to be achieved, rather than commitments to be met. Proponents of soft law argue that it encourages States to improve the environment without necessarily having to adhere to the formalities of international law. An alternative reason, however, for adopting a non-binding document is not because States want to strengthen existing environmental standards, but because they are not sure whether they want to adopt standards in the first place. In the case of a highly controversial issue, the international community may prefer to take only tentative steps towards international regulation without adopting legal commitments. It is a 'half-way house' between the declaration of political objectives and the creation of binding international law. Such instruments are often exceedingly ambiguous, and often give participating States a high degree of discretion as regards the interpretation of the document and the implementation of its provisions. This is seen as being particularly important where a State, due to domestic concerns, requires a flexible approach to a problem. Economic cost, concerns over unemployment, scientific uncertainty are all reasons why States might prefer non-binding commitments to 'hard' law.

But then one is left with the question as to why States take so much care in the negotiation of non-binding texts, if they are not legally binding? Why should they be concerned by something that will not – and cannot – be legally held against them? However, as well as having significant political importance, the development of soft law is also increasingly playing an important role in the development of international law, proper. There is a very obvious relationship between soft law and the traditional sources of international law; unquestionably non-binding instruments *can* contribute to its development. States take care in drafting soft law not because of any equivalence in status between it and international law, but because they realize soft law can ‘harden’ over time into actual legal commitments, both in relation to treaties and also customary international law.

As regards treaty law, the development of non-binding documents is often an initial step before the international community is prepared to negotiate specific legal commitments on the issue. There are numerous roles that non-binding instruments can play in this area. They can help initiate the negotiating process for the adoption of a legally binding treaty; they can demonstrate to wary States the benefits of action (or that the costs of action are not so great); and they can provide interim guidelines before a treaty is signed. And following the adoption of a treaty, subsequent non-binding instruments can encourage States parties to further strengthen the obligations contained therein.

As regards customary international law, soft law can be evidence of either the existence of a pre-existing rule, or evidence of the emergence of a new rule. Many international lawyers, however, would caution against the acceptance of a single soft law document, even a resolution of the UN General Assembly, as conclusive evidence of either. Vital issues of universality, uniformity and repetition of international practice should not be disregarded easily. However, where a document, especially a General Assembly resolution, is declaratory of a rule of customary international law, the document is often an excellent exposition of the rule.

There is a further argument that must be discussed before concluding this section on soft law. Some have argued that it is not only documents such as codes of practice, resolutions and recommendations, *et cetera* that should be treated as soft law; certain treaty provisions should also fall within the category. It is based on the argument that the difference between ‘hard’ and ‘soft’ law does not depend upon the type of document in which it is found, but rather on the substantive nature of the obligation in question. The use of treaty form, so the argument goes, does not ensure a ‘hard’ legal obligation; only those provisions that are precisely worded and specify the exact obligations to be undertaken can be so labelled. Broad ‘framework’ treaties are sometimes treated as examples of soft law, as the obligations they contain are too vague to impose specific obligations on State parties. The judgment of Chief Justice Gibbs in *The Commonwealth of Australia v. Tasmania* (1983) is often relied upon to support this argument. Chief Justice Gibbs felt that it was possible for States to adopt a treaty that contained no binding obligations, and which merely formulated moral or legal precepts. However, this argument that certain treaty provisions are examples of soft law must be rejected outright. The difference between law and non-law is not, as has been argued above, the nature or wording of the commitment, but rather the process by which it is created. To accept anything else would be to jeopardize the integrity of the international legal

system. It is of course correct to point out that a number of provisions particularly in 'framework' treaties, such as the 1992 Climate Change Convention, are rather vague and open-ended; texts that are compromise position between various viewpoints are rarely anything else. However, the normative status of such provisions is not determined by their exactness; their status, in fact, depends upon the intention of States. And the inclusion of a provision within a treaty is conclusive evidence of their intention to be bound by it – however vague and discretionary the provision actually is.

In conclusion, soft law is a difficult issue for many international lawyers. Not only does it exist outside the traditional boundaries of international law, but it also challenges the normative value of international law proper. Some international lawyers, on the other hand, welcome the development of soft law as it is a means of introducing, they argue, much needed flexibility into the system. Ultimately, what must be asserted is that whilst soft law has an important role to play, it will always be secondary to that of international law.

3. Status of Principles in International Environmental Law

As has already been noted, not all environmental principles can be said to have a formal legal status. But even if they do, what is the actual nature of such legality in international law? The classical approach in international law has always been that for a norm to have legal status, it must fall within one of the sources of international law as laid out in Article 38.1 of the Statute of the International Court of Justice. For our purposes, this means that it must either be a provision of an international convention or treaty, a rule of customary international law, or a general principle of law 'recognized by civilized nations'. (See Mechanisms to Create and Support Conventions, Treaties and other Responses) What is noticeable about Article 38.1 is that, unlike many municipal systems, international law can be created in a number of ways. The two principal methods are undoubtedly the adoption of treaties and the evolution of customary international law. 'General principles' are usually regarded as a secondary source of international law, used by international courts and tribunals to assist them in the administration of justice.

It is suggested that environmental principles may acquire formal legal status via any of the three sources mentioned above – treaty, custom or general principle – depending upon the nature of the environmental principle, at issue. To take treaties first, it is unquestionably correct that environmental principles (such as the precautionary principle) contained within a treaty have a more solid legal basis than those that are merely contained within the texts of soft law instruments, such as the 1992 Rio Declaration.

Moreover, where such principles are contained within the substantive and operational part of a treaty, as compared to the aspirational preamble, such as Article 3 of the 1992 Climate Change Convention, this should also be more clearly recognized. However, it must be noted that principles contained within a treaty are only legally binding within the context of that treaty regime. For an environmental principle to have an autonomous legal nature beyond the scope of the treaty, it must look elsewhere for its normative status.

This leads one onto the question as to whether environmental principles could be rules of customary international law? The answer to this must be ‘yes’, but only in certain circumstances. To take the example of what is known as the ‘no harm’ principle, discussed further below. The ‘no harm’ principle, as initially contained within Principle 21 of the 1972 Stockholm Declaration says:

‘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’.

The International Court of Justice in *Legality of the Threat or Use of Nuclear Weapons (Request by the United Nations General Assembly for an Advisory Opinion)* in 1996 recognized that the ‘no harm’ principle had become a rule of customary international law. As was noted above, customary international law are rules of international practice accepted as law. There are two elements to this definition; an ‘international practice’ respected by the majority of the international community, and a general acceptance by the majority of the international community that such practice is legally binding upon it.

But above and beyond that, there is also a requirement that the practice be ‘of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law’ (as noted by the International Court of Justice in the *North Sea Continental Shelf Cases* between the Federal Republic of Germany, the Netherlands and Denmark in 1969). What this means is not entirely clear; but, in essence, it is recognition that there must be a minimum level of agreement as to how to comply with the rule before it can become customary international law. In other words, if it is impossible to say what the rule entails or how to ensure compliance with it, it is not of ‘a fundamentally norm-creating character’. To give an example; whilst it is possible to say – if only superficially – how States are to comply with the ‘no harm’ rule (ie. not to ‘cause damage to the environment of other States or of areas beyond the limits of national jurisdiction’), it is much more difficult to say with any precision what it means to comply with the precautionary principle – the notion that States should act cautiously in the event of scientific uncertainty. Therefore, whilst some environmental principles may well develop into rules of customary international law (if they satisfy the requirements of an international practice accepted as law), others, by their very nature, may not.

After having discussed treaties and rules of customary international law, the next issue is whether environmental principles can become ‘general principles of law recognized by civilized nations’? However, the meaning of these ‘general principles’ has always been unclear. Whereas some commentators believe general principles can include principles of substantive law (such as, possibly, the precautionary principle), others remain adamant that the general principles in question refer only to jurisdictional rules relating to evidence and procedure. The latter approach has been the one that the International Court of Justice and, though not bound by the Court’s Statute, most international tribunals have generally adopted. However, individual judges have occasionally tried to justify a broader approach to ‘general principles’. Judge Tanaka in

his dissenting opinion in the *South West Africa Case* in 1966 argued that the general principles mentioned in Article 38.1 of the Court's Statute also included concepts of natural law that ultimately formed the basis for human rights law. And this broad approach was adopted by Vice-President Weeramantry who, when discussing sustainable development in the *Gabcikovo-Nagymaros Case* between Hungary v. Slovakia in 1997 noted that, 'when the Statute of the Court described the sources of international law as including the "general principles of law recognized by civilized nations", it expressly opened a door to the entry of such principles into modern international law'. (See International Binding Mechanisms) However, such comments have been isolated instances in the separate opinions of certain judges; the majority consider 'general principles' to simply refer to those rules of procedure that help in the administration of international justice. For the present, this view must be accepted.

Nevertheless, the seemingly automatic translation of political principles into international law by some commentators and States has worried others who are concerned that a clear distinction should always be made between those principles that are incorporated into international law, and those that do not have such normative status. They argue that principles can play a useful role in the development of international environmental law and policy without having to be termed 'legal' themselves, which may be an arbitrary and unnecessary step. Principles not only establish the political and moral objectives which the international community aspires to achieve (such as 'sustainable development'), but they also provide much needed guidance in the negotiation, implementation and interpretation of international obligations, particularly when the law is to be applied flexibly to suit the circumstances of the individual situation. Little is gained by giving a principle a normative value that it has not yet achieved; States are unlikely to obey it as they would rightly feel that it has been imposed upon them against their will – an anathema in an international community made up of sovereign States.

4. Environmental Principles

There is no definitive list of environmental principles; nor has there been any attempt to place them in any particular order of priority. However, before moving on to discuss arguably the four most important environmental principles, namely the 'no harm' principle, the precautionary principle, the principle of integration and the principle of 'common but differentiated responsibilities', it is appropriate to consider some of the various lists and compendia of environmental principles that have been developed since the emergence of modern international environmental law in the 1970s.

4.1. 1972 Stockholm Declaration

Undoubtedly, the first attempt to try to formulate such a list was the 1972 Stockholm Declaration. It included the following important principles:

Principle 1: *'Man has the fundamental right to...an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for future generations...'*;

Principle 2: *‘The natural resources of the earth including the air, water, land, flora and fauna and especially representative samples of natural ecosystems must be safeguarded for the benefit of present and future generations...’;*

Principle 6: *‘The discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon ecosystems...’;*

Principle 9: *‘Environmental deficiencies generated by the conditions of underdevelopment and natural disasters pose grave problems and can best be remedied by accelerated development...’;*

Principle 13: *‘...States should adopt an integrated and co-ordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve the human environment...’;*

Principle 21: ‘no harm’ principle (as set out above);

Principle 24: *‘International matters concerning the protection and improvement of the environment should be handled in a co-operative spirit by all countries, big or small, on an equal footing...’.*

This is obviously only a selection of some of the principles in the 1972 Stockholm Declaration. However, they do illustrate a number of points. First, many of these environmental principles use the term ‘should’ rather than ‘shall’; recognition that the Stockholm Declaration is a non-binding text.

Second, there is explicit acknowledgement that humanity and nature are in a symbiotic relationship, both dependent upon each other. Principle 1 emphasises both the necessity of a good environment for the survival of humankind, and humankind’s responsibility in protecting the environment. And third, the Stockholm Declaration is not simply concerned with environmental issues in its strictest sense. Developmental and socio-economic issues are also of importance.

This early attempt at formulating general environmental principles was further developed by the United Nations General Assembly in its 1982 World Charter for Nature and the 1986 Final Report on Legal Principles for Environmental Protection and Sustainable Development.

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Biographical Sketch

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