EDITORIAL COMMENT

STANDING TO CHALLENGE HUMAN ENDEAVORS THAT COULD CHANGE THE CLIMATE

International lawmaking is a time-consuming business when traditional methods are used. The process is worse than time-consuming when it is applied to technological change and its effect on the human environment. In that arena, it has been recognized for quite a while that traditional methods —treaty making and state practice leading to custom—are simply inadequate by themselves.[1]

One technique for accelerating the adaptation of international law to developments in the environmental field is the use of "soft" law to promote the "progressive emergence of general environmental norms and principles."[2] Of course, one source of soft law is the well-placed United Nations General Assembly resolution.[3] Procedural, as well as substantive, norms may be developed with the help of soft law.

In the fall of 1988, the Government of Malta proposed a General Assembly "Declaration proclaiming climate as part of the common heritage of mankind."[4] During negotiations on Malta's proposal, "common heritage" became "common concern."[5] Presumably, this change reflected a desire to avoid the politically charged debate over the full implications of "common heritage," engendered by its use in the deep seabed and outer space contexts. In any event, the General Assembly did adopt a resolution on the

[1] *See, e.g.*, Gotlieb, *The Impact of Technology on the Development of Contemporary International Law*, 170 RECUEIL DES COURS 115, 139–41 (1981).

To take an important, recent example of treaty making, the Montreal Protocol [to the Vienna Convention on the Protection of the Ozone Layer] on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 ILM 1550 (1987), had been overtaken by scientific discovery by the time it entered into force on January 1, 1989. It provides in Article 2(4) that industrialized countries are to reduce their annual consumption of chlorofluorocarbons (CFCs) by June 30, 1999, to 50% of their consumption in 1986. Under Article 5, developing countries have an extra 10 years to do so. Reacting to alarming scientific findings regarding the depletion of the ozone layer, 81 nations in May 1989 declared their intent to phase out completely the production and consumption of CFCs controlled by the Montreal Protocol not later than 2000. Helsinki Declaration on the Protection of the Ozone Layer, May 2, 1989, 19 ENVTL. POL'Y & L. 137 (1989). *See also* United Nations Environment Programme [UNEP] Governing Council Res. 15/36, para. 11(a), in Report of the Governing Council on the work of its fifteenth session, 44 UN GAOR Supp. (No. 25) at 164, 167, UN Doc. A/44/25 (1989).

[2] Governing Council of the UN Environment Programme, Environmental Perspective to the Year 2000 and Beyond, in UN Doc. UNEP/GC.14/26, Ann. II, at 34 (1987).

[3] On the concept of "soft law," see especially Baxter, *International Law in "Her Infinite Variety,"* 29 INT'L & COMP. L.Q. 549 (1980).

[4] UN Doc. A/43/241 (1988).

[5] *See* Malta's draft and revised draft resolutions, UN Docs. A/C.2/43/L.17 and A/C.2/43/L.17/Rev.1 (1988).

"Protection of global climate for present and future generations of mankind," containing the "common concern" language.[6]

Specifically, the resolution "*[r]ecognizes* that climate change is a common concern of mankind, since climate is an essential condition which sustains life on earth."[7] It goes on to recommend several measures designed to develop understanding of the causes and effects of climate change and to generate international measures for climate preservation. The subject is undeniably an important one. But is the resolution important to the development of international law on climate change? The answer appears to be that it is, in a limited sense.

Although the resolution was proposed as a "Declaration," the General Assembly did not adopt it with that pedigree. In UN practice, a declaration has a special status. Even though it is formally a resolution with no higher rank in the Charter than other resolutions, it is regarded as "a formal and solemn instrument suitable for those occasions when principles considered to be of special importance are being enunciated."[8] An ordinary resolution is presumably less formal or less solemn, or both. Moreover, an ordinary resolution—like the one on climate change—normally uses language less legislative in form than a declaration would. It typically "calls upon," rather than "decides." It typically is expressly, as well as technically, recommendatory (using "should" rather than "shall").

This lack of special status, however, does not strip the resolution on climate change of all legal significance. Taken as a whole, it may be regarded as ultrasoft law, but it is somewhere beyond the starting point on the continuum from nonlaw to true law. It is the product of serious discussions that produced a consensus in the Second Committee.[9] The General Assembly adopted it by consensus.[10] More to the present point, the key paragraph,

[6] GA Res. 43/53 (Dec. 6, 1988).

[7] *Id.*, para. 1. The "common concern" language is repeated in GA Res. 44/207, Preamble (Dec. 22, 1989). The Noordwijk Declaration on Atmospheric Pollution and Climatic Change, Nov. 7, 1989, says in paragraph 7 that "Climate change is a common concern of mankind." Int'l Env't Rep., Current Rep. (BNA) 624 (Dec. 13, 1989). The Statement of the Meeting of Legal and Policy Experts, emanating from a meeting convened by the Government of Canada in February 1989, says in paragraph A.3 that the atmosphere "constitutes a common resource of vital interest to mankind." *See* UN Doc. A/C.2/44/2 (1989), and 19 ENVTL. POL'Y & L. 78, 79 (1989).

[8] Cable from the UN Office of Legal Affairs (Nov. 16, 1981), 1981 UN JURID. Y.B. 149. The formulation is based on a Legal Memorandum of the Office of Legal Affairs, UN Doc. E/CN.4/L.610, *quoted in part in* 34 UN ESCOR Supp. (No. 8) at 15, UN Doc. E/3616/Rev.1 and E/CN.4/832/Rev.1 (1962).

[9] *See* UN Doc. A/C.2/43/SR.44, at 8–9 (1988); UN Doc. A/43/905, at 5 (1988).

[10] *See* UN Doc. A/43/PV.70, at 66 (1988). There are differing views about the significance of consensus in the adoption of General Assembly resolutions. *Compare* Jiménez de Aréchaga's discussion, in CHANGE AND STABILITY IN INTERNATIONAL LAW-MAKING 48–49 (A. Cassese & J. Weiler eds. 1988) [hereinafter CHANGE AND STABILITY], and Sloan, *General Assembly Resolutions Revisited (Forty Years After)*, 58 BRIT. Y.B. INT'L L. 39, 140 (1987) (stressing the significance of consensus), *with* Condorelli, *The Role of General Assembly Resolutions*, in CHANGE AND STABILITY, *supra*, at 37, 42–47, and Delupis, *The Legal Value of Recommendations of International Organisations*, in INTERNATIONAL LAW AND THE INTERNATIONAL SYSTEM 47, 54–55 (W. Butler ed. 1987) (noting that consensus texts tend to be watered down). Schwebel, *The Effect of Resolutions*

quoted above, does not purport to prescribe conduct. Instead, it serves a legitimizing function by recognizing climate change to be a common concern of mankind. Its legal significance does not depend on any quasi-legislative power of the General Assembly; rather, it depends on the strength of the shared governmental conviction it enunciates and on the inferences that may properly be drawn from it.

The paragraph is legitimizing in the sense that it recognizes a collective interest in climate change that presumably extends well beyond the interests acknowledged at the Stockholm Conference on the Environment in 1972. The Stockholm Action Plan implied something less than common concern by calling only for consultation with "other interested States" when activities posing a risk of appreciable effects on climate were being contemplated or implemented.[11] Even that limited assertion has influenced the development of international environmental law,[12] but the collective consciousness regarding interrelated climatic effects has been raised since 1972. It has found expression in the current resolution.[13]

Clearly, if climate change is a matter of "common concern," international regulation of it is legitimate.[14] But that still is not saying much. It is not necessary to identify climate change as a "common concern of mankind" so as to legitimize, today, the international regulation of a phenomenon inherently capable of transcending national boundaries. We may then ask if the concept has some additional significance. It would seem that it does. It implies that—whatever states' obligations may be in the area of climate change—they run *erga omnes*.[15] Consequently, any state should have standing to

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of the U.N. General Assembly on Customary International Law, 73 ASIL PROC. 301, 302, 308–09 (1979), warns about false consensus, achieved despite significant reservations harbored by a minority of states. In such cases, adoption of the resolution is usually followed by statements expressing the reservations. Only two statements followed the adoption of GA Res. 43/53, one by the European Community and one by Malta. Both enthusiastically supported the resolution. UN Doc. A/43/PV.70, at 66–68 (1988).

[11] Stockholm Action Plan for the Human Environment, Recommendation 70, UN Doc. A/CONF.48/14 (1972), *reprinted in* 11 ILM 1421, 1449 (1972).

[12] *See* F. KIRGIS, PRIOR CONSULTATION IN INTERNATIONAL LAW 123–24 (1983).

[13] The linkages between climate change and other environmental conditions, including the possibility that action to correct one environmental threat could have repercussions in other environmental areas, appear in the Report on the Villach Conference of the World Climate Impact Studies Programme (1985), *summarized in* UNEP, 1985 Annual Report of the Executive Director, UN Doc. UNEP/GC.14/2, at 70–71 (1986). A preambular paragraph of GA Res. 43/53 refers to the conclusions of the Villach Conference.

[14] A second World Climate Conference will be convened in November 1990. A framework convention on climate change is being prepared, with the goal of completing it by the time of the 1992 UN Conference on Environment and Development. *See* UN Doc. UNEP/GC.14/26, at 51 (1987); Noordwijk Declaration, *supra* note 7, para. 29.

[15] The International Court has recognized the principle of obligations *erga omnes* in the context of basic human rights, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 ICJ REP. 15, 23 (Advisory Opinion of May 28); and Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain) (Second Phase), 1970 ICJ REP. 3, 32 (Judgment of Feb. 5); and in the context of a unilateral undertaking addressed to the international community, Nuclear Tests (Austl. v. Fr.; NZ v. Fr.), 1974 ICJ REP. 253, 269 and 457, 474 (Judgments of Dec. 20).

make representations to any other concerning the latter's climate-affecting policies or activities, without having to allege that it is uniquely affected.[16] Nor should standing be a problem when a state brings a proceeding in an international tribunal with jurisdiction to hear a challenge to climate-affecting conduct.[17] Whether a state could take other unilateral action to vindicate the common concern, such as reprisals, would depend on whether it has fulfilled whatever procedural and substantive conditions apply to the chosen remedy.[18]

The law of standing in the context of climate change thus would complement the law of standing as it is increasingly recognized in relation to the marine environment beyond the limits of national jurisdiction. The current *Restatement of Foreign Relations Law* asserts:

> Any significant pollution of the marine environment . . . is of concern to all states. Any state may complain to the offending state or to an appropriate international agency against violation of generally accepted

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When the Court in *Barcelona Traction* said that "on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality" (1970 ICJ REP. at 47), it was not denying the relevance of the *erga omnes* principle to standing; it was simply observing that universal human rights instruments have not explicitly conferred standing upon all states parties to protect the rights of persons of any nationality. *But see* ILO Constitution, Oct. 9, 1946, Art. 26(1), 62 Stat. 3485, TIAS No. 1868, 15 UNTS 35 (any member state may file a complaint if it is not satisfied that any other member is securing effective observance of a labor convention that both have ratified, without having to show harm to itself or its nationals).

Application of the *erga omnes* principle to *locus standi* in the context of indiscriminate environmental harm was suggested (as an "apparently radical concept") in Brownlie, *A Survey of International Customary Rules of Environmental Protection*, 13 NAT. RESOURCES J. 179, 183 (1973). But see the more guarded conclusions on standing by way of an *actio popularis*, as that term is generally understood, in B. SMITH, STATE RESPONSIBILITY AND THE MARINE ENVIRONMENT 98 (1988).

[16] Recognition that climate change is a common concern of mankind might be thought to imply standing not only for states, but for individuals as well. As in the case of human rights, it is individuals who will suffer the consequences if governments fail to meet their obligations. But the analogy to human rights does not take individuals very far down the road to standing. Individuals do not yet have international personality in the sense that states do. Foreign offices will require that complaints from non-nationals be presented by their own governments. There are currently no international tribunals or other international mechanisms designed to hear individuals' environmental complaints. Ordinary courts in domestic legal systems are not likely to treat a General Assembly resolution asserting a common concern as a sufficient basis, in itself, for an individual's standing to complain about threatened climate change if the complainant is no more vulnerable to the change than is the general population.

[17] In other contexts, standing has been a problem in international tribunals. It was an insurmountable problem in *Barcelona Traction, supra* note 15. That case did not involve any question of standing to represent common interests. The ICJ's second opinion in the South West Africa Cases (Ethiopia & Liberia v. S. Afr.), 1966 ICJ REP. 6 (Judgment of July 18), rejected the standing of two former League of Nations members to assert violations of a League Mandate. It should not preclude standing in a "common concern" proceeding, even though the Court observed cryptically that a right of *actio popularis* "is not known to international law as it stands at present." 1966 ICJ REP. at 47. The Court was not dealing with a matter explicitly defined by the international community at that time as a matter of common concern.

[18] For a full discussion, see Charney, *Third State Remedies in International Law*, 10 MICH. J. INT'L L. 57 (1989).

> international rules and standards for the protection of the marine environment by another state or its nationals or ships.[19]

Moreover, in the context of standing, the "common heritage" concept applicable to the deep seabed is indistinguishable from "common concern." The International Law Commission has provisionally adopted a commentary to one of its articles on state responsibility asserting that the "common heritage" concept as applied to the deep seabed expresses a collective interest that may be vindicated by any party to the UN Convention on the Law of the Sea (once it enters into force).[20] Although this passage in the Commission's commentary and the Commission's corresponding draft article refer only to the standing of states parties to a multilateral convention, the commentary adds that this does not exclude the development of customary rules to the same effect.[21]

Efficiency is likely to be served by recognizing universal state standing in the context of climate change, so long as the world lacks a functioning international body with the legal capacity, standing and political will to protect shared interests in climate stability. Efficiency would be served because the cost to broadly inclusive interests will have escalated, perhaps incalculably, by the time any one or a few states could show unique, nonminimal harm to themselves. Standing to complain without a showing of unique harm would enable not only a single government, but also several like-minded governments acting together, to challenge the climate-affecting activity before the consequences get out of hand. Timely challenge could thus be made, with the cost of mounting the challenge spread among more than one complainant.[22]

There is a risk for the unwary in all this. Those who have standing must be vigilant lest they lose their rights by inaction. If state *A* asserts, verbally or by conduct, a right to do something, it is an assertion against all that have a sufficient interest to complain legitimately. Thus, if "common concern"

[19] 2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. VI, Introductory Note, at 101 (1987).

[20] Report of the International Law Commission on the Work of its thirty-seventh session, [1985] 2 Y.B. INT'L L. COMM'N, pt. 2 at 1, 27, UN Doc. A/CN.4/SER.A/1985/Add.1.

[21] *Id.* Of course, standing in one context—the suspension of a multilateral treaty obligation in response to another party's material breach—would have to take account of Art. 60(2), Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331. If climate change is a common concern of mankind, a breach of an environmental convention that significantly affects climate might well be subject to the broad grant of standing in Article 60(2)(c).

[22] This would not necessarily mean that states not subject to the norm complained of could join in the challenge. Thus, in the case of treaty norms that do not reflect custom, standing might be limited to states parties to the treaty plus any intended third-party beneficiaries. The mere recognition of "common concern" probably would not render all states third-party beneficiaries of all treaty norms dealing with climate. Of course, treaty norms may codify, crystallize or generate custom. *Cf.* North Sea Continental Shelf (FRG/Den.; FRG/Neth.), 1969 ICJ REP. 4 (Judgment of Feb. 20). The Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, Art. 2(2)(b), 26 ILM 1529 (1987), requiring appropriate measures to control activities under contracting parties' jurisdiction that are likely to have adverse effects from modification of the ozone layer, may well be in one of the custom-related categories.

gives all states standing to complain about prospective climate change anywhere in the world, no state may be heard to say that its failure to object has legal significance only at the point when special effects of the change on its own territory become apparent. Of course, some states with standing to object may do so as surrogates for the others. The point is that if no states object, or if only a few do so without representing the others, all others might discover that they have acquiesced in the climate-affecting conduct. That would bar their complaints against violation of any norm that falls short of *jus cogens*.

Realization that rights could be lost might cause governments to formulate challenges when the risk of climate change is insufficient to justify them.[23] That may simply be a cost of increased awareness. In any event, the harm from overzealous complaints legitimized by broadened notions of standing is likely to be less than the harm from activities that cannot effectively be challenged unless particularized effects on individual states are apparent.

Despite the hazards just mentioned, the recognition of climate change as a common concern of mankind is to be welcomed.[24] In the long term, the most efficient mechanism will be an international body functioning on premises maximally scientific and minimally political, with its own standing to protect climate stability. Malta's initiative contemplates that eventuality, but it has also given states a potentially useful instrument in the interim.

FREDERIC L. KIRGIS, JR.*

[23] For discussion of problems inherent in a broad concept of standing, see Charney, *supra* note 18, at 86–90.

[24] Cf. Schachter, *International Law in Theory and Practice*, 178 RECUEIL DES COURS 9, 199–201 (1982 V), concluding that there are distinct advantages in applying the concept of obligations *erga omnes* to a limited category of principles, including those prohibiting massive pollution of the atmosphere or the sea. Charney, *supra* note 18, at 95, concludes that third-state remedies may be desirable when no directly injured state would have traditional standing—as in the case of damage to common spaces outside the jurisdiction of any state.

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