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# The Role of International Organizations in the Development of International Environmental Law: Adjusting the Lenses of Analysis

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# THE ROLE OF INTERNATIONAL ORGANIZATIONS IN THE DEVELOPMENT OF INTERNATIONAL ENVIRONMENTAL LAW: ADJUSTING THE LENSES OF ANALYSIS

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ABSTRACT

International organizations have gradually moved beyond constituting mere fora for negotiations between states and have assumed a more active role in law-making. In the environmental field, international organizations engage in a variety of functions. For example, the UN has convened the Global Conferences, leading to the adoption of foundational declarations of principles, and numerous other international organizations have prepared draft texts, promoted the conclusion of environmental agreements, adopted standards, guidelines and recommendations, and prepared influential studies. Additionally, novel institutional arrangements have been established by multilateral environmental agreements, which often include a Conference of the Parties empowered to develop the treaty obligations through innovative legislative processes which do not always require consent by all state parties.

While these various instruments have influenced the development of international environmental norms, the extent and the processes through which they have done so remain unaccounted for. This article argues that the traditional account of the sources of international law, reliant on the triad of formal sources in Article 38(1) of the Statute of the International Court of Justice, and the strict division between hard and soft law, which still dominates the mainstream discourse, is unable to fully grasp the nature of institutional law-making. This is particularly relevant in the environmental field, where scientific uncertainties and states' frequent unwillingness to commit to far-reaching (often high cost) solutions make the negotiation of traditional international treaties and the development of customary rules more challenging and have led to the development of novel and dynamic law-making processes, often led by international organizations. Additionally, it contends that the first step to develop an all-encompassing account of the role of international organizations in the development of environmental law is to abandon the *a priori* labelling

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of instruments into the categories of binding or nonbinding (or hard versus soft law), which only considers their immediate intended effects and predetermines the result of any analysis into their broader law-making characteristics. Instead, it proposes that it is necessary to ignore the strict binary law versus non-law when conducting research into the normative outputs of international organizations, allowing for the collection and analysis of the broadest variety of instruments and their individual characteristics.

The article concludes that only through such research can new ways of categorizing the "infinite variety" of instruments of international organizations be proposed and international lawyers can start developing the new analytical tools they need to advance the study of institutional law-making today.

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## 1. INTRODUCTION

International organizations have had a significant role in the development of international environmental law. They are present in every step of norm development—they set the agenda for international negotiations, prepare draft conventions, adopt guidelines and codes of conduct, directly alter the content of—or develop—treaty obligations, and adopt compliance regimes.[1] Furthermore, novel institutional

1. *See generally* Daniel Bodansky et al., *International Environmental Law: Mapping the Field*, THE OXFORD HANDBOOK OF INT'L ENV'T L. 1, 17–19 (Daniel Bodansky et al. eds., 2008); Gerhard Loibl, *The Role of International Organisations in International Law-Making International*

arrangements have been established by multilateral environmental agreements ("MEAs"), which often include a Conference of the Parties ("COP") empowered to develop the treaty obligations through innovative legislative processes that do not always require consent by all state parties.[2]

However, the theory of international law-making has largely failed to catch-up with developments in practice. International lawyers attempting to capture the normative output of international organizations in their entirety have long struggled with the shackles of Article 38(1) of the Statute of the International Court of Justice ("ICJ") and the triad of formal sources of international law. This difficulty has only grown because of the expanding role that international organizations play in fields such as environmental protection and the variety of instruments they adopt. As a result, a relevant part of the instruments of international organizations remains understudied regarding their characteristics and effects—and most of them have been relegated to the category of "soft law," a concept that is widely underexplained and, as such, remains limited in its usefulness.

This article deals with these challenges and proposes a framework to move the debate forward. Part 2 provides a brief overview of the different roles that international organizations have played in the development of international environmental law. Part 3 discusses the relation between the normative instruments of international organizations in this field and the formal sources of international law, concluding that this relation is insufficient to explain the impact of those instruments in law-making processes. Accordingly, I argue that the formalist account of the sources of international law and the strict division between hard and soft law, which still dominates the mainstream discourse, is unable to fully grasp the nature of institutional law-making as it stands today.

Finally, Part 4 sets some guidelines for future research in the field. It proposes that an all-encompassing analysis of the practice of different organizations operating in the environmental field should guide future developments in theory and we should set aside the *a priori* distinction between binding and nonbinding instruments. This is the first step in developing a new language and new analytical tools that will allow for a better discussion of the variety of normative outputs of international organizations.

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*Environmental Negotiations – an Empirical Study*, 1 NON-STATE ACTORS & IN'TL L. 41, 43 (2001); Julia Sommer, *Environmental Law-Making by International Organizations*, 56 HEIDELBERG J. INT'L L. 628 (1996).

2. *See* Bodansky et al., *supra* note 1, at 19.

## 2. INTERNATIONAL ORGANIZATIONS AS ACTORS IN THE DEVELOPMENT OF INTERNATIONAL ENVIRONMENTAL LAW

Nearly all international organizations today have included issues of environmental protection and sustainable development in their work programs, contributing to a complex and diverse scheme of global environmental governance.[3] The United Nations ("UN") has been occupied with environmental concerns since the 1960s, although notably, no reference to the environment can be found in the UN Charter.[4] It was the UN that convened the Global Conferences in Stockholm and Rio, as well as the Conference on the Law of the Sea, leading to the negotiation and adoption of the UN Framework Convention on Climate Change ("UNFCCC"),[5] the Convention on Biological Diversity ("Biodiversity Convention"),[6] and the UN Convention of the Law of the Sea ("UNCLOS").[7] The UN General Assembly established the UN Environmental Programme ("UNEP") in 1972 and the Commission on Sustainable Development ("CSD") in 1992.[8] These bodies, having mostly recommendatory powers, have played a significant role in environmental governance.[9] Several environmental conventions such as the Convention on Migratory Species,[10] the Vienna Convention on the Protection of the Ozone Layer,[11] the Basel Convention on Transboundary Movements of Hazardous Wastes ("Basel Convention"),[12] and the Biodiversity Convention were concluded under the auspices of the UNEP, following

3. Loibl, *supra* note 1.

4. *See generally* U.N. Charter. It is now largely uncontroversial that those powers can be implied from the UN broad mandate of furtherance of international cooperation in solving economic and social problems. *See* PATRICIA BIRNIE ET AL., INTERNATIONAL LAW AND THE ENVIRONMENT 58–59 (Oxford Univ. Press, 3d ed. 2009).

5. United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107.

6. Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79.

7. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

8. G.A. Res. 2997 (XXVII) (Dec. 15, 1972); G.A. Res. 47/191 (Dec. 22, 1992).

9. *See, e.g.*, G.A. Res. 47/191 (Jan. 29, 1993).

10. Convention on the Conservation of Migratory Species of Wild Animals, June 23, 1979, 1651 U.N.T.S. 333.

11. Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, 1513 U.N.T.S. 293.

12. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 57.

the priorities set out in its 1982 and 1993 Montevideo Programmes.[13] Furthermore, the UNEP developed several principles, guidelines, and standards on conservation and use of shared national resources, marine environment protection, hazardous waste management, environmental impact assessment, and others,[14] including the Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Waste[15] and the UNEP Goals and Principles on Environmental Impact Assessment.[16] The CSD, in turn, is primarily responsible for reviewing the implementation of Agenda 21, having a broad list of monitoring, review, and recommendatory tasks.[17] It meets annually and provides a diplomatic forum for continued negotiations concerning sustainable development.[18] It has mostly approved political recommendations.[19] Additionally, the International Law Commission ("ILC"), a subsidiary body of the UN General Assembly, has conducted relevant work on the codification of the law relating to international watercourses and the prevention of transboundary harm and, more recently, environmental protection during armed conflict and protection of the atmosphere.[20]

13. U.N. Env't Programme, Montevideo Programme for the Development and Periodic Review on Environmental Law, Decision 10/21 of the Governing Council of UNEP (May 31, 1982); U.N. Env't Programme, Programme for the Development and Periodic Review on Environmental Law for the 1990s (June 1993).

14. *See generally* BIRNIE ET AL., *supra* note 4, at 68; Loibl, *supra* note 1, at 60–63.

15. U.N. Env't Programme, *Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes*, UNEP/GC.14/17, Annex II (1987).

16. U.N. Env't Programme, *Environmental Impact Assessment*, UNEP/GC/DEC/14/25 (June 17, 1987).

17. G.A. Res. 47/191, *supra* note 9, ¶ 4(c).

18. *See id.* ¶ 9.

19. *See generally id.* ¶ 14(c).

20. *See, e.g.*, *Report of the International Law Commission on the Work of its Forty-Sixth Session, Draft Articles on the Law of the Non-Navigational Uses of International Watercourses and Commentaries Thereto and Resolution on Transboundary Confined Groundwater*, 49 U.N. GAOR Supp. No. 10, U.N. Doc. A/49/10 (1994), *reprinted in* [1997] 2 Y.B. Int'l Comm'n, U.N. Doc. A/CN.4/SER.A/1994/Add.1; Int'l Law Comm'n Rep. on the Work of Its Fifty-Third Session, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (2001); Int'l Law Comm'n, Rep. on the Work of its Seventieth Session, Protection of the Atmosphere, U.N. Doc. A/CN.4/L.909 (June 6, 2018); Int'l Law Comm'n, Rep. on the Work of its Seventy-First Session, Protection of the Environment in Relation to Armed Conflicts, U.N. Doc. A/CN.4/L.937 (June 6, 2019).

UN specialized agencies have also assumed responsibilities for environmental protection; most have developed their powers in this field through broad interpretations of their constitutive treaties and practice.[21] These include the International Maritime Organization ("IMO"), the Food and Agricultural Organization ("FAO"), the World Bank, the UN Educational, Scientific and Cultural Organization, the UN Industrial Development Organization ("UNIDO"), and the International Fund for Agriculture.

Other international organizations, which mainly operate in different fields, also engage with the environment—such as the World Trade Organization ("WTO") and the Organization for Economic Cooperation and Development ("OECD").[22] Finally, most regional organizations also act on environmental matters—in Europe, the UN Economic Commission for Europe ("UNECE"), the Council of Europe, the European Union, the Organization for Security and Cooperation in Europe ("OSCE"), and the North Atlantic Treaty Organization ("NATO") have all acted in the field.[23]

These organizations have been undertaking a range of law-making activities.[24] They have promoted the negotiation of environmental conventions—IMO developed conventions related to pollution from vessels, including the International Convention for the Prevention of Pollution from Ships ("MARPOL")[25] and the Convention for the Control and Management of Ship's Ballast Water and Sediments;[26] FAO developed the International Treaty on Plant Genetic Resources for Food and Agriculture[27] and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and

21. BIRNIE ET AL., *supra* note 4, at 59.

22. *See* Francesca Romanin Jacur, *The Making of International Environmental Law*, *in* RSCH. HANDBOOK ON THE THEORY AND PRAC. OF INT'L LAWMAKING 419, 419 (Catherine Brölmann & Yannick Radi eds., 2016).

23. *See* BIRNIE ET AL., *supra* note 4, at 72–73, for the role of UNECE in developing regional environmental law.

24. *See id.* at 71–84.

25. International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 1340 U.N.T.S. 184.

26. International Convention for the Control and Management of Ships' Ballast Water and Sediments, *Adoption of the Final Act and Any Instruments, Recommendations and Resolutions Resulting from the Work of the Conference* U.N. Doc BWM/CONF/36 (Feb. 16, 2004).

27. International Treaty on Plant Genetic Resources for Food and Agriculture, Nov. 3, 2001, 2400 U.N.T.S. 303.

Pesticides in International Trade ("PIC Convention"),[28] the latter together with UNEP. They have established new bodies and institutions—together FAO, the International Labour Organization ("ILO"), UNIDO, the World Health Organization ("WHO"), UNEP and OECD established the Inter-Organization Programme for the Sound Management of Chemicals through a memorandum of understanding.[29] They established implementation mechanisms—the World Bank cooperates in the implementation of MEA based regimes through a variety of funding schemes and acts as a trustee for the Global Environment Facility ("GEF"), an institution established jointly by the World Bank, UNEP, and the UN Development Program with the objective of facilitating the transfer of funds and technology from developed to developing states to help the latter meet the incremental costs of implementing environmental measures.[30] They provide expert advice and technical consultations for international negotiations—FAO provided expert and influential advice, for instance, in the negotiation of the Convention on Fishing and Conservation of the Living Resources of the High Seas,[31] the UNCLOS, and the 1995 Agreement on Straddling and Highly Migratory Fish Stocks;[32] the WTO and UNEP published a joint report addressing the linkages between trade and climate change, introducing new concepts at a critical time of negotiations over a post-Kyoto climate change treaty.[33]

28. Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Sept. 10, 1998, 2244 U.N.T.S. 337.

29. *Memorandum of Understanding Concerning Establishment of the Inter-Organization Programme for the Sound Management of Chemicals*, WORLD HEALTH ORGANIZATION [WHO] (1994), https://www.who.int/iomc/participants/iomc-mou.pdf [https://perma.cc/8VRS-YNMY].

30. Global Environment Facility [GEF], *Instrument for the Establishment of the Restructured Global Environment Facility*, (September 2019), https://www.thegef.org/documents/instrument-establishment-restructured-gef.

31. Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 559 U.N.T.S. 285.

32. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Aug. 4, 1995, 2167 U.N.T.S. 3; BIRNIE ET AL., *supra* note 4, at 74.

33. World Trade Org. & U.N. Env't Programme, Trade and Climate Change (2009); Jeffrey L. Dunoff, *Mapping a Hidden World of International Regulatory Cooperation*, 78 L. & CONTEMP. PROBS. 267, 284 (2015).

Finally, these international organizations play an important role in international standard setting.[34] The wide range of instruments they have adopted in this context include the Codex Alimentarius—a set of food standards, guidelines and codes of practice aimed at contributing to the safety, quality, and fairness of international food trade adopted by the WHO and FAO—[35] the annexes on ship safety and pollution adopted by the IMO[36] the CO2 emission standards for air transport adopted by the International Civil Aviation Organization[37] and the WHO standards on air quality.[38]

In addition to these, MEAs established a great number of institutional arrangements; most MEAs are designed as framework conventions, laying down only general obligations and establishing their own institutional structures with powers to develop and specify the obligations contained in the treaty.[39] They usually set up a permanent plenary organ, known as COP, and auxiliary organs (such as secretariats, financial mechanisms, and subsidiary technical organs, advising on scientific, legal, and economic aspects).[40] COPs are normally tasked with adopting concrete measures necessary for implementing the broad objectives set out in MEAs, often through the adoption of amendments and protocols (which are generally subsequently ratified by the parties), development and amendment of (binding) technical annexes, and elaboration and adoption of nonbinding guidelines and recommendations that are needed to make key provisions of the agreement operational.[41]

An example of this institutional dynamic is found in the COP to the UNFCCC, which is entrusted with regularly reviewing the implementation of the obligations under the convention and related instruments, making the decisions necessary to promote its effective implementation, adopting regular reports, and making recommendations.[42] Furthermore, it can adopt amendments to the convention by a three-fourths majority vote of the parties present and

34. Paolo Contini & Peter H. Sand, *Methods to Expedite Environment Protection: International Ecostandards*, 66 AM. J. INT'L L. 37, 40 (1972).

35. *Id.* at 44.

36. *Id.* at 43.

38. *Id.* at 42; BIRNIE ET AL., *supra* note 4, at 74–75.

38. Contini & Sand, *supra* note 34, at 42.

39. *See generally* Jutta Brunnée, *COPing with Consent: Law-Making Under Multilateral Environmental Agreements*, 15 LEIDEN J. INT'L L. (2002).

40. *See id.* at 4.

41. Romanin Jacur, *supra* note 22, at 422. *See* Brunnée, *supra* note 39, at 17–32.

42. United Nations Framework Convention on Climate Change, *supra* note 5, at art. 7(1).

voting if no consensus can be reached.[43] Importantly, the COP to the UNFCCC adopted the Kyoto Protocol in 1997, regulating greenhouse gases emissions and establishing a new institutional structure, the Meeting of the Parties ("MOP") to the Kyoto Protocol.[44] Similarly, the COP to the Biodiversity Convention is empowered to adopt protocols and amendments to the convention and its annexes, create subsidiary bodies deemed necessary to implement the convention, and establish appropriate forms of cooperation with bodies from other conventions.[45] Amendments to the Biodiversity Convention are adopted by unanimity or, failing that, by a two-thirds majority vote of the parties present and voting at the meeting, and shall be submitted to the parties for ratification, acceptance or approval.[46] In 2000, the COP adopted the Cartagena Protocol on Biosafety, which deals with the handling, transport and use of living modified organisms resulting from modern biotechnology.[47] In 2010 the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization was adopted.[48]

In some other cases, however, MEAs and their protocols established innovative approaches to amendment procedures, in which changes can enter into force without consent from all state parties, making them more expedited.[49] An example can be found with the powers conferred to the MOP of the Montreal Protocol of Substances that Deplete the Ozone Layer, which can adopt amendments to the annexes to the protocol, adding or removing substances, and decide on the mechanisms, scope and timing of control measures.[50] These decisions of the MOP are taken by consensus or, if that fails, by a two-thirds majority vote of the parties present and voting and they are binding on

43. *Id.* at art. 15(3).

44. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 162 [hereinafter Kyoto Protocol].

45. Convention on Biological Diversity, *supra* note 6, at art. 23.

46. *Id.* at art. 29(3).

47. Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 29, 2000, 2226 U.N.T.S. 208.

48. Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity, Oct. 29, 2010, U.N.T.C. Registration No. 30619.

49. *See* PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 138–39 (Cambridge Univ. Press, 2d ed. 2003).

50. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 3 at art. 2(10).

all parties,[51] unless they notify an objection to the depository within six months of approval.[52] A similar procedure is provided for the amendment of the annexes of a "scientific, technical, procedural or administrative character" to the UNFCCC and the Kyoto Protocol.[53] The MOP to the Montreal Protocol can, however, also adopt adjustments to the ozone depleting potentials of the substances already listed in the annexes and to their phase-out schedules with a qualified majority involving both developed and developing states. These enter into force for all state parties, without any possibility to opt out.[54] This type of expedited amendment procedure is justified by the need to quickly update environmental treaties to incorporate technical and scientific developments, as well as changes of economic and political nature.[55] Furthermore, this normative setting provides for a dynamic and iterative process for the development of international environmental legislation, where scientific and technical expertise play a significant role.[56] In fact, MEAs often create scientific or technical bodies (usually subsidiary bodies to the COPs) and rely upon the work of independent advisory bodies as well as integrate scientific information into law-making and compliance processes.[57]

These developments in normative processes inside international organizations are increasingly at odds with a traditional account of international law-making, still dependent on state consent and where the international organizations have little autonomy from their members.[58] Additionally, as international organizations are drafting the texts of environmental treaties, adopting standards and guidelines that effectively regulate areas of practice, and developing treaty obligations, in some cases dispensing with the need for state consent, it becomes increasingly challenging to explain the making of international environmental law through the lenses of formalism and the exclusivity

51. Vienna Convention for the Protection of the Ozone Layer, *supra* note 11, at arts. 9(4) and 10(2).

52. Montreal Protocol on Substances that Deplete the Ozone Layer, *supra* note 50, at art. 10(2).

53. Kyoto Protocol, *supra* note 44, at art. 21; United Nations Framework Convention on Climate Change, *supra* note 5, at art. 16(1-4).

54. Montreal Protocol on Substances that Deplete the Ozone Layer, *supra* note 50, at art. 2(9)(d).

55. Romanin Jacur, *supra* note 22, at 424; SANDS, *supra* note 49, at 138.

56. *See generally* Bodansky et al., *supra* note 1, at 18–20.

57. Jutta Brunnée, Max Planck Encyclopedia of Public International Law: Environment, Multilateral Agreements ¶¶ 38–40 (Oxford University Press Jan. 2011).

58. *See* Bodansky et al., *supra* note 1, at 21–22.

of the formal sources of international law. The next section deals with these challenges.

### 3. THE INSUFFICIENCY OF THE FORMAL SOURCES OF INTERNATIONAL LAW

The capacity to develop international norms is often mentioned as one of constitutive elements of international organizations and one the reasons states decide to cooperate through these institutions.[59] However, the exact terms and scope of their contribution to international law-making are far from clear.

Traditionally, all norms of international law derive from one of the formal sources listed in Article 38(1) of the Statute of the ICJ: treaties, custom and general principles of law.[60] Notably, instruments of international organizations are absent from this list, which has posed a challenge to the many authors trying to capture their normative relevance.[61] In most cases international organizations are only empowered to make recommendations to their member states (in the form of resolutions, declarations, or guidelines); while the power to adopt binding acts is only exceptionally granted.[62] Having noted this, international lawyers found refuge in the category of "soft law" to describe the majority of their normative instruments.[63]

Despite there being no consensus on the concept, a relatively uncontroversial definition of soft law is a set of non-binding instruments containing principles, norms, standards, or other statements of expected

59. NIELS M. BLOKKER & HENRY G. SCHERMERS, INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY § 1216 (Nijhoff 5th rev. ed. 2011); PHILIPPE SANDS ET AL., BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS 267 (Sweet & Maxwell 6th ed. 2009); Kenneth W. Abbott & Duncan Snidal, *Why States Act through Formal International Organizations*, 42 J. OF CONFLICT RESOL. 3, 15 (1998).

60. *See generally* NIGEL WHITE, THE LAW OF INTERNATIONAL ORGANISATIONS 159 (Manchester Univ. Press 2005).

61. *Cf.* a short overview of these attempts in Jan Klabbers, *The Normative Gap in International Organizations Law: The Case of the World Health Organization*, 16 INT. ORGAN. LAW. REV. 272, 273 (2019).

62. *Cf.* Ian Johnstone, *Law-Making by International Organizations*, *in* INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 266, 272 (Jeffrey L. Dunoff & Mark A. Pollack eds., Cambridge Univ. Press 2012); *see* Ellen Hey, *International Institutions*, *in* THE OXFORD HANDBOOK OF INT'L ENV'T L. 750, 755 (Daniel Bodansky et al. eds., 2007).

63. *See* Catherine Redgwell, *Sources of International Environmental Law: Formality and Informality in the Dynamic Evolution of International Environmental Law Norms*, *in* THE OXFORD HANDBOOK ON THE SOURCES OF INTERNATIONAL LAW 955 (Samantha Besson & Jean d'Aspremont eds., 2017).

behavior.[64] Several authors agree that, although these commitments cannot be forcibly enforced, they still give rise to some level of compliance expectation.[65]

With respect to international environmental law, it is suggested that it is a "particularly fertile area for soft law norms," where they permit reaching agreements on international action in areas where scientific uncertainties make it difficult for states to agree on binding long-term agreements.[66] To justify the legal relevance of these instruments, albeit their non-binding character, several authors argue that they can give rise to legal obligations in certain situations—*i.e.*, become hard law—through a relation with one of the formal sources of international law.[67] For example: (i) the drafts of the UNFCCC and the Biodiversity Convention, prepared under UN auspices, acquired legal force when they were signed as treaties by states; (ii) the adoption of the Stockholm Declaration contributed to the codification of the duty to prevent transboundary harm as a rule of customary international law; and (iii) the inclusion of the common but differentiated responsibilities and the polluter-pays principles in the Rio Declaration

64. Dinah Shelton, *International Law and "Relative Normativity," in* INTERNATIONAL LAW 137, 159 (Malcolm D. Evans ed., Oxford Univ. Press 4th ed. 2014); *see* WHITE, *supra* note 60. Some authors use the term soft law to refer to rules that are included in binding legal instruments but are imprecise in their terms, rendering them non-justiciable and not-enforceable – see, most notably, Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. INT'L L. 413, 414 (1983). This is not the use of the term that is considered in this article.

65. Thirlway provides a working definition of soft law, according to which it is "a system of international commitments or obligations that are not regarded by those concerned as binding in the sense that can be enforced in the same way, as those imposed by international law proper but yet are considered as something more than mere political gestures, so that there is an expectation of compliance even if there is no legal duty." HUGH THIRLWAY, THE SOURCES OF INTERNATIONAL LAW 188–89 (Oxford Univ. Press 2nd ed. 2019). *See also* Alan Boyle, *Soft Law in International Law-Making*, *in* INTERNATIONAL LAW 118, 120–21 (Malcolm D. Evans ed., Oxford Univ. Press 5th ed. 2018); Shelton, *supra* note 64, at 160; BIRNIE ET AL., *supra* note 4, at 34.

66. Redgwell, *supra* note 63, at 956; *see also Jutta Brunnée, Sources of International Environmental Law: Interactional Law*, *in* THE OXFORD HANDBOOK OF THE SOURCES OF INTERNATIONAL LAW 960, 978–79 (Samantha Besson & Jean d'Aspremont eds., Oxford University Press 2017); BIRNIE ET AL., *supra* note 4, at 34–36.

67. *See, e.g.*, THIRLWAY, *supra* note 65, at 192–94; Boyle, *supra* note 65, at 120–21; Redgwell, *supra* note 63, at 955–56; Shelton, *supra* note 64, at 161; ALAN BOYLE & CHRISTINE CHINKIN, THE MAKING OF INTERNATIONAL LAW 214–29 (2017).

contributed to their emergence as general principles of law.[68] However, this is only part of the story of how these instruments impact the development of international environmental law.

### *3.1. Treaties and treaty instruments*

Treaties are the most common instrument through which generally applicable rules of environmental law have been developed.[69] The International Convention for the Regulation of Whaling,[70] the Convention on International Trade in Endangered Species of Wild Fauna and Flora,[71] the UNCLOS,[72] the Basel Convention,[73] the UNFCCC,[74] and the Biodiversity Convention[75] are some examples of the numerous MEAs concluded during the past few decades.

While the conclusion of treaties remains, largely, the domain of states, under certain circumstances international organizations can intervene in the process. In some cases, the constitutive instrument of an organization explicitly provides for the power to prepare and adopt drafts of conventions to be later signed by member states. This is the case of the IMO, which, under the powers conferred by Article 2 of the IMO Convention,[76] has adopted several conventions related to the prevention of marine pollution, among them MARPOL.[77]

In other cases, the preparation of draft conventions and the convening of international conferences has become the practice of an organization. The most evident example of this is the practice of the

68. *See* Boyle, *supra* note 65, at 120–21; Redgwell, *supra* note 63, at 955–56; Shelton, *supra* note 64, at 159–160.

69. *See* Redgwell, *supra* note 63, at 944; Brunnée, *supra* note 66, at 968; SANDS, *supra* note 49, at 126.

70. International Convention for the Regulation of Whaling, Dec. 2, 1946, 161 U.N.T.S 72.

71. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 993 U.N.T.S. 243.

72. United Nations Convention on the Law of the Sea, *supra* note 7.

73. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, *supra* note 12.

74. United Nations Framework Convention on Climate Change, *supra* note 5.

75. Convention on Biological Diversity, *supra* note 6.

76. Convention on the International Maritime Organization, Mar. 17, 1958, 289 U.N.T.S. 1, art. 3. Later renumbered according with the amendment of 1977. Amendments to the title and substantive provisions of the Convention on the International Maritime Organization, Nov. 9, 1977, 1285 U.N.T.S. 318.

77. International Convention for the Prevention of Pollution from Ships, *supra* note 25.

UN itself, which has convened the Global Conferences on the Environment and was involved in the preparation of draft texts for the UNFCCC, the Biodiversity Convention on, and the PIC Convention (together with FAO), to name just a few.[78] Finally, it has been common for environmental treaties to incorporate the content of previous guidelines or standards drafted by international organizations—for instance, the UNEP Goals and Principles on Environmental Impact Assessment were substantially incorporated in the Convention on Environmental Impact Assessment in a Transboundary Context[79] and the Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Waste provided the basis for negotiations of the Basel Convention.[80]

These practices do not raise any problems under a formalistic account of sources of international law—it has long been recognized that drafts prepared by international organizations can be incorporated into international negotiations and lead to the conclusion of a treaty, thus conferring binding force to the text.[81] However, the specific scientific and political constraints that characterize the environmental field have led to the development of new, more flexible processes for treaty-making and treaty-adaptation, which are led by international organizations and challenge the traditional account of sources as discussed in the following paragraphs.

Some of these constraints arise from heavily relying on scientific assessments to identify both environmental problems and effective solutions. These assessments are often unclear about the causes of the problems and the best approaches change over time as science and the environment quickly evolve.[82] In addition, while environmental challenges are diverse among themselves, often involving different policy areas and divergent interests, they are closely interconnected,

78. United Nations Framework Convention on Climate Change, *supra* note 5; Convention on Biological Diversity, *supra* note 6; Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, *supra* note 28.

79. Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, 34028 U.N.T.S. 1.

80. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, *supra* note 12.

81. *See generally* Boyle, *supra* note 65, at 126–27; BLOKKER & SCHERMERS, *supra* note 59, § 1266; BOYLE & CHINKIN, *supra* note 67, at 216.

82. Brunnée, *supra* note 57, ¶ 1; Bodansky et al., *supra* note 1, at 7–8; Robin R. Churchill & Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law*, 94 AM. J. INT'L L. 623, 628 (2000).

requiring holistic approaches that are not easy to achieve.[83] Finally, human activity that has harmful impacts on the environment is mostly caused by industrial and technological developments, requiring costly adjustments in production and consumption models and accentuating inequalities between developed and developing states.[84] These aspects make it difficult for states to achieve broad consensus in international negotiations and make the field difficult to address through a comprehensive set of rules and commitments set out in one (or even a few) instruments. Instead, the UNEP register of environmental agreements counts 272 agreements adopted between 1920 and 2005.[85]

This difficulty is the reason why the field has been regulated, mostly, through MEAs—each often addressing only one environmental issue and designed as framework conventions.[86] The outcome of this practice are regimes in which treaties are merely "the tip of the normative iceberg" and the majority of norms that detail the obligations assumed by states are developed in subsequent protocols or through binding and non-binding decisions of the COP.[87] As noted, amendments to treaty or protocol norms are often adopted by consensus or, as a last resort, by a qualified majority vote of the parties at a COP or the MOP.[88] Moreover, at least in the case of certain amendments to the annexes of the Montreal Protocol, there is no provided possibility for objecting states to opt out.[89] These procedures clearly deviate from the rules on treaty amendment provided for in the

83. Katja Biedenkopf, *Relations Between International Organisations in Combating Climate Change*, *in* PALGRAVE HANDBOOK OF INTER-ORGANIZATIONAL RELATIONS IN WORLD POLITICS 649, 650 (Joachim A. Koops & Rafael Biermann eds., Palgrave Macmillan U.K. 2017); Bodansky et al., *supra* note 1, at 8.

84. Brunnée, *supra* note 57, ¶ 1; BIRNIE ET AL., *supra* note 4, at 34, 40.

85. *See* United Nations Environment Programme [UNEP], *Register of International Treaties and Other Agreements in the Field of the Environment*, UNEP/Env.Law/2005/3 (Dec. 30, 2005).

86. Romanin Jacur, *supra* note 22, at 420; Loibl, *supra* note 1, at 42–43.

87. Bodansky et al., *supra* note 1, at 21; *see also* BIRNIE ET AL., *supra* note 4, at 17.

88. *E.g.*, Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Dec. 29, 1972, 1046 U.N.T.S. 138, at art. XV; Vienna Convention for the Protection of the Ozone Layer, *supra* note 11, at arts. 8–9; Montreal Protocol on Substances that Deplete the Ozone Layer, *supra* note 50, at arts. 9–10; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, *supra* note 12, at art. 17; Convention on Biological Diversity, *supra* note 6, at arts. 29–30; United Nations Framework Convention on Climate Change, *supra* note 5, at arts. 15–16. *Cf.* Hey, *supra* note 62, at 756–57.

89. *See* Montreal Protocol on Substances that Deplete the Ozone Layer, *supra* note 50, at art. 2 ¶ 9(d).

Vienna Convention on the Law of Treaties, according to which all states must agree to an amendment to be bound by it.[90] In fact, a marked feature of the environmental treaty system is that decisions on new standards, or adaptation of existing ones, can be taken within the institutional frameworks created by MEAs through simplified legislative procedures, instead of requiring states to go back to lengthy treaty negotiations.[91]

Furthermore, these features of the decision-making procedures of the institutional structures of MEAs highlight the limited explanatory force of the "treaty analogy," which attempts to explain the bindingness of decisions of international organizations through the combined will of all their members who participate in the discussions and consent to be bound. More generally, they challenge the strict requirement of state consent that characterizes the first formal source of international law and set aside the idea that COPs and MOPs are mere treaty bodies instead of autonomous institutional structures.[92]

### *3.2. Custom*

The identification of a rule of customary international law requires, as established in Article 38(1)(b) of the ICJ Statute, evidence of two elements: general practice and *opinio iuris*.[93] To qualify as general practice, a practice must be consistent (albeit not uniform),[94] extensive (albeit not universal),[95] and include those states whose interests are

90. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 38.

91. *See, e.g.*, Montreal Protocol on Substances that Deplete the Ozone Layer, *supra* note 50, at art. 11 ¶ 4(h)–(j).

92. Churchill and Ulfstein have produced one of the most in-depth analysis of these "autonomous institutional arrangements", which, they argue, possess the three basic elements of the definitions of an international organizations ((i) being founded on an international agreement, (ii) having at least one organ with a will of its own, and (iii) being established under international law). Accordingly, they conclude that the institutional arrangements of MEAs should be considered as an international organization, albeit of a less formal, more ad hoc nature than traditional ones. Churchill & Ulfstein, *supra* note 82, at 632–3.

93. Statute of the I.C.J., Oct. 24, 1945, 33 U.N.T.S. 993, art. 38(1)(b) [hereinafter Statute of the I.C.J.]; Int'l L. Comm'n, Draft Conclusions on Identification of Customary International Law, U.N. Doc. A/73/10, at 124 (2018).

94. *See* Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, Judgment, 1986 I.C.J. Rep. 14, ¶ 186 (June 27); North Sea Continental Shelf Cases (Ger. v. Den.; Ger. v. Neth.), Merits, Judgment, 1969 I.C.J. Rep. 3, ¶ 74 (Feb. 20).

95. *See* Nicar. v. U.S., 1986 I.C.J. ¶186.

specially affected.[96] The elapsing of any particular period is not essential.[97] To give rise to a customary rule, the general practice must be undertaken with a sense of legal obligation, *i.e.*, it must be accompanied by *opinio iuris*.[98]

Whereas it is the practice of states that is considered most determinant in finding the emergence of a new rule of custom (and, for that reason, the first element of custom is often referred to as "state practice," even if that is not the wording in the ICJ Statute),[99] it has gradually been recognized that the practice of international organizations can also be relevant, and it is usually taken into account.[100]

In its recent work on identification of customary international law, the ILC explicitly stated that "[i]n certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law."[101] The ILC specified what the cases are in which the practice of the organizations themselves, as separate from the practice of their member states, counts towards the requirement of general practice.[102] According to this expert body, practice can only be relevant in relation to "those rules (a) whose subject matter falls within the mandate of the organizations, and/or (b) that are addressed specifically to them (such as those on their international responsibility or relating to treaties to which international organizations may be parties)."[103]

Additionally, practices of organizations that have a larger number of member states, that are directly carried out on behalf of those members or endorsed by them, and are not *ultra vires* will have greater weight in relation to the formation, or expression, of rules of customary international law.[104] According to these criteria, it is plausible that the practice of those institutional structures established by MEAs will be particularly relevant in the development of international environmental law, particularly since some of them have a broad membership and are

96. Ger. v. Den.; Ger. v. Neth, 1969 I.C.J. ¶ 73.

97. *See id.*

98. Int'l L. Comm'n, Draft Conclusions on Identification of Customary Int'l Law, with Commentaries, U.N. Doc. A/73/10, at 138 (2018) [hereinafter ILC Draft Conclusions].

99. Michael Wood & Sender Omri, *State Practice*, ¶¶ 1–2 (2017).

100. *E.g.*, ILC Draft Conclusions, *supra* note 98, at 130; Maurice H. Mendelson, *The Formation of Customary International Law*, *in* 272 ACADÉMIE DE DROIT INTERNATIONAL RECUEIL DES COURS 155, 201–3 (1999).

101. ILC Draft Conclusions, *supra* note 98, at 130.

102. *Id.*

103. *Id.* at 131.

104. *Id.*

granted broad powers to interpret, apply, and even modify the agreement.

As for *opinio iuris*, while the ILC draft conclusions seem to only refer to states in their enumeration of the forms of evidence of this element, the commentary makes it clear that the list applies *mutatis mutandis* to the practice of international organizations that can evidence acceptance as law.[105]

Under these terms, resolutions, decisions, and other instruments of international organizations can have an impact on the development of customary international law. They can, similarly to the practice of states, codify existing rules, start the process for the formation of a new rule, or arrest the development of a rule.[106] Additionally, the attitudes of member states towards them can reveal state practice and *opinio iuris* of states themselves.[107] Accordingly, when in the Advisory Opinion on the Legality of the Threat and Use of Nuclear Weapons the ICJ recognized that the general obligation of states to ensure the activities within their jurisdiction and control do not cause transboundary environmental harm was part of customary international law, it referred to principles in the Stockholm and Rio Declarations as expressing "the common conviction of the States concerned that they have a duty."[108]

However, customary international law remains a limited source of norms in the environment field.[109] Bodansky, Brunnée and Hey argue that customary international law is just not well suited to produce the kind of detailed regulation that environmental problems require, due to the decentralized and uncoordinated processes through which it develops, and, therefore, it can only produce some broad principles.[110] In fact, a general practice with the level of detail and precision required

105. *Id.* at 141.

106. *See generally id.*

107. BLOKKER & SCHERMERS, *supra* note 39, §§ 1249–1252; SANDS ET AL., *supra* note 59, at 295–97; JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 591–95 (2005); BOYLE & CHINKIN, *supra* note 67, at 212.

108. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶¶ 27–29 (July 8).

109. In addition to the duty to prevent transboundary harm, it is argued that the equitable and reasonable use of natural resources and certain procedural obligations, such as consultation, provision of information, and the obligation to carry out an environmental impact assessment for activities likely to cause transboundary harm, have reached the status of customary environmental law. *See, e.g.*, Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 14, ¶¶ 177, 204 (Apr. 20); ELLEN HEY, ADVANCED INTRODUCTION TO INTERNATIONAL ENVIRONMENTAL LAW 59–62, 79–83 (2016); Redgwell, *supra* note 63, at 952–53; SANDS, *supra* note 49, at 148.

110. Bodansky et al., *supra* note 1, at 23.

is not easy to find and demonstrating the existence of *opinio iuris* is no small challenge, as it is difficult to access the motives underlying the actions of states and other relevant actors.[111] These difficulties add up to the long-discussed identity crisis of customary international law, related to the emergence of modern approaches that de-emphasize the importance of general practice as a requirement of custom.[112] As a result, this source is unlikely to be a main driver in the development of international environmental law.

### *3.3. General principles of law*

General principles of law are the final source of international law recognized under Article 38 of the ICJ Statute.[113] A current account of this source considers it to encompass two types of general principles: general principles of municipal law, which are common to a majority of states and which can be transposed to the international legal system, and principles of international law, that develop directly in the international legal system.[114] While the process for the identification of general principles is not overtly clear, the key requirement seems to be the verification that they enjoy general acceptance by states (also referred to as endorsement or recognition).[115] General acceptance can be derived either from the inclusion of a principle in municipal legal

111. *See* SANDS, *supra* note 49, at 144–46 (noting that few instances of empirical research have been conducted into state practice relating to international environmental obligations); *see also* DANIEL BODANSKY, THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW 198 (2010) (noting the difficulties of obtaining systematic information about incidents on the ground even for delegates of the state).

112. Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT'L L. 82, 88 (1988–1989); *see also* Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 118 (2005); Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. OF INT'L L. 757, 757–58 (2001). This approach finds support in the Nicaragua case, where the ICJ delimited the content of the customary rule on the prohibition of the use of force essentially from the wording of UN General Assembly resolutions rather than the practice of states. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, Judgment, 1986 I.C.J. Reports 14, ¶ 187 (1986).

113. Statute of the I.C.J., *supra* note 93, at art. 38(3).

114. Marcelo Vásquez-Bermúdez (Special Rapporteur), *First Rep. on General Principles of Law*, U.N. Doc. A/CN.4/732, ¶¶ 189–253 (2019); THIRLWAY, *supra* note 65, at 108–9. *But see* Alain Pellet & Daniel Müller, *Article 38*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 819, 255 (Andreas Zimmermann et al. 3rd ed. 2019) for an example where 38(1)(c) is not interpreted to include the second type of principles.

115. Simma & Alston, *supra* note 112, at 102.

orders or from its deduction from rules of international law, which states have already accepted, and declarations of states directly recognizing the principle.[116]

It is the second type of general principles that we are referring to in the debate on whether certain "principles of international environmental law" found in treaty provisions, the declarations of the UN Conferences, and other non-binding instruments and widely discussed in legal literature can be considered as general principles of law.[117] The precautionary principle, the polluter-pays principle, the principle of common but differentiated responsibilities, and the principle of sustainable development are some of the most frequently referenced candidates for recognition under this source of international law.[118]

The ILC Special Rapporteur on this topic identifies two processes for the identification of general principles formed within the international legal system—either they are "widely incorporated into treaties and other international instruments, such as General Assembly resolutions," or they "underlie general rules of conventional or customary international law."[119] According to the Special Rapporteur, these are two alternative forms of demonstrating recognition, which must be wide, representative, and reflect a common understanding of the community of nations to determine the identification of the general principle.[120] In practice, the identification of a principle of international environmental law will most likely require a combination of both processes in order to gather enough evidence that it enjoys the necessary general acceptance or recognition.

116. Marcelo Vásquez-Bermúdez (Special Rapporteur), *Second Report on General Principles of Law*, U.N. Doc. A/CN.4/741, ¶ 11 (2020) [hereinafter ILC Second Report]; Beatrice I. Bonafé & Paolo Palchetti, *Relying on General Principles in International Law*, *in* RESEARCH HANDBOOK ON THE THEORY AND PRACTICE OF INTERNATIONAL LAW MAKING 160, 163–64 (Catherine Brölmann & Yannick Radi eds., 2016). *See also* Frontier Dispute (Burk. Faso v. Mali), Judgment, 1986 I.C.J. Rep. 554, ¶ 24 (Dec. 22, 1986).

117. *See generally* SANDS, *supra* note 49 (describing such principles in detail).

118. U.N. Conference on Environment and Development, Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I, ¶¶ 3, 4, 7, 15, 16 (Aug. 12, 1992) [hereinafter Rio Declaration]; HEY, *supra* note 109, at 65–74; Pierre-Marie Dupuy, *Overview of the Existing Customary Legal Regime Regarding International Pollution, in* INTERNATIONAL LAW AND POLLUTION 451 (1991); SANDS, supra note 49, at 48.

119. ILC Second Report, *supra* note 116, ¶¶ 122, 138; s*ee also* Bonafé and Palchetti, *supra* note 117, at 162 (discussing the process of deduction through which general principles can be inferred from existing international conventional and customary rules).

120. ILC Second Report, *supra* note 116, ¶ 121.

In this context, the various instruments of international organizations, even non-binding instruments such as resolutions and declarations, are relevant insofar as they recognize certain general principles and demonstrate their acceptance by the community of states, particularly when these are adopted by a large majority and concern the interpretation or development of international law.[121] Accordingly, the argument in favor of the recognition of the principle of common but differentiated responsibilities as a general principle of law relies on the express reference in Article 3 of the UNFCCC[122] and in Principle 7 of the Rio Declaration,[123] as well as the provisions of the Kyoto Protocol and the Paris Agreement, that establish differentiated responsibilities for industrialized and non-industrialized states.[124] Similarly, in favor of the recognition of the polluter pays-principle, it is argued that it was embodied in the texts or preamble of several treaties, Principle 16 of the Rio Declaration, and several recommendations by the OECD.[125]

121. BLOKKER & SCHERMERS, *supra* note 59, § 1253; BOYLE & CHINKIN, *supra* note 67, at 222–25.

122. United Nations Framework Convention on Climate Change, *supra* note 5, at art. 3(1).

123. Rio Declaration, *supra* note 118, ¶ 7.

124. Kyoto Protocol, *supra* note 44, at arts. 2–3; Paris Agreement to the United Nations Framework Convention on Climate Change art. 2, 4, Dec. 12, 2015 T.I.A.S. No. 16-1104.

125. *See e.g.*, Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, art. 3(2), Nov. 7, 1996; Convention on the Protection and Use of Transboundary Watercourses and International Lakes, art. 2(5)(b), Mar. 17, 1992, 1936 U.N.T.S. 269 (1992); Convention for the Protection of the Marine Environment of the North-East Atlantic, art. 2(2)(b), Mar. 25, 1992, 2354 U.N.T.S. 67; International Convention on Oil Pollution Preparedness, Response and Cooperation, pmbl., May 13,1990, 1891 U.N.T.S. 77; ASEAN Agreement on the Conservation of Nature and Natural Resources, art. 10(d), July 9, 1985; Convention for the Protection of the Mediterranean Sea against Pollution, art. 12, Feb. 12, 1978, 1102 U.N.T.S. 27. *See also* Organisation for Economic Co-operation and Development [OECD], *Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies*, ¶¶ 2–5, OECD/LEGAL/0102 (May 26, 1972); Organisation for Economic Co-operation and Development [OECD], *Recommendation of the Council on the Implementation of the Polluter-Pays Principle*, OECD/LEGAL/0132 (Nov. 14, 1974); Organisation for Economic Co-operation and Development [OECD], *Recommendation of the Council on the Application of the Polluter-Pays Principle to Accidental Pollution*, OECD/LEGAL/0251 (July 7, 1989); Organisation for Economic Co-operation and Development [OECD], *Recommendation of the Council on the Uses of Economic Instruments in Environmental Policy*, OECD/LEGAL/0258 (Jan. 30, 1991); ILC Second Report, *supra* note 116, ¶¶ 135–137.

The legal force of the principles of international environmental law, however, remains unclear. Many commentators discuss instead their emergence as customary international law[126] or focus on their role in providing frameworks for the legal and diplomatic efforts of states, rather than their status as a source of law.[127]

### *3.4. Narrative loopholes and the limitations of the hard law vs. soft law dichotomy*

The previous sections have illustrated how soft law instruments adopted by international organizations have been incorporated into treaty texts or contributed to the emergence of rules of customary international law and general principles of law. However, this narrative, which relies on the strict dichotomy between hard and soft law, only tells us a small part of the story of institutional law-making and cannot fully explain the impact these instruments have in the development of international environmental law.

Firstly, this narrative cannot explain the persuasive force of certain nonbinding instruments of international organizations with which states frequently comply even in the absence of any relation to a formal source.[128] This is notably the case of numerous standards adopted by international organizations that establish thresholds of environmental protection (including codes of conduct, guidelines, suggested practices). As an example, the FAO International Code of Conduct on the Distribution and Use of Pesticides[129] and UNEP London Guidelines for the Exchange of Information on Chemicals in International Trade,[130] which established soft law obligations for states not to export banned

126. BIRNIE ET AL., *supra* note 4, at 107–10; SANDS, *supra* note 49, at 148; Dupuy, *supra* note 118, at 63–65.

127. Dupuy, *supra* note 118, at 461–62 (referring specifically to sustainable development and to the precautionary principle). Dupuy sustains that the distinction between custom and general principles is not particularly relevant when looking at the processes for the development of environmental law, as "both kinds of norms proceed from the same progressive sedimentation of general statements, together with more or less coherent state practice and sometimes assisted by judicial consolidation," *id.*

128. Nigel D. White, *Lawmaking, in* THE OXFORD HANDBOOK OF INTERNATIONAL ORGANIZATIONS 566 (Jacob Katz Cogan et al. Nov. 2017); Matthias Goldmann, *We Need to Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law*, LEIDEN J. OF INT'L L. 335, 335–36 (2012).

129. Food and Agriculture Organization of the United Nations Res. 10/85, International Code of Conduct on the Distribution and Use of Pesticides (Nov. 28, 1985).

130. The Governing Council of the United Nations Environment Programme Decision 15/30, London Guidelines for the Exchange of Information on Chemicals in International Trade (May 25, 1989).

chemicals or pesticides without agreement from the importing states, were widely accepted and implemented by states already before they came to be incorporated in the PIC Convention.[131] Similarly, the standards of the Codex Alimentarius, dealing with, among others, maximum limits on pesticides, were widely applied by states and food producers well before a reference to them was incorporated in the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.[132]

In fact, although standard-setting constitutes a significant part of the law-making activities of international organizations today, and although it has proved to be a persuasive means of guiding state conduct in several domains, it is a practice that is difficult to encompass within the traditional account of institutional law-making.[133] It is telling that organizations themselves are at odds with how to deal with these instruments. The UN General Assembly, for instance, has taken various approaches towards UNEP adopted standards. For example, while it merely took note of the UNEP Principles on Shared National Resources as "guidelines and recommendations" to be used in formulating conventions,[134] it promulgated the World Charter for Nature by stating that its principles "shall be reflected in the law and practice of each State, as well as at the international level."[135] The UNEP Governing Council, in turn, asked states and international organizations to "take . . . into account" the Montreal Guidelines on Land based Pollution.[136] It is not clear whether these different forms of endorsement had any impact on the reception of these instruments by states.

Secondly, a narrative that relies on the strict requirements of the formal sources of international law equally struggles to explain the legal character of decisions of COPs and MOPs, which are not treaty law but, nevertheless, bind member states.[137] The difficulties arise particularly in relation to those decisions that modify certain aspects of

131. ALVAREZ, *supra* note 107, at 232. *See generally* Mohamed Ali Mekouar, *Pesticides and Chemicals: The Requirement of Prior Informed Consent*, *in* THE ENVIRONMENT AND NATURAL RESOURCES 146 (Dinah Shelton ed., 2003).

132. ALVAREZ, *supra* note 107, at 222–23; DAVID M. LEIVE, INTERNATIONAL REGULATORY REGIMES: CASE STUDIES IN HEALTH, METEOROLOGY, AND FOOD (1976).

133. SANDS ET AL., *supra* note 59, at 293–94; ALVAREZ, *supra* note 107, at 217–57, 595–97.

134. G.A. Res. 34/186 ¶¶ 2–3 (Dec. 18, 1979).

135. G.A. Res. 37/7 ¶ 14, World Charter for Nature (Oct. 29, 1982).

136. The Governing Council of the United Nations Environment Programme Decision 13/18/11, Montreal Guidelines for the Protection of the Marine Environment against Pollution from Land-based Sources, (May 24, 1985).

137. *See generally* Brunnée, *supra* note 39.

treaty obligations that a qualified majority can adopt without a chance for opposing states to opt out, therefore escaping the formal rules for treaty amendment.

Finally, and more importantly, a narrative that labels most instruments of international organizations as soft law is of limited utility when what the traditional theory of sources of international law can say about this category is little more than it not being *formally* law.[138]

A review of recent accounts on institutional law-making demonstrates that the problem in contemporary narratives is not the lack of realization that the normative output of international organizations is expanding in size and variety and growing in importance, a widely discussed trend. Instead, the main problem is that theory has not been able to catch up with practice and has largely remained unchanged since the creation of international organizations. The traditional framework of institutional law-making rests on three fundamental premises: (1) state consent as the basis of legitimacy of all international rules; (2) a strict division between law and non-law; and (3) the trilogy of formal sources as the only sources of international law.[139] This traditional model sees international organizations as little more than fora for negotiations between states and is unable to properly address the innovative legislative techniques and dynamic law-making processes that they have developed.[140] In fact, arguments that seek to explain the normative authority of international organizations by reference to formal law-making processes and a strict division between soft and hard law are unsuccessful in filling the gap in the story of institutional law-making.[141]

In this context, the "soft law" label is used to encompass a great number and variety of instruments adopted by international organizations, which are adopted through different procedures and influence international law in distinct ways.[142] In studying the normative output of international organizations, one would expect that

138. *See* Klabbers, *supra* note 61, at 274; Matthias Goldmann, *Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority*, 9 GERMAN L. J. 1865, 1869 (2008).

139. *See generally* Klabbers, *supra* note 61, at 272–75; Goldmann, *We Need to Cut Off the Head of the King*, *supra* note 128, at 335–38.

140. White, *supra* note 128, at 579–80; Klabbers, *supra* note 61, at 274–75; ALVAREZ, *supra* note 107, at 258–59.

141. *See generally* Klabbers, *supra* note 61 for the imagery of a gap in the story.

142. Jaye Ellis, *Shades of Grey: Soft Law and the Validity of Public International Law*, 25 LEIDEN J. OF INT'L L. 313, 333 (2012) (arguing that the definition of soft law encompasses such a wide range of phenomena that the usefulness on the category for legal scholarship is limited).

international lawyers should be able to describe and explain at least some of this variety. However, this can only be achieved once we stop applying a framework of analysis that, simply put, does not have the vocabulary nor the analytical tools to deal with new phenomena that did not exist at the time it was created. This position is not novel. In 1977, Schreuer argued that authors attempting to explain recommendations of international organizations within the framework of the traditional sources of international law were "tackl[ing] new legal phenomena with a set of unsuitable theoretical tools."[143] According to Schreuer, explaining the relevance of recommendations by reference to any of the sources in Article 38 was "hardly plausible."[144] The UN General Assembly itself noted this in Resolution 3232 (XXIX) of 22 November 1970, where it recognized that, "the development of international law may be reflected, *inter alia*, by declarations and resolutions of the General Assembly which may to that extent be taken into consideration by the International Court of Justice."[145]

In 1981, Jennings advocated against trying "to force these newer trends and techniques into one or other of the compartments of the 1920 mold."[146] For Jennings, it was pointless to try to categorize, under any of the traditional sources, the laws and regulations made by international organizations in their specific fields.[147] Writing more recently, Goldman agreed that the plurality of legal instruments of international organizations "stands in marked contrast to the narrow limits of the classical doctrine of the sources of international law as stipulated in Article 38(1) of the ICJ Statute."[148] Furthermore, the constitutional ambitions of Article 38 have been long questioned— it is hardly clear that the article was intended to do anything else besides listing the types of instruments that the ICJ (and the Permanent Court of International Justice before it) was to apply and especially that it

143. Christoph Schreuer, *Recommendations and the Traditional Sources of International Law*, GERMAN Y.B. INT'L L. 103, 112 (1977).

144. *Id.*

145. GA Res. 3232(XXIX) (Nov. 22, 1974); Schreuer, *supra* note 143, at 112.

146. Robert Y. Jennings, *What is International Law and How Do We Tell It When We See It?*, 37 SCHWEIZERISCHES JAHRBUCH FOR INTERNATIONALES RECHT 59, 71 (1981) (referring to Article 38 of the Statute of the Permanent Court of International Justice as the "1920 mould.").

147. *Id.* at 70.

148. Goldmann, *Inside Relative Normativity*, *supra* note 138, at 1869; *see also* Jan Klabbers, *Constitutionalism and the Making of International Law: Fuller's Procedural Natural Law*, 5 NO FOUNDATIONS 84, 92 (2008); ALVAREZ, *supra* note 107, at 258.

was intended as an exhaustive list of sources of international law norms.[149]

Nevertheless, despite the recurrence of the debate, the traditional account of law-making by international organizations, originally developed over a century ago as the first organizations appeared and later strongly relying on the list of sources established in Article 38, has lingered until today. [150] It is time international lawyers agree on its limitations and find ways to overcome them.

### 4. LOOKING THROUGH A DIFFERENT LENS

Moving beyond the deadlock in the study of institutional law-making requires international lawyers to change their analytical tools and develop a new approach for analyzing the instruments of international organizations. This requires actively challenging—and, potentially, abandoning all together—the premises underlying the traditional framework of institutional law-making, creating space to test new ones.

A good place to start is by challenging the strict binary distinction that contrasts law with non-law—and the consequent opposition between binding and nonbinding instruments of international organizations. In several cases, the formally binding or nonbinding character of a rule is insufficient to explain its persuasiveness, authority, and even compliance by states and other actors, making it clear that theory no longer fits practice. The formally nonbinding character of certain standards and guidelines on protection of the environment has not prevented them from shaping state conduct.[151]

However, current studies on law-making by international organizations usually depart from the division of instruments into binding and nonbinding. Handbooks on the law of international organizations typically structure the discussion on the legal instruments around four categories: conventions, binding decisions (or determinations), nonbinding instruments (also referred to as soft law and divided into recommendations and declarations), and internal rules governing the functioning of the organizations (binding but without external effects).[152] This initial labelling of instruments predetermines

149. Anthea Roberts & Sandesh Sivakumaran, *The Theory and Reality of the Sources of International Law*, *in* INTERNATIONAL LAW 100 (Malcolm D. Evans ed. 2018); Goldmann, *We Need to Cut Off the Head of the King*, *supra* note 128, at 348–49; Klabbers, *supra* note 148, at 84.

150. *See generally* Klabbers, *supra* note 61.

151. *See supra* pp. 258–262.

152. *See* JAN KLABBERS, AN INTRODUCTION TO THE LAW OF INTERNATIONAL ORGANIZATIONS 156–57 (Cambridge Univ. Press, 3d ed.

the result of all subsequent analysis into their law-making characteristics—only the first two types of instruments are even considered as being potentially law-creating.

But the problem goes beyond choosing the right moment for classification. In fact, it is the very classification into binding and nonbinding that is problematic, as it presupposes that international normativity is an "all or nothing" variable—either an agreement fulfils all the formal criteria, and it is part of binding international law, or it is not law and has only political or moral significance.[153] The expansion of the concept of soft law does not really solve this problem because soft law instruments are still generally considered to be non-law, even if they are "somehow of relevance to law."[154] They are unable to create binding obligations and, to the extent that it is sometimes admitted that they can have legal effects, these are normally described in relation to the formal sources of international law.

This ignores that there are instruments of so-called soft law that share most characteristics of hard law—such as following a detailed procedure for approval, sharing the characteristics of legal rules, functioning just like international law norms, and as noted, often achieving high levels of compliance.[155] The main difference is that, generally, the violation of these norms does not entail specific legal consequences—namely, it does not give rise to a claim of state responsibility and the right to judicial enforcement. While relevant, this characteristic does not seem sufficient to exclude these instruments from the realm of international normativity—particularly considering how this option is also not practically available for so many formal international law norms and it is widely agreed not to be a defining element of international law.[156] Instead, it is one of the characterizing elements of these types of norms to be featured in their description

2015); BLOKKER & SCHERMERS, *supra* note 59, §§ 1196–1334; WHITE, *supra* note 60, at 158–88.

153. Goldmann, *We Need to Cut Off the Head of the King*, *supra* note 128, at 341.

154. Ellis, *supra* note 142, at 319. *See also* THIRLWAY, *supra* note 65, at 188–89; Redgwell, *supra* note 63, at 955–56.

155. *See generally* Goldmann, *We Need to Cut Off the Head of the* King, *supra* note 128, at 336 ("why should soft law be excluded from the definition of international law if it looks like international law and basically functions like international law?").

156. *Cf. id.* at 336, 341. Either because international dispute settlement is not available due to absence of state consent to an international jurisdiction or because the provisions are too vague to give rise to state responsibility, *id. See also* JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 15 (Oxford Univ. Press 9th ed. 2019); THIRLWAY, *supra* note 65, at 2–3.

within a revised doctrine of normative instruments of international organizations.

Authors that argue for the inclusion of (at least, certain) nonbinding instruments within an enlarged concept of international legality advocate for one of two strategies—either they propose to revise the rule of recognition to reach further than the formal sources doctrine and encompass certain soft law instruments, or they sustain that different rules of recognition should be identified to recognize different levels of normativity.

Representative of the first type of propositions are the writings of Klabbers and Brunnée and Toope. These authors depart from an application of Fuller's eight criteria for the morality of law to propose that a revised rule of recognition should be based, not on formalistic criteria, but on substantive requirements of legality.[157] According to Fuller, legal rules must meet eight procedural criteria to be considered moral and, as such, to be properly called law, they must be general, publicized, prospective rather than retroactive, reasonably clear, not contradict each other, not ask for the impossible, remain fairly constant over time, and there should be some congruence between declared rules and official action.[158] These are both a substantive set of criteria for the validity of law and a formal criterion for the identification of law; law that does not meet the eight requirements, at least to some extent, would simply not be law.[159] Granted, these authors still support the necessity of a formal rule of recognition to delineate the boundary between law and non-law.[160] However, they sustain that the relevant criterium for identification of international legal rules is not their inclusion within instruments with certain formal characteristics but the possession of certain internal characteristics, which entail their legal legitimacy and persuasiveness.[161] Such an approach allows for the inclusion of nonbinding instruments within the realm of international law, as long as they comply with the requirements of legality. Brunnée and Toope argue that certain nonbinding rules may even generate more fidelity (i.e., attract its own adherence) than certain binding rules.[162]

157. Goldmann, *We Need to Cut Off the Head of the King*, *supra* note 128, at 361–62

158. Or they must avoid "eight distinct routes to disaster." LON L. FULLER, THE MORALITY OF LAW: REVISED EDITION 39 (1969). *See also* Brunnée, *supra* note 39, at 26; Jan Klabbers, *supra* note 148, at 84, 92.

159. *Id.* at 107.

160. Goldmann, *We Need to Cut Off the Head of the King*, *supra* note 128, at 361–63

161. *Id.*

162. JUTTA BRUNNÉE & STEPHEN J. TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT 27–28, 51 (2010).

Goldmann, in turn, criticizes this approach for putting all instruments on the same footing.[163] For Goldmann, the way forward is to assume that different grades of legal normativity can exist, a position that has been referred to as "relative normativity."[164] Those different levels would permit distinguishing between formal sources of international law and other instruments which are not susceptible to giving rise to damages or claims before international courts but, nonetheless, share characteristics of legal rules.[165] Goldmann proposes seeing normativity as a continuum, creating the possibility to identify different categories of instruments.[166] He then argues that each category of instruments resembles a self-contained regime, composed of instruments that are comparable to such a degree that justifies the development and application of one identical legal regime that sets up rules regarding competence, procedure, and judicial review.[167] Finally, he proposes that different rules of recognition should be conceived for each category of instruments, which reflect their different characteristics and legal effects.[168]

A fitting solution is probably found somewhere in the middle. While a broad analysis of the output of international organizations will certainly reveal a diversity of normative instruments, displaying a different number of legal characteristics and producing a diversity of legal effects, all of which can be considered law-making, it must still be possible for the international lawyer to distinguish normative instruments from those that do not meet that qualification.[169] That is, it should still be possible to formulate a rule of recognition to distinguish international law from non-law, even when arguing that the concept of law might contain different categories and levels of normativity and that such a rule needs to incorporate enough flexibility so that it can recognize a diversity of sources that goes well beyond the formal sources of Article 38 and that will be different in different fields.

I argue, however, that the formulation of a revised rule of recognition and an all-encompassing theory of law-making by

163. Goldmann, *Inside Relative Normativity*, *supra* note 138, at 1877.

164. *Id.* at 1872. *See also* Shelton, *supra* note 64, at 160. For a critique of relative normativity *see* Weil, *supra* note 64.

165. Goldmann, *Inside Relative Normativity*, *supra* note 138, at 1876–77.

166. *Id.* at 1877.

167. *Id.* at 1877–81.

168. *Id.* at 1879–80.

169. *Cf.* Goldmann, *We Need to Cut Off the Head of the King, supra* note 128, at 341–42 (admitting that there will still be a distinction between soft-law and non-soft law in his theory but noting that "it should make a difference whether one recognizes only one single binary structured type of law or two or multiple ones.").

international organizations is the last step of a long walk that international lawyers are just starting. As a first step, it is fundamental to deepen our understanding of the diverse legal outputs of organizations to be able to construct a theory that covers the processes taking place in the practice of organizations today. Particularly concerning nonbinding instruments, the study of the individual characteristics of each type of instrument has been largely absent.

For the sake of completeness of the analysis, and to advance alternative paths for research and theory, I propose that it is necessary to conduct research into the normative outputs of international organizations while ignoring the strict binary law versus non-law and collecting and analyzing the broadest variety of instruments. This is particularly relevant for research focusing on law-making by international organizations engaged in protection of the environment. In few other fields is "law in its infinite variety"[170] as visible as it is here, notably because of the relative infancy of the field and the unsystematic way in which international regimes have emerged.

Looking into the different outputs of organizations in the environmental field that were mentioned throughout this article, one comes across a wide variety of instruments: (1) treaties (notably, the MARPOL, adopted by the IMO), protocols, annexes, and amendments to those; (2) instruments establishing new institutional structures, be it new bodies of an organization aimed at dealing directly with certain environmental matters (examples include the UNGA resolutions establishing UNEP and the CSD) or joint institutional arrangements where two or more organizations cooperate (such as the GEF); (3) various decisions on implementation of treaty obligations and compliance review adopted by COPs; (4) declarations of principles, guidelines, and standards aiming to guide action on environmental conservation (such as the UNEP Guidelines on Management of Hazardous Waste and on Environmental Impact Assessment); and (5) draft texts, which guide negotiations and can be adopted by states (such as the draft texts of the UNFCCC and the Convention on Biodiversity, prepared by the UN).

All these instruments have legal effects of their own, despite differing in how they are created, who they address, how they function, and the consequences of non-compliance. Some of them are the final output of a legislative process, while others are meant as an intermediary step, to be later taken up by other actors; some include mandatory language, while others do not; some are addressed to states, others also to different actors; some are meant to direct conduct, while others to guide future law-making; some are adopted by unanimity, other by consensus, others by majority; and not all of them rely on

170. Richard Baxter, *International Law in Her Infinite Variety*, 29 INT'L & COMPAR. L. Q. 549 (1980).

state consent. Little progress can be made in the doctrine by grouping a good part of these instruments under the category of soft law and analyzing them together.

Instead, an empirical analysis of the various normative activities of international organizations must guide future research. Without the constraints of the theory of sources and the strict binding versus nonbinding division, it should paint a full picture of their normative outputs and analyze their different characteristics, processes for adoption, reception by states and other relevant actors, and impact in shaping conduct and developing international law. It is only from such an analysis that new ways of categorizing this infinite variety of instruments can be developed and that international lawyers can start developing the analytical tools they so desperately need to advance their discussion and fill the gap in the story of institutional law-making.

## 5. CONCLUSION

The developments in normative processes in international environmental law, where international organizations have played a central role, have evidenced that the traditional account of institutional law-making is increasingly at odds with international law-making today. As international organizations are drafting the texts of environmental treaties, adopting standards and guidelines that effectively (and, sometimes, exclusively) regulate areas of practice, and developing and altering treaty obligations (in some cases, dispensing with the need for express consent by all state parties), it becomes evident that it is not possible to continue explaining institutional law-making through the three dogmas of state consent, strict division between law and non-law, and the trilogy of formal sources. The limitations of this traditional framework are evidenced by the fact that that all it can say about most normative outputs of international organizations is that they are formally not law and, as such, should be grouped under the category of soft law, despite their internal diversity and that many share the characteristics of binding international law.

Accordingly, this article argued that international lawyers must come to terms with the fact that the traditional framework of institutional law-making does not have the vocabulary, nor the analytical tools necessary, to deal with new diverse and dynamic law-making processes led by international organizations that did not exist at the time that framework was created.

To move the debate forward and start closing the gap between the practice of international organizations and the theory of institutional law-making, it is fundamental that new approaches are developed that actively challenge the premises of the traditional framework. To this end, this article proposes the abandonment of the strict binary opposition between law and non-law—at the very least, for the purpose

of analysis. This will permit painting the full picture of normative activities of international organizations and exploring the different characteristics of their instruments, without an a priori judgement of their aptitude to produce legal effects. It is only from such analysis that international lawyers can start to develop the new analytical tools they need to account for the full story of law-making by international organizations in their different fields.

The crux of the matter is still the decades-old question famously asked by Jennings, "what is international law and how do we know it when we see it?"[171] In the case of the normative instruments of international organizations, we need to change our reading lenses if we aim to even start seeing, let alone explaining, their variety and their contribution for the development of international law.

171. Jennings, *supra* note 146.