

HOW DID THEY BECOME LAW?: A JURISPRUDENTIAL  
 INQUIRY ABOUT THE OUTCOME PRINCIPLES OF HISTORIC  
 UNITED NATIONS ENVIRONMENTAL CONFERENCES

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## I. INTRODUCTION

Few called them a politician's empty promises when the President of the Republic of Korea announced an ambitious package of pledges to implement the sustainable development goals declared by the unanimity of the United Nations (UN) General Assembly on September 26, 2016. Not many, either, among the largest crowd of heads of state and government in the history of environmental conferences in attendance during the high-level meeting, would have dwelled on the reasons behind their boundless trust in her pledges being realized. This despite the popular theory that the adoption of a resolution, which contains those goals, is merely recommendatory in nature and thus does not legally guarantee compliance by participant states.<sup>1</sup>

Beginning with the UN Conference on Human Environment (Stockholm Conference) in 1972, the international community has convened under the auspices of the UN for similar gatherings: the UN Conference on Environment and Development (Rio Conference) in 1992, the World Summit on Sustainable Development (Johannesburg Summit) in 2002, the UN Conference on Sustainable Development (Rio+20) in 2012, and the aforementioned summit for the adoption of the post-2015 development agenda (Sustainable Development Summit).<sup>2</sup> They called a great deal of public attention to the issues of worldwide environmental degradation and became an important part of the human struggle to protect, conserve, and enhance the Earth's environment. At the center of the immense changes in our thoughts and behaviors that this unprecedented movement brought about

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<sup>1</sup> Schwebel, *The Effect of Resolutions of the U.N. General Assembly on Customary International Law*, 73 PROC. OF THE AM. SOC'Y OF INT'L L. 301 (1979) (General Assembly lacks legislative powers—Resolutions are not binding on member states or in international law at large).

<sup>2</sup> The UN held seminal environmental conferences on a vicennial basis: the Stockholm Conference, the Rio Conference, and Rio+20. In between, there were conferences aimed at a ten-year review of the previous vicennial conferences: the session of a special character and tenth session of the Governing Council of the UN Environmental Programme (UNEP) (Nairobi Summit) in 1982 and the World Summit on Sustainable Development (Johannesburg Summit) in 2002. Most recently, in September 2015, a high-level meeting, Sustainable Development Summit, was convened at the UN Headquarters in New York and adopted an outcome document titled conferences: the session of a special character and tenth session of the Governing Council of the UN Environmental Programme (UNEP) (Nairobi Summit) in 1982 Development (Johannesburg Summit) in 2002. Most recently in September 2015, a high-level meeting (Sustainable Development Summit) was convened at the UN Headquarters in New York and adopted an outcome document titled "Transforming our world: the 2030 Agenda for Sustainable Development." There could be additions to this list, especially those with a specialized focus, but these may be the most important and influential contemporary UN environmental conferences with a general scope.

lies the normative power derived from the outcome principles of those conferences.

This Article seeks the origin of this normative power and examines the legal status of the outcome principles of these historic UN environmental conferences. In the process, what have typically been regarded as “soft law principles” will prove to be virtually indistinguishable from the general principles of law that the traditional scholarship recognizes as a source of international law. This may not be true for all soft law instruments, but is rather a precise conclusion in the case of soft law principles.<sup>3</sup> So far, few have identified the possibility that soft law principles are indeed a source of international law under Article 38 of the Statute of the International Court of Justice (ICJ). The author’s contention would be, however, that in international law the argument for soft law principles as law and the argument for hard law principles as law are the same. Therefore, if the former succeeds, the latter should succeed, too; in case either argument is not successful, in fact both fail in similar ways. The author will also elaborate the conditions to fortify this novel theoretical conclusion, drawing directly from the practice of the major UN environmental conferences that have produced soft law principles. Such jurisprudential inquiry will touch upon the fundamental questions of international law, which need to be answered further to understand the scope and degree of influences that these outcomes principles had upon the evolution of international environmental law and governance.

## II. FORMS OF THE OUTCOMES OF UN ENVIRONMENTAL CONFERENCES

International conferences convened under the auspices of the UN have produced outcomes in various forms of documents bearing different legal and political implications.<sup>4</sup> For instance, the UN diplomatic conference of

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<sup>3</sup> Scholars are rethinking principles in international law. In a recent meeting, Mathias Forteau, French member of the UN International Law Commission (ILC) held a briefing before the UN member states that the Commission will decide in the upcoming session whether to include principles as one of their next quinquennial topics. See Mathias Forteau, Member, Int’l Law Comm’n, Briefing on the Work of the International Law Commission (June 23, 2016).

<sup>4</sup> In regard to the various types of outcomes of UN conferences, see generally HENRY G. SCHERMERS & NIELS M. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY* (5th rev. ed., Martinus Nijhoff Publishers 2011) (1972); HANNA BOKOR-SZEGŐ, *THE ROLE OF THE UNITED NATIONS IN INTERNATIONAL LEGISLATION* (North-Holland Pub. Co. 1978); BENEDETTO CONFORTI & CARLO FOCARELLI, *THE LAW AND PRACTICE OF THE UNITED NATIONS* (4th rev. ed., Martinus Nijhoff 2010) (1996); Paul Szasz, *General Law-making Process*, in 1 *UNITED NATIONS LEGAL ORDER* 35-108 (Oscar Schachter & Christopher C. Joyner eds., Cambridge Univ. Press 1995); Volker Rittberger, *Conferences in UNITED*

plenipotentiaries held in Rome from June 15 to July 17, 1998 concluded the Rome Statute of the International Criminal Court, a treaty establishing the first permanent international criminal court, which is recognized as a source of international law in a strict sense.<sup>5</sup> On the other hand, UN Conferences on the Standardization of Geographical Names, which have been convened every five years since 1967, produced resolutions containing standards in the field of nomenclature that are merely technical and recommendatory in nature.<sup>6</sup> There are also UN conferences, which failed to produce a meaningful outcome.<sup>7</sup> For instance, the UN Conference on Territorial Asylum held in Geneva from January 10 to February 4, 1977 was initially expected to produce an international convention. However, participants could not reach a consensus and ended up only with the record of proceedings in a report.<sup>8</sup> Conferences not just by the UN, but by other intergovernmental and nongovernmental organizations have gone through the congruent path with similarly varied outcomes.<sup>9</sup>

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NATIONS: LAW, POLICIES AND PRACTICE 160–68 (Rüdiger Wolfrum & Christiane Philipp eds. Martinus Nijhoff, 1995); Robbie Sabel, *Conferences and Congresses, International*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (July 2008); Christine Chinkin & Ina Gätzschmann, *Summit Meetings*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Mar. 2013).

<sup>5</sup> For more examples of UN conferences leading to the conclusion of well-known treaties, see *United Nations Diplomatic Conferences*, UNITED NATIONS OFFICE OF LEGAL AFFAIRS, <http://legal.un.org/diplomaticconferences> (last visited Apr. 18, 2016).

<sup>6</sup> See generally U.N. Dep't of Econ. & Soc. Affairs, *Resolutions Adopted at the Nine UNCISGs: 1967, 1972, 1977, 1982, 1987, 1992, 1998, 2002, 2007*, U.N. Doc. E/CONF.101/INF/6 (July 13, 2012).

<sup>7</sup> It is not easy to identify a failed conference since its official announcement almost always tends to be positive. Nonetheless, if the conference could not produce a planned outcome, it could be evaluated as a failure at least to that extent. See Interview with Anonymous\*, Senior Legal Officer, U.N. Office of Legal Affairs, in New York, N.Y. (Dec. 9, 2015). \*The name of the interviewee has been omitted deliberately.

<sup>8</sup> See *Report of the U.N. Conference on Territorial Asylum*, U.N. Doc. A/CONF.78/12 (Apr. 21, 1977). There are other similar examples. The Second UN Conference on the Law of the Sea held in Geneva on March 17 to April 26, 1960 considered the topic of the “breadth of the territorial sea and fishery limits,” the resolution of which participants in the First Conference could not agree upon. The Second Conference failed again to reach a consensus, and discussions on the topic were deferred until the Third Conference was convened thirteen years later. See *Second United Nations Conference on the Law of the Sea, 1960*, U.N. OFFICE OF LEGAL AFFAIRS, <http://legal.un.org/diplomaticconferences/lawofthesea-1960/lawofthesea-1960.html> (last visited Apr. 18, 2016).

<sup>9</sup> For instance, the Hague Conference on Private International Law has produced about forty-five conventions and other forms of legal instruments, including discussions on the topic were defersidered the topic of the extent.,” which was adopted after ten years’ negotiation. See Hague Conference on Private In’l Law, *Principles of Choice of Law International Commercial Contracts* (Mar. 19, 2015), <https://assets.hchh.net/docs/5da3ed47-f54d-4c43-aaef-5eafc7c1f2a1.pdf>. Some of the conferences were fruitful and others were not throughout

Among the variations, seminal international environmental conferences organized under the auspices of the UN often concluded in two types of outcomes: a declaration and a plan of action or implementation. For example, participants in the Stockholm Conference addressed their conviction about the promotion of the environment in the Declaration of the UN Conference on the Human Environment<sup>10</sup> and adopted the Action Plan for the Human Environment.<sup>11</sup> Likewise, those in the Rio Conference agreed upon the Rio Declaration on Environment and Development on the one hand<sup>12</sup> and Agenda 21 on the other.<sup>13</sup> The Johannesburg Summit also adopted both the Johannesburg Declaration on Sustainable Development<sup>14</sup> and the Plan of Implementation of the World Summit on Sustainable Development.<sup>15</sup> Though slightly divergent from these examples, Rio+20 and the Sustainable Development Summit combined these two outcomes into one document while substantively keeping them separate within the document.<sup>16</sup>

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its history since the first meeting in 1893. Meetings of the International Conference of the Red Cross and Red Crescent also contributed in similar ways to setting standards in humanitarian affairs and laws, including their guidelines and codes of conduct, some of which proved to be part of customary international law in the field.

<sup>10</sup> The Declaration contains twenty-six principles following seven preambular paragraphs. See *Conference Declaration of the U.N. Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1 (1973) [hereinafter *Stockholm Declaration*].

<sup>11</sup> The Action Plan suggests a framework for environmental action with 109 recommendations covering diverse areas of concern. See U.N. Conference on the Human Environment, *Action Plan for the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1 (June 1973).

<sup>12</sup> The Declaration has twenty-seven principles with five preambular paragraphs. See 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 (1993) [hereinafter *Rio Declaration*].

<sup>13</sup> Agenda 21 is a 473-page document with extensive sets of action plans composed of forty chapters and as many as 1414 paragraphs. See U.N. Conference on Environment and Development, *Agenda 21*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex II (1993).

<sup>14</sup> The Declaration is composed of thirty-seven paragraphs. See World Summit on Sustainable Development, *Johannesburg Declaration on Sustainable Development*, U.N. Doc. A/CONF.199/20, 1–5 (2002).

<sup>15</sup> The Plan of Implementation provides 11 chapters and 190 paragraphs. See World Summit on Sustainable Development, *Plan of Implementation of the World Summit on Sustainable Development*, res. 2, annex, U.N. Doc. A/CONF.199/20 (Sept. 4, 2002).

<sup>16</sup> The General Assembly decided to have the outcome of Rio+20 in one concise document. See G.A. Res. 64/236, para. 20(b) (Mar. 31, 2010). It is partly because the previous outcome in two types of documents was too voluminous to make it a convenient guide in practice. See Woong Kyu Sung, *Core Issues in International Sustainable Development: Analysis of Shifting Priorities at U.N. Environmental Conferences*, 44 ELR 10574, 10575 n.7 (2014). However, the Rio+20 outcome document is substantively similar and formally analogous with the outcomes of other UN environmental conferences. More specifically, among the six chapters, the former four chapters (paragraphs similar and formally analogous with the outcomes of other UN environmental conferences. More specifically, among the six chapters, the former

Some major UN environmental conferences furnished a substantial portion of their outcome in the form of principles. For instance, the Stockholm Conference provides twenty-six principles and the Rio Conference provides twenty-seven principles. Outcomes from other major UN environmental conferences also tend to include, though only substantively, a bundle of principles as is the case with other soft law instruments in various formats that purport to lay down principles.<sup>17</sup> For example, although Rio+20 did not explicitly provide paragraphs titled “principles,” the conference introduced in its outcome a number of principles to promote what is called the “green economy,” a new concept of sustainable development.<sup>18</sup> In the case of the Sustainable Development Summit, the outcome declaration includes a subsection titled “Our shared principles and commitments” that merely recalls several past conferences and outcomes in which important principles were announced.<sup>19</sup> The Summit set out, instead, seventeen goals to be achieved, which strongly imply a set of principles.<sup>20</sup>

### III. CONTEXT OF OUTCOME PRINCIPLES

What is the importance of these outcome principles in international law? How does it relate to the identical terminology found in the ICJ Statute that the traditional scholarship considers as an applicable law?

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four chapters (paragraphs 1–103) may substantively comprise a declaration. The latter two chapters (paragraphs 104–283) contain provisions about a framework for action, follow-up plans, and means of implementation. *See id.* at 10575–76. The outcome of the Sustainable Development Summit is somewhat complex. It contains a section (paragraphs 1–53), which comes after a preamble, with the express title “Declaration” and towards the end of this section there are two subsections with the titles “Means of implementation” and “Follow-up and review” respectively. In addition, the outcome document has other separate sections at its very end entitled “Means of implementation and the Global Partnership” and “Follow-up and review.” Between the Declaration and the latter two sections, there is a portion dedicated to listing “Sustainable Development Goals and targets.” *See* G.A. Res. 70/1, Transforming our world: the 2030 Agenda for Sustainable Development (Sept. 25, 2015). The Nairobi Summit reached a consensus on the declaration only. *See* U.N. Env’t Programme Governing Council on its Session of a Special Character and Tenth Session, *Nairobi Declaration*, U.N. Doc. A/37/25, annex II (1982).

<sup>17</sup> Christine Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT’L & COMP. L.Q. 850, 851 (1989).

<sup>18</sup> *See* Sung, *supra* note 16, at 10576.

<sup>19</sup> G.A. Res. 70/1, *supra* note 16, paras. 10–13.

<sup>20</sup> G.A. Res. 70/1, *supra* note 16, paras. 18–38.

### A. *Jurisprudential Nature of Principles*

Principle is a term that is difficult to define though it has been frequently used in diverse contexts, including in the outcome of the major UN environmental conferences as shown above.<sup>21</sup> To avoid stipulating the definition of the term for selective purposes, Ronald M. Dworkin suggested a negative approach.<sup>22</sup> His definition centers on a categorical comparison of the principle with two other legal standards: namely, “value” on the one hand and “rule” on the other. This method is very much conducive to grasping the concept and function of principles and clarifying their jurisprudential significance, which has since been followed by many scholars. Simply put, value is a more abstract concept and rule is a more concrete one, relative to the principle.<sup>23</sup> The value is an expression of the eventual goal that a group or society aspires to attain in a particular field.<sup>24</sup> On the other hand, the rule describes specific types of conduct that are either required or prohibited and thus creates clearly delimited rights and obligations.<sup>25</sup>

The legal status of a principle lies in-between. Principles suggest a normative strategy to pursue relevant values and the values provide a theoretical basis and moral support to the principles.<sup>26</sup> On the other hand, principles denote what a set of rules have in common and the rules find their abundant meaning in the principles.<sup>27</sup> In this way, a set of norms have developed over time from values to principles and to rules, or vice versa. Of course, the distinction between the three concepts is more like an orientation and approximation rather than a clear division or separation. In certain contexts, principles are treated closer to values, and when necessary, they are directly applicable to actual cases just as rules are.<sup>28</sup> Despite the limited

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<sup>21</sup> Joaquín R.-Toubes Muñiz, *Legal Principles and Legal Theory*, 10 *RATIO JURIS* 267, 269 (1997).

<sup>22</sup> *Id.*; see also TRUDY GOVIER, *PRACTICAL STUDY OF ARGUMENT* 76–77 (Enhanced 7th ed., Wadsworth Pub. Co. 2014) (1985).

<sup>23</sup> Jonathan Verschuuren, *Sustainable Development and the Nature of Environmental Legal Principles*, 9 *POTCHEFSTROOM ELECTRONIC L.J.*, May 2006, at 209, 211, <http://www.nwu.ac.za/p-per/volume-9-2006-no-1-1> (defining the principle and explaining its legal significance).

<sup>24</sup> *Id.* at 214.

<sup>25</sup> Jaye Ellis, *Sustainable Development as a Legal Principle: A Rhetorical Analysis*, in 2 *SELECTED PROCEEDINGS OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW* 642, 643 (Hélène Ruiz Fabri et al. eds., Hart Pub. 2010); see also ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 112 (Harvard Univ. Press 1995).

<sup>26</sup> Verschuuren, *supra* note 23, at 212–a.

<sup>27</sup> *Id.* at 237–42.

<sup>28</sup> *Id.*; see also Philippe Sands, *International Law in the Field of Sustainable Development: Emerging Legal Principles*, in *SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW* 53, 54 (Winfried Lang ed., Graham & Trotman/Martinus Nijhoff 1995).



international recognition thus far,<sup>29</sup> principles have played a central role mediating and bridging of the gap between an abstract value and concrete rules.<sup>30</sup>

For example, the principles of environmental law addressing human dependence on the environment have served the values promoting nature's anthropogenic virtue and utility. To properly interpret rules realizing the liability and compensation for environmental damage, we may have to revisit the principle of just distribution of environmental costs and that of common but differentiated responsibilities. In both ways, principles have given deeper meaning and flexibility to other normative sources and enable a legal system to accommodate emerging trends and recent scientific development as well as particular circumstances so that over time and through these processes an international environmental legal regime could become established.<sup>31</sup> In this way, the normative power flowing from the outcome principles is important to understand the dynamics of the whole system of law that the UN environmental conferences were to develop for effective global environmental governance.

#### *B. Type of Soft Law Possessing Stronger Normative Power*

There has not been much academic focus on the principles, particularly when this important normative concept is found in extralegal or paralegal international instruments, including the outcome of the UN environmental conferences. On the other hand, scholars have argued for and against the legal value of similar instruments more generally, and their arguments contributed to the creation of a new legal category that helps explain those apparently abnormal international instruments:

Social norms of varying character and relevance influence the behaviour and decisions of actors participating in international relations. As far as their binding quality is

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<sup>29</sup> International courts or tribunals delivered few judgments that manifest the distinction of principles from values or rules. After the UN Framework Convention on Climate Change, several Member States, including the United States, persistently argued against the inclusion of relevant principles in an article of the Convention. Even the World Commission on Environment and Development, which officially defined the term "sustainable development" and tried to mainstream it at the international level, omitted addressing the question of the legal status of principles related to environmental protection and sustainable development in its seminal report titled "Our Common Future." See Verschuuren, *supra* note 23, at 210–11.

<sup>30</sup> *Id.* at 251.

<sup>31</sup> Thomas A. Mensah, *Soft Law: A Fresh Look at an Old Mechanism*, 38 ENVTL. POL'Y & L. 50, 51–52 (2008).

concerned, such social norms range from purely moral or political commitments to strictly legal ones. Yet between these fairly clear cut categories exists a wide range of other rules, the legally binding character of which has been deliberately and sometimes explicitly denied by their drafters, but which nevertheless cannot be considered mere moral or political directives.<sup>32</sup>

Such instruments and norms therein are often called “soft law.” There being various types of soft law, a declaration that embodies the principles may be among the most formal sort. Of course, there could be objections to this statement since it is said that an international conference produces the declaration as an outcome of the work, especially when it lacks the will and power to adopt binding measures.<sup>33</sup> Nonetheless, one thing is clear that the international community has been very careful in the choice of title for a legal instrument, and the term “declaration” was put in only if the instrument contained principles that had significant legal implications. A memorandum drafted by the UN Office of Legal Affairs confirms this established practice by stating that the declaration is “a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated.”<sup>34</sup>

The Universal Declaration of Human Rights adopted in 1948 is a good example.<sup>35</sup> Although it is not a treaty, the Declaration turned out to be one of the most influential instruments throughout history in mainstreaming the principles of human rights to the world. These principles, which at its adoption might have been viewed as controversial in many parts of the world, eventually led to significant legal developments, including adoption of numerous international conventions<sup>36</sup> and domestic acts<sup>37</sup> that contained the letter and spirit of the Declaration. It now comprises the foundation of

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<sup>32</sup> Daniel Thürer, *Soft Law*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, paras. 1–2 (Mar. 2009).

<sup>33</sup> Dinah Shelton, *Soft Law*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL LAW 68 (David Armstrong ed., Routledge 2009).

<sup>34</sup> *Id.* at 70.

<sup>35</sup> See generally G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

<sup>36</sup> *The Core International Human Rights Instruments and Their Monitoring Bodies*, U.N. OFF. OF HIGH COMM’R FOR HUM. RTS., <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (last visited Apr. 19, 2016).

<sup>37</sup> INTERNATIONAL HUMAN RIGHTS LAW: SIX DECADES AFTER THE UDHR AND BEYOND 9 (Mashood A. Baderin & Manisuli Ssenyonjo eds., Ashgate 2010); Stephen Gardbaum, *Human Rights as International Constitutional Rights*, 19 EUR. J. INT’L L. 749, 750–51 (2008).

international human rights regime.<sup>38</sup> Section 702 of the Third Restatement of the Foreign Relations Law of the United States recognizes as part of international law, not only political norms, but also the seven categories of human rights abuses that the Declaration prohibits.<sup>39</sup> The UN International Law Commission (ILC) even acknowledges that the declared principles include a few instances of customary international law.<sup>40</sup>

The Declaration on the Granting of Independence to Colonial Countries and Peoples may be another example demonstrating the importance of the principles in a declaration in international law. The declaration started its life in a shrewd attempt to avoid the procedural blockade at the UN that could be caused by the colonial powers while there were clear needs for a set of principles to follow among the international community navigating in the midst of worldwide decolonization.<sup>41</sup> Neither its form nor contents might have been thought to expressly assert its firm legal status in international law. In fact, these principles properly reflected the strong trends in international legal development and the role of the Declaration was crucial on the ground in bringing about the termination of the old system called “Colonial Empires.”<sup>42</sup> To this day, the Declaration represents the legal framework in ensuring “peaceful co-existence among states,” claiming its principles to be *jus cogens* in international law.<sup>43</sup>

### C. Stagnation of Conventional International Law

There are not only theoretical reasons but also phenomenological ones to recognize both hard and soft laws as valid legal instruments in international law.<sup>44</sup> Soft law can be identified in all fields of law, but they are particularly

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<sup>38</sup> Fact Sheet No. 2 (Rev. 1), *The International Bill of Human Rights*, UNITED NATIONS OFF. OF HIGH COMM’R FOR HUM. RTS. (June 1996) <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf> (last visited Apr. 19, 2016).

<sup>39</sup> Daniel T. Murphy, *Commentaries: The Restatement (Third)’s Human Rights Provisions—Nothing New, But Very Welcome*, 24 INT’L L. 917, 917–18 (1990).

<sup>40</sup> Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 287, 341 (1995–1996).

<sup>41</sup> Edward McWhinney, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, U.N. AUDIOVISUAL LIBR. OF INT’L L. (2008). In voting in the General Assembly, the United States, the United Kingdom of Great Britain and Northern Ireland (U.K.), and France abstained with others, and there was no objection. *See also* United Nations GAOR, 15th Sess., 947 plen. mtg., U.N. Doc. A/PV.947 (Dec. 14, 1960).

<sup>42</sup> McWhinney, *supra* note 41.

<sup>43</sup> Arnold Pronto, *Understanding the Hard/Soft Distinction in International Law*, 48 VAND. J. TRANSNAT’L L. 941, 953–54 (2015).

<sup>44</sup> *Id.* at 950.

important and prevalent in the context of international relations.<sup>45</sup> One cannot state categorically that hard law binds and creates legal obligations on states while soft law does not.<sup>46</sup> Scholars and practitioners believe that the binary approach cannot grasp the complexity of cases or the dynamism of diverse legal phenomena.<sup>47</sup> In today's world, the separation between hard and soft laws is not always strict or simple and it is increasingly difficult to identify their distinctive characters.<sup>48</sup>

It has been conventional wisdom to say that whether a normative instrument carries legally binding obligations in the international sphere depends on the intention of the authors. However, the intention is often mixed and its expression varies from explicit to implicit, from direct to circumstantial. Sometimes the intention to make the instrument legal is drawn rather clearly in internal provisions or final clauses of the instrument itself.<sup>49</sup> However, this is often not the case. In many instances, legal implications are intense where states promised political commitment only. Despite the soft form in which norms sit, or even regardless of the intention of the authors who drafted them, the norms do frequently have "legal consequences that go beyond what would be expected from mere statements of aspirations."<sup>50</sup>

Some scholars have showed uneasiness with the rise of debates on softness in international law:

Although less visible, many scholars have chosen to advocate an extension of the limits of classical international law by legalizing objects which intrinsically lie outside the limits of international law. This is precisely what the unconditional proponents of the concept of soft law are—consciously or unconsciously—aiming at. . . . [N]owadays, it is the *scholarship that makes the law* and no longer *the law that makes the legal scholarship*.<sup>51</sup>

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<sup>45</sup> Thürer, *supra* note 32, para. 3.

<sup>46</sup> Mensah, *supra* note 31, at 50.

<sup>47</sup> Jean D'Aspremont & Tanja Aalberts, *Symposium on Soft Law: Which Future for the Scholarly Concept of Soft International Law? Editors Future for the Scholar*, 25 LEIDEN J. INT'L L. 309, 309 (June 2012).

<sup>48</sup> *Id.*; see also Shelton, *supra* note 33, at 71–75.

<sup>49</sup> Mensah, *supra* note 31, at 50.

<sup>50</sup> *Id.*

<sup>51</sup> Jean D'Aspremont, *Softness in International Law: A Self-Serving Quest for New Legal Materials*, 19 EUR. J. INT'L L. 1075, 1090–91 (2008).

This critique, however, is strikingly weak in theory and practice. In recent years, eminent scholars have discussed the topic and published articles and books in major publications.<sup>52</sup> During expert debates, persistent objectors have grounded their repeated claim on an important but overly simplistic point that soft law is not law only because it is not intended as law, and they usually do not present sufficient evidence to rebut the normative value of soft law being law.

Of course, there are more subtle arguments, though they are rare. A few scholars think that the alleged effect of soft law comes from legal facts, which should be *stricto sensu* distinguishable from legal acts that can create rights and obligations.<sup>53</sup> However, it is incorrect that the influence that soft law exercises is always a by-product, not the direct consequence of the will of the states. For instance, it might be nonsensical to insist that the participation of the head of state in an environmental conference that adopts the outcome declaration constitutes merely a legal fact, which comprises the entourage of the conference. It is rather evident and reasonable that the government intended a legal act by sending its highest authority to create and assume negotiated outcomes. Moreover, the strength of a legal act itself depends largely on relevant legal facts.

The application of international law is now frequently called for at the center of many challenging global issues requiring the participation of a multitude of actors in their resolution.<sup>54</sup> With this backdrop, states increasingly see certain pragmatic advantages in using and developing soft law.<sup>55</sup> At the UN, the contemporary frontier of international law-making, a soft law instrument gets increasing attention in cases where its Member States are reluctant to prompt stiff legalization of a field of international

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<sup>52</sup> Picking examples only in the American Society of International Law (ASIL), a group of distinguished scholars published their workshop about soft law as early as in 1997. See generally STUDIES IN TRANSNATIONAL LEGAL POLICY: INTERNATIONAL COMPLIANCE WITH NONBINDING ACCORDS (Edith Brown Weiss ed., ASIL 1997). Scholars also discussed the topic in its annual meetings as recently as in 2015. For instance, in the 109th Annual Meeting, Joseph Weiler (moderator), Jutta Brunnée, Benedict Kingsbury, Georg Nolte, and Joel Trachtman discussed various issues posed by the development of international norms through more flexible mechanisms. At the same meeting, Kal Raustiala (moderator), Ayelet Berman, Dinah Shelton, Edward Swaine, and Ingo Venzke discussed the on-going stagnation of traditional processes for making international law. See Joseph Weiler et al., *Legitimacy, Adaptability, and Consent in Modern International Law*, Presentations at the 109th ASIL Annual Meeting (Apr. 9, 2015); Kal Raustiala et al., *The Stagnation in International Law*, Presentations at the 109th ASIL Annual Meeting (Apr. 9, 2015).

<sup>53</sup> D'Aspremont *supra* note 51, at 1077–79.

<sup>54</sup> Jutta Brunnée, *COPing with Consent: Law-Making under Multilateral Environmental Agreements*, 15 LEIDEN J. INT'L L. 1, 2 (2002).

<sup>55</sup> See generally SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW, ch. 3, sec. F, 96–108 (2d ed., Thomson West 2012).

concern, with recognition, however, that regulating it is critical. The Member States often collectively reach an ironic conclusion in this context that a “nonbinding approach would, in the aggregate, have a greater impact than a formally binding text.”<sup>56</sup>

The legislative process, if we can describe it as such, to make a soft law is cost saving.<sup>57</sup> This does not mean that every process is compact and manageable, but the amount of time and energy invested in concluding soft law has been perceived to be relatively small compared to hard law that governs an area with commensurate sensitivity and complexity.<sup>58</sup> However, the benefits of soft law cannot be fully explained by cost-effectiveness. As soft law develops and its importance grows, the analysis becomes much more complex. Most of the outcomes of landmark international environmental conferences organized under the auspices of the UN take more than two years to produce at the high cost of intensive negotiations and associated governmental processes. They may entail additional expenses if preliminary stages, before the preparatory committee officially starts its work, are duly taken into account. Even certain attempts fail due to lack of consensus or deficiency of available resources notwithstanding all these efforts.

With growing costs and risks involved, however, soft law is still inevitable. This is particularly true in handling an emerging global phenomenon that may significantly affect the security and welfare of a large number of countries. For example, it is hard to make an international treaty regulating novel environmental issues because often the scope or cause of the problems that the issues raise has not been fully known or revealed, requiring further scientific research. In other words, they cannot be solved simply with additional political endeavors or instant financial investments. Notwithstanding this prematurity, states can no longer remain idle since the impact of the environmental problems is great and severe, whether current, imminent or potential: “[T]he increasing sense of urgency in combating global environmental problems has prompted calls for new approaches to international environmental law-making . . . .”<sup>59</sup>

In such a case, national authorities and the broader international community have preferred governing the field with soft law rather than hard law. Making a stricter legal instrument at this stage will neither resolve the issue, nor be realistically possible.

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<sup>56</sup> Pronto, *supra* note 43, at 942.

<sup>57</sup> MURPHY, *supra* note 55, at 96.

<sup>58</sup> Shelton, *supra* note 33, at 75–77.

<sup>59</sup> Brunnée, *supra* note 54, at 2.

Recent studies show that multilateral treaty-making on a global scale has revealed its limitations.<sup>60</sup> Quite a few of the multilateral environmental agreements, which should be binding formally on paper, may not by themselves properly influence the conduct of states. Distinguished scholars at a recent annual meeting of the American Society of International Law discussed the phenomenon of stagnation in producing the traditional sources of international law including treaties.<sup>61</sup> These sources, they observed, started to give way to alternative mechanisms such as various forms of soft law, and the latter filled the vacuum that had resulted from the stagnation of the former.<sup>62</sup> Indeed, the amount of multilateral treaties deposited with the UN Secretary-General has not changed much for years.<sup>63</sup> A number of specific cases at the UN forums qualitatively support this statistical trend as well. For example, States Parties to the UN Convention on the Law of the Sea (UNCLOS), concluded more than thirty years ago, have since addressed the need for a legal instrument to meet the challenges arising from the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction, whose regulation in the aforementioned convention was considered sparse or unclear. Until recently, the States Parties could reach a rough agreement on how to proceed to negotiations without knowing the substantive direction of the negotiations or the foreseeable timeline by which they will have a set of relevant rules.<sup>64</sup>

An increasing number of UN Member States are recognizing the limitation of traditional international law, particularly in facing prevalent environmental problems and addressing the need for an alternative approach, as well illustrated by a delegate below:

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<sup>60</sup> See generally Weiler et al., *supra* note 52; Raustiala et al., *supra* note 52; Jutta Brunnée *International Legislation*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Oct. 2010); Jutta Brunnée *Consent*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Oct. 2010).

<sup>61</sup> Weiler et al., *supra* note 52; Raustiala et al., *supra* note 52.

<sup>62</sup> Weiler et al., *supra* note 52; Raustiala et al., *supra* note 52.

<sup>63</sup> Per the screenshots of the relevant web pages taken by the Wayback Machine, the total number of multilateral treaties deposited with the UN Secretary-General has only slightly increased from 2009 until 2015. The Secretariat itself described on its web pages that the number was 500 for years. The Treaty Section in the UN Office of Legal Affairs tried to rebut the evidence of stagnation in treaty-making in its own annual Seminar on Treaty Law and Practice held on June 2, 2015. See Anonymous\*, *The Work of the Treaty Section of the U.N. Office of Legal Affairs*, Presentation at the Annual Seminar on Treaty Law and Practice (June 2, 2015). \*The name of the presenter has been omitted deliberately.

<sup>64</sup> Relevant negotiations have been accelerated and intensified only since Rio+20 decided to urgently address the issue. See G.A. Res. 66/288, *The Future We Want*, ¶ 162 (July 27, 2012). In this regard, a Preparatory Committee established by General Assembly Resolution 69/292 is expected to produce meaningful outcomes in developing an international legally binding instrument under UNCLOS.

[T]he traditional response of international law, developing international legal standards in small incremental steps, each of which must be subsequently ratified by all countries, is no longer appropriate to deal with the highly complex environmental problems of the future. The time has come for something more innovative, for a conceptual leap forward. . . .<sup>65</sup>

The norms discussed here might not be legally binding, but they are taken seriously by both state and non-state actors, who are the subjects of international law today.<sup>66</sup> They have “the effect of narrowing the options that would otherwise be legally-available,” thereby delegitimizing some part of existing rules and practices and preparing a new bundle of international law in the relevant field.<sup>67</sup> It may not only be because the norms are at least politically binding, but also because the legal principle of good faith or estoppel applies to those who agreed upon them.<sup>68</sup>

Many soft law norms do not stop formally being a political instrument *per se*, but will soon effectively turn themselves into legally binding rules.<sup>69</sup> For this reason, soft laws are increasingly recognized, or even actually intended, by state authors as “evidence of law” that should be applied to govern state behavior in relevant fields. Thus, from the initial drafting stage states would try to crystallize only later applicable law into these norms.<sup>70</sup> For example, the principle that the seabed and its resources are the common heritage of mankind was included in a resolution of the UN General Assembly as the first step in the process of developing a relevant treaty regime, and states would recognize the principle as applicable law before the UNCLOS incorporating it came into being.<sup>71</sup> A state decision to adopt soft law is therefore another expression of its desire to make it officially hard law.

#### *D. Analogous Legal Justification for Outcome Principles and International Law*

If a norm is to be called “law,” it must meet four basic requirements: the existence of a norm, the subject to which it is directed, the legislative process

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<sup>65</sup> U.N. GAOR, 44th Sess., 15th plen. mtg. at 76, U.N. Doc. A/44/PV.15 (Oct. 6, 1989).

<sup>66</sup> MURPHY, *supra* note 55, at 96.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Pronto, *supra* note 43, at 954.

<sup>70</sup> Mensah, *supra* note 31, at 50.

<sup>71</sup> *Id.* at 50–51.



to make the norm law, and the enforcement mechanism.<sup>72</sup> The first two are met in case of both international law and outcome principles generated by a major UN environmental conference. Thus, the existence of the legislative process and the compliance mechanism is the key to grant a firm legal status to the two distinct types of norms.

Above all, in testing the legal status of soft law principles, scholars have highlighted the problem of the lack of a legislative process. The outcome principles of the major UN environmental conferences have been produced through multilateral diplomatic processes. They are, however, fairly well-founded: preliminary steps to raise awareness among the Member States and the broader international community, an initial phase to trigger the General Assembly process towards convening a conference, stages for the works of a preparatory committee to create a zerodraft, including working group and expert meetings if necessary, intergovernmental negotiations based on the zerodraft to conclude the first draft before holding the conference, and final negotiations, revisions, and adoption of the text in the actual conference proceedings. Obviously, this whole course is full of deviations and anomalies compared to a congressional legislative process. From domestic viewpoints, there is no stable procedure, coherent coordination or democratic legitimacy.

However, it is interesting that the situation is not different in the case of treaty-making.<sup>73</sup> Although variations may exist, multilateral treaty-making more or less follows the same processes that soft law principles have to go through. They share material bases from platforms of a legislative process to participants. For instance, the format of a diplomatic conference under the auspices of the UN has been used not only for major environmental conferences that produced soft law principles governing the field but also for international law-making forums. Both are allowed to have their own rules of procedure, but the default is the Rules of Procedure of the UN General Assembly. Coordinators of such conferences are not necessarily top experts on the topic and procedure of the conferences. In addition, delegates have not been elected by their people even though they might be the agent of a democratically elected head of state or include that head of state self. For this reason, if the diplomatic process to make a treaty is an effective

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<sup>72</sup> SALEM H. NASSER, *SOURCES AND NORMS OF INTERNATIONAL LAW 27* (Mobility & Norm Change Vol. 7, Galda & Wilch Verlag 2008).

<sup>73</sup> International law-making processes, including ones for multilateral treaties, are generally described as “eclectic, unsystematic, overlapping, and often poorly coordinated.” See ALAN BOYLE & CHRISTINE CHINKIN, *THE MAKING OF INTERNATIONAL LAW 98–103* (Oxford Univ. Press 2007).

legislative process, so is the process to make outcome principles. If the latter cannot be recognized as such, the former should not either.

From the early stages of modern legal philosophy, the enforcement mechanism was believed essential in guaranteeing compliance and realizing the law's binding nature.<sup>74</sup> The mechanics of international society are, however, different from those of national societies. So far, international society does not have a judicial organ with comprehensive compulsory jurisdiction, a centralized enforcement system including a standing police force or army, or an executive body that governs all these institutions as in the domestic sphere.<sup>75</sup> Without any of these institutional guarantees, it is perhaps difficult to make the case that international law is binding. Indeed, in most cases international law does not enforce the obligations that it intends to impose.<sup>76</sup> If international law is *de facto* non-enforceable, how can it be called law?<sup>77</sup> Another relevant argument is that the enforcement mechanism of international law is inapplicable against powerful countries or disproportionately serves their interest.<sup>78</sup> On the other hand, there can be historical and contextual discourses to explain weaknesses in the enforcement of international law. International law is evolving relative to the growth of the international community and the latter may not yet have reached the level of sophistication that an advanced domestic system enjoys.<sup>79</sup> Scholars also consider that international law has idiosyncrasies

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<sup>74</sup> John Austin argued as early as the 1830s that law could be distinguished from other normative domains because of a threat to sanctions backed by the political sovereign. Hans Kelsen also had the view that a mechanism that enabled the law to "impose its demands" was "the most important of law's function." See Andrei Marmor & Alexander Sarch, *The Nature of Law*, in STAN. ENCYCLOPEDIA PHIL. (last updated Aug. 7, 2015), <http://plato.stanford.edu/entries/lawphil-nature>.

<sup>75</sup> Malcolm Shaw, *International Law*, in ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/topic/international-law> (last visited Apr. 20, 2016).

<sup>76</sup> Andrew T. Guzman, *Rethinking International Law as Law*, 103 ASIL PROC. 155, 155 (2009).

<sup>77</sup> Some scholars cast serious doubts on whether international law deserves to be called a kind of law. See generally Antonia Chayes, *International Agreements: Why They Count as Law*, 103 ASIL PROC. 158, 158–161 (2009); John R. Bolton, *Is There Really "Law" in International Affairs?*, 10 TRANSNAT'L L. & CONTEMP. PROBS. 1, 1–48 (2000); Eric A. Posner, *Do States Have a Moral Obligation to Obey International Law?*, 55 STAN. L. REV. 1901, 1901–19 (2003).

<sup>78</sup> Posner, *supra* note 77, at 1909–16.

<sup>79</sup> Since Kant's philosophical sketch titled "Perpetual Peace," there have been academic works focused upon the development of global governance, including a common governmental authority for all humanity. Immanuel Kant, *Perpetual Peace* (1795).

because its societal environment differs considerably from its domestic equivalent.<sup>80</sup>

All the above theses apply perfectly to explain soft law. Indeed, soft law has been rejected as international law for the same deficiencies. Soft law is known to be most vulnerable to the criticism that it lacks a binding nature as well as an enforcement mechanism, thus being unable to attract compliance. Therefore, traditional scholarship believed that soft law norms had validity as social or political barometers, which provided guidelines and standards to the extent they were socially or politically useful and influential, but could not provide legal rights and obligations nor guarantee punishment or compensation against an act of non-compliance or omission of an act required for compliance. Furthermore, during the course of all historic UN environmental conferences, delegations from developing countries complained that terms in the outcome might cause them difficulties while mostly benefitting the developed countries. In addition, evolutionism and contextualism, which can be used to refute the criticisms that international law is not law, have the same merits in defense of soft law.

Further down the road, what will be the true meaning of the bindingness of law? Is compliance with law possible without enforcement, or is law somehow enforceable without an enforcement mechanism? In the Austinian conception of law, the word “binding” refers firstly to the enforceability of a norm by a sovereign power that dominates the use of force.<sup>81</sup> That is to say, law must be complied with, and if this is not the case, physical or other coercive force will intervene to make it so, including imposing penalties or levying costs for non-compliance. However, such a conception of law is not always true or real, in both domestic and international realms, and particularly in the latter. Thus, the distinction between law and non-law made by the enforceability of each norm may not be correct in international law.

It is generally understood that conduct becomes non-optional when it is coerced by force. However, similar obligatory behavior can also be attained through an intense social response that falls short of physical sanctions authorized by a government, so long as they are of a scope and magnitude

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<sup>80</sup> For example, Emmerich de Vattel defined principles as a set of legally enforceable norms, articulated within diplomatic practice, thus rendering their application fit for international relations. See Amanda Perreau-Saussine, *Lauterpacht and Vattel on the Sources of International Law: The Place of Private Law Analogies and General Principles*, in VATELPACHT AND VATTEL ON THE SOURCES OF INTERNATIONAL LAW 167, 170–73 (Vincent Chetail & Peter Haggemacher eds., Martinus Nijhoff 2011).

<sup>81</sup> Mehrdad Payandeh, *The Concept of International Law in the Jurisprudence of H.L.A. Hart*, 21 EUR. J. INT'L L. 967, 969 (2010).

that could produce a result of habitual compliance.<sup>82</sup> Once turning away from a rigid positivist thesis, a law can be identified whenever conduct was made non-optional or obligatory regardless of the sources of influence that made actors comply with the law.<sup>83</sup> At the international level, public opinion in the international community has performed the same function with incremental power and dynamism. The efficacy of naming and shaming by the international community is now critical in changing state behavior as international relations become dense and interwoven due to many global agendas that affect the daily life of peoples in multiple countries. Therefore, it is right to conclude that in order to understand international law today we need to accept a broader definition of the bindingness in law.

This is also the key to properly address the state of soft law in international law. Whereas many scholars permit putting aside the traditional meaning of bindingness in evaluating the legal status of international law, they still would like to apply it strictly to soft law for fear that it might seriously compromise international law scholarship. They do not want to make international law more vulnerable by officially accommodating any soft law as a valid source of international law. Redemption from softness is, however, a critical challenge for both international law and soft law, and international law scholarship, despite all defenses (and attacks), cannot provide irrefutable logic and rationale to detach itself from soft law. Soft law is soft more or less to the extent of international law, and it is very difficult to discover a categorical difference between the two. This is particularly so, if a soft law instrument has acquired its normative power from “principles.”

#### IV. PRINCIPLES AS A SHARED SOURCE OF INTERNATIONAL LAW AND SOFT LAW

Interestingly, despite the fact that both international law and soft law do not satisfy a fundamental condition to be law, states have somehow chosen a limited number of international law sources and decided to give them recognition as possible means to create their legal obligations.<sup>84</sup> According to traditional legal scholarship, these sources of international law are roughly identical to what the ICJ Statute requested the Court to apply when an

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<sup>82</sup> H.L.A. Hart called this intense social response a “general pressure for conformity” and thought that it may qualify as the binding attribute of law. See Sean D. Murphy, *The Concept of International Law*, 103 ASIL PROC. 165, 166–67 (2009).

<sup>83</sup> *Id.* at 166.

<sup>84</sup> COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 5–6 (Dinah Shelton ed., Oxford Univ. Press 2003).

international dispute arose and has been brought to the Court.<sup>85</sup> Notwithstanding the invention of a class of “hard international law,” the distinction between international law and soft law becomes much more difficult when it comes to evaluating the legal status of principles. First of all, the term “principles” is the name that is found in both categories as a source of law (or norm if one would argue that soft law is not a law in the true sense). As explained previously, an instrument of soft law with stricter formality and influences, such as a declaration, often contains principles as its main source that endows normative power to that instrument.<sup>86</sup> In international law, too, as Article 38(1)(c) of the Statute of the ICJ illustrates, principles are regarded as a source of law:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply . . . the general principles of law recognized by civilized nations.<sup>87</sup>

Whereas a soft law declaration often contains principles as its main content, they are found, only occasionally and partially, in international conventions or in the form of international custom, and it is difficult to identify any separate type of international law instruments that typically contains principles. Additionally, there is no international law or soft law instrument at all that provides a clear and express definition.<sup>88</sup> However, the ICJ Statute listing them as an independent source provides itself considerable clues to this long-standing but little known source that allegedly belongs to law and non-law simultaneously.

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<sup>85</sup> *Id.* Decisions of the ICJ binds the state parties and have affected the behavior of other states seriously by setting precedents, despite the provision to the contrary in the statute of the Court. *See* Statute of the International Court of Justice art. 59, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933 [hereinafter ICJ Statute].

<sup>86</sup> The paragraphs of the Declaration are given an explicit title with numbers such as Principle 1, Principle 2, and so forth. Sometimes, there is a description at the start or end of the text that its contents represent principles. Or, though only implicitly, the form and substance of an instrument indicates that it indeed includes legal principles.

<sup>87</sup> Article 38(1) of the ICJ Statute is different from Article 38 of the Statute of the Permanent Court of International Justice (PCIJ). The PCIJ Statute only prescribes that the Court shall apply the four sources listed in its Article 38 and does not specify their legal character expressly although they should be the sources of international law. The ICJ Statute is clearer on this and adds a new parenthesis: by applying the four sources, the Court is to decide a case “in accordance with international law.” In this way, the ICJ Statute vividly states that they are the sources of international law.

<sup>88</sup> MURPHY, *supra* note 55, ch. 3, sec. C, at 86–88.

### A. Linguistic Analysis

Linguistically, it seems that “principles” as a source of international law has to satisfy specific conditions added to those “principles” as a source of soft law. It may then be important to examine what the conditions are and whether they draw meaningful distinctions between the two kinds of principles. From part of the JCJ Statute cited above, these conditions are described by the additional linguistic clusters that include “general,” “of law,” and “recognized by civilized nations.” The first and the third are closely linked, making one semantic unit insofar as “general principles of law recognized by civilized nations” cannot be distinguishable from “principles of law generally recognized by civilized nations” or “principles of law recognized by civilized nations generally.” It means the generality of a principle can be acquired ultimately by the recognition given by states, rather than simply the generality of substance within a principle at hand.<sup>89</sup>

Such an understanding may also be confirmed by the usage of the same term in other parts of the same article in the ICJ Statute. Apparently article 38(1)(a) distinguishes the international conventions into two types: “general or particular.”<sup>90</sup> Contextually this phrase is more obscure than clear and by itself does not explain much.<sup>91</sup> The differentiation between general and particular treaties was not clear in the *travaux préparatoires*, either.<sup>92</sup> Through subsequent practices, the Court has hardly approved this bifurcation. However, if it did, it usually referred to the distinction between multilateral and bilateral treaties respectively, which means that in the Court’s understanding the term “general” was, if ever, associated closely with the recognition given by the larger number of states.<sup>93</sup> In summary, it can be said based on a textual analysis, drafters’ intention, and subsequent usage that the general rules of interpretation of a treaty provided in the Vienna Convention on the Law of Treaties support the above semantics.<sup>94</sup> The same is true for Article 38(1)(b), which states that international custom

<sup>89</sup> Continental law and legal theories have recognized the notion of general principles of law as one of the sources of law. In the domestic context, general principles of law count generality acquired by law in a society. See generally Neha Jain, *Judicial Lawmaking and General Principles of Law in International Criminal Law*, 57 HARV. INT’L L. J. 111 (2016).

<sup>90</sup> ICJ Statute art. 38(1)(a).

<sup>91</sup> Alain Pellet, *Article 38*, in STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 731, 809 (Andreas Zimmermann et al. eds., Oxford Univ. Press 2012).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 810. Regarding a scholarly quest for distinction between general and particular treaties, see also Grigory Tunkin, *Is General International Law Customary Law Only?*, 4 EUR. J. INT’L L. 534, 536–39 (1993).

<sup>94</sup> Vienna Convention on the Law of Treaties art. 31, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

is the evidence of “a general practice accepted as law.”<sup>95</sup> The term “general” describes the geographical scope of the practice, which strongly implies the great number of countries involved in the practice in question.<sup>96</sup> In a recent report on the identification of customary international law, the ILC defined “particular” customary international law, which was a concept relative to “general” customary international law, as the rule of international custom applicable only among a limited number of states.<sup>97</sup> Their conclusion reaffirms that the meaning of the statutory term “general” can be reduced to describing the state of involvement or recognition by the number of countries to the extent of acquiring generality on a global scale.

Dealing with the “general principles of law recognized by civilized nations,” the ICJ agreed to rename this source of international law as a “generally recognized principle of law” in an advisory opinion on the Effect of Awards of Compensation Made by the United Nations Administrative Tribunal.<sup>98</sup> The court goes further to omit the word “general” in another advisory opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, showing the Court’s interpretation that this modifier is not crucial to understand the character of “principles” as the third binding source of international law under the Statute:

The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as “a crime under international law” involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, 11 December 1946). The first consequence arising from this conception is that the principles underlying the Convention are *principles which are recognized by civilized nations* as

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<sup>95</sup> ICJ Statute art. 38(1)(b).

<sup>96</sup> Pellet, *supra* note 91, at 829.

<sup>97</sup> Int’l Law Comm’n, *Identification of Customary International Law: Text of the Draft Conclusions Provisionally Adopted by the Drafting Committee*, U.N. Doc. A/CN.4/L.869, Draft Conclusion 16[15], at 4 (2015) [hereinafter ILC Identification of Customary International Law]; see also Olufemi Elias, *The Relationship between General and Particular Customary International Law*, 8 RADIC 67–88 (1996).

<sup>98</sup> Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, 1954 I.C.J. Rep. 47, at 53 (July 13, 1954).

binding on States, even without any conventional obligation (emphasis added).<sup>99</sup>

There have been scholarly attempts to identify differences between general and non-general principles. It was thought only the former constituted an international legal source under Article 38(1)(c) of the ICJ Statute although both were effective in systematization, interpretation, or progressive development of international law.<sup>100</sup> However, even these scholars had to admit that often the two kinds could not be separated, thus principles as a mere enabler for legal systemization, interpretation, or advancement cannot be clearly distinguishable from those constituting an international legal source.<sup>101</sup> Their conclusion is inevitable because principles are essentially general considering their jurisprudential nature, as previously explained, albeit that they can occasionally be applied to specific cases.<sup>102</sup> Of course, it might be conceivable that there are “more general” principles than others. In other words, some of the principles, such as the principle of proportionality, cover an extremely wide territory of application, whereas others, such as *nullum crimen sine lege*, are applicable only in a single field of law.<sup>103</sup> Alternatively, there may exist principles with a higher level of generalization that subsume other principles.<sup>104</sup> However, all these principles are general in their very nature—the nature which causes the former to guide the latter in application and interpretation. Generality was

<sup>99</sup> Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, at 12 (May 28). In *Corfu Channel*, the ICJ used the term “general and well-recognized principles” in its judgment.” See *Corfu Channel (U.K. v. Albania)*, Judgment, 1949 I.C.J. Rep. 4, at 22 (Apr. 9) [hereinafter *Corfu Channel Case*].

<sup>100</sup> Rüdiger Wolfrum, General International Law (*Principles, Rules, and Standards*), in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, ¶ 20 (Dec. 2010).

<sup>101</sup> *Id.*

<sup>102</sup> Georg Schwarzenberger noted in his lecture at the Hague Academy of International Law that every principle is an abstraction and generalization from individual cases or legal rules of an apparently more limited scope. See Georg Schwarzenberger, *The Fundamental Principles of International Law*, in 87 RECUEIL DES COURS 191, 201 (1955). In the *Gulf of Maine* case, the ICJ said that principles included rules of international law, thus applicable to cases by the Court, and still the use of the term “principles” may be justified “because of their more general and more fundamental character.” See *Gulf of Maine (Canada v. U.S.)*, Judgment, 1984 I.C.J. Rep. 246, para. 79, at 288–90 (Oct. 12). Dworkin also said that principles are norms more or less general in any way. See Muñoz, *supra* note 21, at 269.

<sup>103</sup> NICOLAS DE SADELEER, ENVIRONMENTAL PRINCIPLES: FROM POLITICAL SLOGANS TO LEGAL RULES 238 (Oxford Univ. Press 2002).

<sup>104</sup> Schwarzenberger called them the fundamental principles of international law. Note, however, that he correctly understood that the principles listed in Article 38(1)(c) include not only the fundamental principles but also principles that do not reach the same level of abstraction. See also Schwarzenberger, *supra* note 102, at 200–03.



not a term selected by the drafters of the ICJ Statute to make a categorical distinction between different kinds of principles in this way. Instead, they defined the term according to the level and scope of recognition given by states to a certain principle.<sup>105</sup> The drafters of the original text understood that general principles were those principles recognized by all or majority nations, and the part “recognized by civilized nations” was an indication of where the recognition of that generality originated.

It might still be necessary to unpack the enigmatic phrase, “recognized by civilized nations.” The focus on the term “civilized” inserted earlier in the PCIJ Statute has shifted partly because the UN membership became open to all peace-loving states under the Charter in 1945, which has become a barometer, if any, for a country’s level of civilization. However, this phrase remains valid except for that archaic modifier. There were different opinions in describing the way nations recognized the principles. In particular, some positivists have believed that general principles should consist solely of domestic legal principles.<sup>106</sup> Alain Pellet concluded in his commentary to Article 38 of the ICJ Statute that general principles of law must be discovered in domestic rules.<sup>107</sup> This extreme position also appeared among the Advisory Committee of Jurists, who drafted the PCIJ Statute, the predecessor of the ICJ. Lord Phillimore, Member of Privy Council of His Majesty the King of England, understood that the recognition referred to *foro domestico*.<sup>108</sup> He thought that the only way to avoid resorting to a legal norm in amorphous shape was to rely on the authority of a principle as it had developed from municipal law with established traditions thereby reducing the possibility of arbitrary application and interpretation.

However, other drafters did not seem to have agreed that principles should only come from national law. Elihu Root, former Secretary of State of the United States, who otherwise agreed with Phillimore on almost all other aspects, subtly differed when he said that law might vary from country

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<sup>105</sup> Drafters did not contend that a state could approve a norm as a general principle while opting out of others as non-general principles. Generality of a principle has not been discussed in this way.

<sup>106</sup> Abdul G. Koroma, *The Application of International Law by the International Court of Justice*, in 4 COLLECTED COURSES OF THE XIAMEN ACADEMY OF INTERNATIONAL LAW 1, 127 (2011).

<sup>107</sup> Pellet, *supra* note 91, at 769–70. Note that Pellet describes himself as being “neither a positivist, nor a moralist.” See Jost Delbrück et al., *Comments on Chapter 13 and 14, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW* 416, 421 (Michael Byes & Georg Nolte eds., Cambridge Univ. Press 2003).

<sup>108</sup> P.C.I.J. ADVISORY COMMITTEE OF JURISTS, PROCÈS-VERBAUX OF THE PROCEEDINGS OF THE COMMITTEE, JUNE 16TH–JULY 24TH 1920, WITH ANNEXES 335 (Van Langenhuyesen Brothers 1920) [hereinafter P.C.I.J. ADVISORY COMMITTEE PROCEEDINGS].

to country and thus a separate accord among states would be necessary to mark a rule to be applicable as a source of international law.<sup>109</sup> Arturo Ricci-Busatti, Legal Adviser to the Ministry of Foreign Affairs of Italy, also agreed to limit international legal sources to positive law but did not pay much attention to domestic law.<sup>110</sup> Furthermore, Baron Descamps, Senator and Belgian Minister of State and then President of the committee, emphasized the importance of the demands of public conscience at the international level as a form of recognition by civilized nations.<sup>111</sup> Switzerland, one of the core stakeholders in establishing the PCIJ, also clarified that principles should come not from municipal law but from the law of nations, which was another name for international law at the time.<sup>112</sup>

It might be helpful to check against the usage of the term in other parts of the same statute. Article 38(1)(a) lists as another source of international law “international conventions . . . that establish rules expressly recognized by the contesting states.”<sup>113</sup> The focus here textually and in practice is on an agreement of states. Whether what is agreed internationally already is contained in the domestic rules of the respective states does not matter. In most cases, a government usually agrees on a set of rules when they are not in contravention with relevant domestic rules. However, this does not always mean that the former have existed as domestic law. The recognition by states refers to their agreement only and is logically distinguishable from domestic legal situations. The existence of municipal rules is not a necessary or sufficient condition for the international convention to establish rules. Conversely, it is rather clear that there have always existed fields that need to be regulated and governed, to which most domestic laws do not yet apply. Prime examples would be some of the newly emerging environmental areas. Even though there are a handful of innovative countries whose governments pioneered the regulation of these areas, simple transposition of their domestic law to international law may not be adopted by other members of the international community.<sup>114</sup>

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<sup>109</sup> *Id.* at 287, 310.

<sup>110</sup> *Id.* at 314–15. Ricci-Busatti rather preferred to have “a reference to international jurisprudence.”

<sup>111</sup> *Id.* at 310.

<sup>112</sup> *Id.* at 91.

<sup>113</sup> *Id.*

<sup>114</sup> On the other hand, Lauterpacht is the champion of the idea that private law rules can become sources of international law through analogy. He believed the common law principles are indeed a part of international law. *See* Perreau-Saussine, *supra* note 80.

The plain meaning of “recognized by civilized nations” does not necessarily coincide with “recognized *in* civilized nations.”<sup>115</sup> Rather, general principles recognized by nations should refer to those principles so widely recognized “by” civilized nations that the type of recognition can be characterized as general recognition. Those principles known to be derived from sources other than domestic law must pass the same test that civilized nations perform collectively to serve as a source of international law.<sup>116</sup> As a set of legally enforceable norms, principles must be articulated and screened through diplomatic exercises on a global scale to render their application fit for international relations. Surely, this source of international law also includes laws directly derived from the specific nature of international relations and the international community that is involved in those relations, which are not necessarily identical to municipal laws.<sup>117</sup> The ICJ also approves this approach.<sup>118</sup> In the same vein, even though a principle is premature, not established in the domestic context and considered at best an example of progressive legal development from the standpoint of traditional scholars in a certain country, it still can be recognized as international law. For instance, in the Corfu Channel case, the ICJ found that the general principle of innocent passage should stand as a source of international law

<sup>115</sup> Phillimore, the only drafter who had insisted that principles should come from domestic law, stated that “the general principles referred to in point 3 were these which were accepted by all nations *in foro domestico*.” Here, he actually added “*in foro domestico*” to “by all nations” even though the latter phrase alone is sufficient to represent the meaning of “by civilized nations.” See P.C.I.J. ADVISORY COMMITTEE PROCEEDINGS, *supra* note 108, at 335.

<sup>116</sup> Abdul G. Koroma suggests four categories of general principles (principles derived from domestic law, principles of international law, basic rules and maxims, and principles governing judicial procedure and evidence) and Oscar Schachter proposed six categories (principles of municipal law that are recognized by civilized nations, principles that are derived from the unique character of the international community, principles that are intrinsic to the idea of law and basic to all legal systems, universalist principles that are valid through all kinds of human societies and that echo the idea of natural law, and principles of justice that are premised on the rational and social nature of human beings). See Koroma, *supra* note 106, at 118–22; OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 50–55 (1991); Neha Jain, *Judicial Lawmaking and General Principles of Law in International Criminal Law*, 57 HARV. INT’L L.J. 111, 117 (2016). These categorical approaches could not sacrifice the requirement of recognition; that is to say, regardless of its origin and kind, a general principle should be “recognized by civilized nations.”

<sup>117</sup> Koroma called “principles of international law” and Schachter explained them by using a detailed description “principles that are derived from the unique character of the international community.” Generally, scholars today do not confine the origin of general principles in *foro domestico*. See Koroma *supra* note 106, at 119; SCHACHTER, *supra* note 116, at 50.

<sup>118</sup> Providing several ICJ cases, Gaja notes as follows: “When the ICJ referred to principles of international law or to general principles, it often considered principles that do not find a parallel in municipal laws.” See Giorgio Gaja, *General Principles of Law*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, ¶ 17 (May 2013).

that the court could apply even when there was no such domestic rule, and was unable to find an obligation specifically applicable to Albania's conduct.<sup>119</sup>

The same is true with many of the principles enshrined in the outcome documents of the major UN environmental conferences. For example, the principle of common but differentiated responsibilities of states might not have existed domestically in some countries when it first appeared in the Stockholm Declaration.<sup>120</sup> Of course, it could be said that by that time the normativity of this principle as a source of international law lived in the conscience of people of the world that day. Over a hundred heads of state and government as well as numerous representatives from civil society organizations participated in Stockholm in 1972 and confirmed the principle. In particular, that fact that a great deal of states adopted the principle satisfies the core requirement that is expressed in the "general principles . . . recognized by civilized nations."<sup>121</sup>

The third addition "of law" might be redundant theoretically and practically. It is self-evident that principles on how to govern a field of international concern are legal principles rather than the principles of physics, economics, or politics. For instance, a principle in physics explains how the natural world works in general.<sup>122</sup> Physical principles therefore are not man-made whereas legal principles are.<sup>123</sup> The difference here comes from the dissemblance in the two worlds that respective disciplines aim to explain. However, the conceptual difference in various types of principles does not have a single dimension. The possible confusion between legal principles and moral or political principles might not be resolved in the aforementioned fashion. Perhaps, for the purpose of this Article, the former

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<sup>119</sup> Corfu Channel Case, *supra* note 99, at 22.

<sup>120</sup> The Stockholm Declaration approved, for the first time, the existence of collective responsibilities among states for environmental problems though with varying degrees according to the economic situation of respective states, when it states that "the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries." See *Stockholm Declaration*, *supra* note 10, Principle 23.

<sup>121</sup> *Id.* at 116.

<sup>122</sup> John W. Carroll, *Laws of Nature*, in STAN. ENCYCLOPEDIA PHIL., <http://plato.stanford.edu/entries/laws-of-nature> (last updated Aug. 22, 2016).

<sup>123</sup> Medieval jurists thought analogously, however, that there were natural laws enacted by God, thus unable to be defeated just as the law of nature in physics will come true without exception. According to the tradition, Vattel understood that the law of nations referred to those "principles of the law of nature" that were applicable to the "conduct and affairs of nations and sovereigns." See also EMER DE VATTEL, *THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, WITH THREE EARLY ESSAYS ON THE ORIGIN AND NATURE OF NATURAL LAW AND ON LUXURY* (Liberty Fund, Inc. 2008) (1797).

can translate into the principles attached with legal obligations while the latter are those only having moral or political influence. The distinction “of law” does not emanate from the subject area that the principles are to cover, but has more to do with their normative status, to which the question of the modifier “legal” or “moral” is merely inconsequential.

If the status of a principle has sufficient legal implications, it leans towards the principle of law. Thus, the proper inquiry is about how much normative power principles have, not about whether they are *a priori* legal or moral, simply begging the question.<sup>124</sup> As previously discussed, jurisprudentially a principle lies between the value, which is moral or political in nature, and the rule, which is legal in nature. Thus, it is inappropriate to say that the status of a principle is strictly moral/political or legal. For instance, “equality” serves both as a legal and political principle. Judges of an international court will use equality as a legal principle if they need to apply it as a source of law in adjudicating a case. There is no rule that requires an international court to categorically exclude this principle from the applicable sources of law. Nor is there an inherent obstacle to call the principle legal, as long as it is intended to govern a field of international concern and is generally recognized as such by states. Exactly the same applies with soft law principles. If it is difficult to discern a legal principle from a soft law principle, it is only inasmuch difficult as to identify which principle falls on a legal source for international law and which one does not.

### *B. Drafter's Formula*

The drafters of the PCIJ Statute spared considerable time and energy in arguing for and against the validity of principles as law. In fact, the focus of their discussions about the concept of principles was much more radical than today's perspectives. They did not make a distinction between soft and hard law principles at all. Rather, drafters directly applied the arguments related to soft law that critics use today to evaluate the legal status of what then became a binding source of international law. Initially a few of them raised serious doubts whether principles could ever be considered law. This is exactly the same sort of suspicion attached to soft law principles all the time. Thus, drafters questioned a thesis that the Court could deliver judgment based on general principles believing only positive law as a valid source of international law.<sup>125</sup>

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<sup>124</sup> See also Anthony H. Lesser, *H.L.A. Hart on International Law*, 11 KRITIKOS, Apr.–Sept. 2014, <http://intertheory.org/HartandInternationalLaw-AHLesser.htm>.

<sup>125</sup> See P.C.I.J. ADVISORY COMMITTEE PROCEEDINGS, *supra* note 108, at 229–30, 286–287 (paying particular attention to the comments made by Root).

Among them, Phillimore relied upon domestic law, as discussed earlier, with the reasoning that any political influence or judicial arbitrariness must be blocked in the Court's adjudication under international law and the best way to guarantee this blockage was to use positive domestic law. Instead, Ricci-Busatti, in fear that general principles might be interpreted at variance in different countries, leaned towards applying universally recognized positive rules of international law.<sup>126</sup> Root argued that the Convention relative to the Creation of an International Prize Court, adopted to establish an arbitral court at the Second Hague Peace Conference in 1907, could not enter into force because it included principles as an applicable source of law and states refused to run the risk of having another unpredictable court.<sup>127</sup>

The scholars insisted that in cases where there are only principles available as a legal source for its judgment, the court should "declare itself incompetent" or "limit itself to making a recommendation instead of pronouncing sentence."<sup>128</sup> According to them, when there was no applicable rule, the matter in question was political in nature and parties should appeal to the Council of the League of Nations, which had competency to resolve the cases that could not be dealt with in a court according to law. They thought that otherwise countries would not be willing to comply with the court's decision and the drafters' scheme for compulsory jurisdiction might not work in practice.<sup>129</sup> Their argument strongly implies a reflection at the time that international courts had failed to promote the peaceful settlement of international disputes. As a potential consequence, judicially uncontrolled exercises of political powers contributed to fostering the context that enabled the outbreak of World War I.

However, the rest of the members of the Advisory Committee disagreed with this view. Francis Hagerup, Envoy Extraordinary and Minister Plenipotentiary of His Majesty the King of Norway at Stockholm replied that the Court could not effectively contribute to the development of international law under a construction that excluded principles as a basis of the PCIJ decision.<sup>130</sup> Mineichiro Adatci, Envoy Extraordinary and Minister Plenipotentiary of His Majesty the Emperor of Japan at Brussels indicated a problem in the presupposition of the theory that the Court could not deliver judgment where there were no conventional international laws.<sup>131</sup> Bernard

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<sup>126</sup> *Id.* at 314–15.

<sup>127</sup> See Declaration concerning the Laws of Naval War, Feb. 26, 1909, pmb. para. 3, preliminary provision, <https://www.icrc.org/ihl/INTRO/255?OpenDocument>.

<sup>128</sup> P.C.I.J. ADVISORY COMMITTEE PROCEEDINGS, *supra* note 108, at 309–10.

<sup>129</sup> *Id.* at 286.

<sup>130</sup> *Id.* at 308.

<sup>131</sup> *Id.*

Loder, Justice of the Supreme Court of the Netherlands, who later became the first President of the PCIJ, also affirmed that it was constant and clear in international jurisdictions that judicial silence on the matter presented to it amounted to a denial of justice and thus the judge should decide upon cases even when there is no conventional or customary law.<sup>132</sup> Descamps further emphasized that principles would actually impose a duty on the judges by preventing them from relying upon subjective opinions and using too much discretion:

That was the law which could not be disregarded by a judge, a law which in practice, whether it is wished to or not, a judge never would disregard.<sup>133</sup>

He also referred back to the Hague Conference and testified that as opposed to Root's summary participant states opined at the time that the law of war was not only formed by rules but also by the "demands of [the] public conscience," by which he meant principles.<sup>134</sup> Descamps provided his observation that, unlike certain rules of secondary importance, principles were relatively stable and authoritative.<sup>135</sup> As sessions were completed, the members of the committee, including the three opponents, agreed that there were cases in which the Court should apply new rules. The true nature of the international arena goes beyond not just the coverage provided by domestic legal systems but also the judicial territory regulated by convention or custom.<sup>136</sup> Global affairs often include the field of law, where there is no exact convention and the formation of custom is also unclear or still in progress. Thanks to the undeniable necessity of principles, the Advisory Committee finally reached an agreement to include principles as one of the sources of international law for the PCIJ.<sup>137</sup>

Debates in the committee do not support adversaryism about the legal validity of soft law compared to hard law. As previously mentioned, there was no distinction made at all between hard law principles and soft law principles in the drafting committee's discussion. Even though some would like to be more subtle in their arguments, which might still enable us to

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<sup>132</sup> *Id.* at 312.

<sup>133</sup> *Id.* at 311.

<sup>134</sup> *Id.* at 310. Albert de Lapradelle, Professor of the Faculty of Law of the University of Paris, also said that the failure of the London Declaration had nothing to do with the alleged unwillingness of participant states to accept the general principles as a source of law. Hagerup also agreed with Lapradelle's understanding of the proceedings. *Id.* at 286–87, 317.

<sup>135</sup> *Id.* at 310–11.

<sup>136</sup> *Id.* at 323.

<sup>137</sup> *Id.* at 319.

distinguish general principles binding states from principles that do not have such force or restrict the application of the third source of international law itself. However, at least the original view by drafters of the PCIJ Statute was that principles should be recognized as a legal source more broadly—without a hard-soft distinction. Of course, the drafters who supported the inclusion of principles in the list of sources of international law also had in mind the need to clarify the meaning and boundary of principles in order to avoid misuse and abuse.<sup>138</sup> However, in the end they decided to add principles to the list of sources of law applicable in the adjudication of the PCIJ while they could not discover any proper measure to respond to possible confusion and doubt.<sup>139</sup> More precisely, they did not appear to make much effort to address this concern—or perhaps need not have done so—except an elucidation that these rules could stand insofar as they dictated the “legal conscience of civilized nations,” that is to say, ones “approved by universal public opinion.”<sup>140</sup> This may be the critical resolution to address those weaknesses conceivably intrinsic to principles as a legal source.

Further notable is that drafters used the terminology “principles” in their discussion without any modifiers. The report of their discussion shows that principles themselves represent their general legal character as far as they are recognized by the majority of states.<sup>141</sup> As a matter of fact, judiciaries have used principles quite often.<sup>142</sup> A growing number of scholars today also

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<sup>138</sup> The President of the Advisory Committee of Jurists mentioned that “one of the most important tasks of the Committee is to try to make them so clear as to be proof against dispute.” Participants in the First Hague Peace Conference of 1899 already recognized the same need. *Id.* at 322.

<sup>139</sup> Phillimore did not discard the thesis that general principles should be derived solely from *foro domestico* almost until the end of the relevant discussion. However, his approach did not represent the general ideas of the Committee. It seemed that Phillimore desired to be consistent in raising what he thought was important while allowing others to win the game, which is a known practice and part of the art of consensus in the context of multilateral diplomacy. Summarizing the debates on general principles Fernandes concluded that international affairs needed principles as a source for the Court’s adjudication just as domestic affairs needed principles as such for the same purpose. In doing so, he did not assimilate the former with the latter, nor did he even contemplate a link between the two. *Id.* at 345–46.

<sup>140</sup> *Id.* at 318–19; *see also* Gaja, *supra* note 118, para. 3. Again, some possible reasons for this passivity could be found in their understanding of international relations as the context in which to realize the ideal of law. This view was expressed in a speech by Descamps on the rules of law to be applied in an international court. *See* P.C.I.J. ADVISORY COMMITTEE PROCEEDINGS, *supra* note 108, at 322–23.

<sup>141</sup> Descamps provided his two-fold complementary evidence to test the existence of a principle: “the concurrent teachings of jurisconsults of authority” and “the public conscience of civilized nations.” Fernandes added that those principles should not have been rejected by the legal traditions of one of the States concerned in a dispute. *See id.* at 324.

<sup>142</sup> *See id.* at 135.



concede such legal significance of principles.<sup>143</sup> Most of the drafters of the PCIJ Statute themselves believed principles were a trustworthy source of law, rather than something arbitrarily crafted, in their pursuit of “objective justice.”<sup>144</sup> Moreover, that objectivity can be acquired by the recognition of states in accordance with the statutory language. They believed that the legal conscience of civilized nations that a judge should be allowed to take into account would be illustrated clearly on certain occasions.<sup>145</sup> These occasions are, according to the drafters, when the assembly of civilized states unanimously approved a group of relevant principles.<sup>146</sup> Thus, from the beginning, the only proof that some principles were a legal source could be found in the weighty consensus of a large number of convened states.

*C. Practice in International Conferences: A New Legislative Process*

Principles declared in a conference carry stronger implications when they mobilize larger and more significant participation. The scope and level of representation at an international conference becomes a meaningful parameter to gauge the political will of the international community behind the conference. Ultimately, it determines the intensity of normative power loaded onto the outcomes of the conference. Countries sending their delegates to an international conference often have their interests at stake when putting their own national positions and priorities in the proceedings of the conference, including in its final outcome. Above all, when the conference attracts many high-level participants, these leaders’ statements in the conference and acts of adoption of the outcome directly affect their national behavior, policy and legislation. It might not be exactly clear what legal effect and meaning the participation of the head of state or the act of his or her adoption of the outcome gives to the status of the outcome. However, in a conference under the auspices of the UN to adopt an outcome assuming to govern a field of global concern, a Member State will not send her president or prime minister without expecting any significant legal effect and meaning. In this context, the choice of level and size of a delegation by a government is an official expression of their will (or reluctance) about the conference and its outcome.

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<sup>143</sup> See the discussion outlined in *supra* note 52.

<sup>144</sup> Descamps named principles as a source of international law for the PCIJ as a means to achieve “objective justice.” See P.C.I.J. ADVISORY COMMITTEE PROCEEDINGS, *supra* note 108, at 322–23. Fernandes’s view supplements Descamps’s since he said that a sentence based on principles was generally more just because they were based on justice, whereas strict law often departed from it. *Id.* at 345–46.

<sup>145</sup> *Id.* at 323–24.

<sup>146</sup> *Id.*

The scope and level of representation at an international conference also delineates the applicable boundary of the conference outcome. Above all, it binds participant countries in one way or another.<sup>147</sup> In the preparatory process to produce the zero draft, countries are allowed to submit a position that has materialized the will of their respective constituencies.<sup>148</sup> The countries continue striving to embody and retain policies and priorities contained in their position throughout the process of negotiations until the conference officially adopts the final outcome.<sup>149</sup> Hence, participant countries are generally bound by this outcome insofar as they are bound by the will of their people that drove them to be part of the proceedings. It also means that there would not be critical reasons or incentives in most of the cases in which a country should violate or be unwilling to be in compliance with what it agreed. Turning to the international dimension, it is generally expected in international relations that a state should not contradict its verbal or behavioral commitment. The basic responsibility of estoppel is very important and realistic if the state wishes to be treated as a faithful partner by other members of the international community.

With this backdrop, consent is a critical foundation for better arbitration among sovereign states in an international legal system today. Once states concede in an international conference to adopt outcome principles, they formally carry normative significance at the international level. Even if the outcome principles do not exactly reflect each and every detail of national policies and priorities, state compliance is required and the burden to further communicate with and persuade its people to mitigate any differences lies with the government that conceded the outcome, except when corruption or other unfair practices were involved in the conference proceedings. This is also true even if a country in question objected to some of the adopted principles in the phases of negotiation. With an aim to restrict the applicability of a particular principle after the conference, the delegation usually delivers a statement at some point during the proceedings—even through EOY after adopting the outcome—that it does not consent to or has reservations about the principle. However, if the country never plans to accept the proposed principle, it does not simply drop out with such discontent or reservation. Instead, the country would obstruct the inclusion of the principle in the outcome or revise the contents through consultations or other diplomatic measures, or simply by stubborn and persistent objections, during the preparatory and actual proceedings of the conference.

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<sup>147</sup> *Id.* at 344.

<sup>148</sup> *Id.* at 345–46.

<sup>149</sup> Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 18232.

Such practices are possible, particularly when the conference favors consensus as a rule of procedure to adopt the outcome, which is often the case with most of the important international norm-setting conferences.<sup>150</sup>

Under the consensus rule, it is indeed possible to prohibit a particular term, phrase or sentence from being included in the outcome of the conference. Even a single country may deter unwarranted language if it feels it truly must do so. This is not just a theoretical possibility. The UN was established as a post-war international system to deter additional world wars and the founders believed that respect for sovereign equality was the basis of the organization.<sup>151</sup> By definition, consensus means the meeting of minds of all countries participating in the negotiation, and in determining whether they reach a consensus, the sovereign equality of all members of the UN applies. Therefore, a strong country could not prevent a weak one from raising an objection with which to obstruct consensus. In the age of the Cold War, the pressure exercised within an ideological group of states was powerful, but it is no longer effective some time after the collapse of the Berlin Wall in 1989.<sup>152</sup> Furthermore, from the mid-2000s on, the world's power dynamics have been changed and the leadership assumed by a "single superpower" has been shared by other diversified groups, which greatly affected the way negotiations are conducted inside the UN.<sup>153</sup> Most of the recent General Assembly resolutions were adopted by consensus whereas around 40%–70% (depending on the year in question) were adopted by voting until the 1980s.<sup>154</sup> Particularly in the Sixth (Legal) Committee of the General Assembly today it is hard to find exceptions to this practice. As a result, for instance, during meetings held in the 70th session of the General Assembly to examine the agenda items to grant observer status to applicant

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<sup>150</sup> In advance of decisions, a country has to undergo a cost-benefit analysis between the national interest in dropping a specific proposal and competing foreign relations interests with its proponents and/or supporters.

<sup>151</sup> U.N. Charter, art. 2, ¶¶ 1–3.

<sup>152</sup> *But see* Louis B. Sohn, *United Nations Decision-Making: Confrontation or Consensus?*, 15 HARV. INT'L L. J. 438, 444 (1974) ("A closer look at [U.N.] records makes it quite clear, then, that despite verbal pyrotechnics, often emphasized by the information media, the work of the [U.N.] proceeds quite smoothly, most decisions being adopted by unanimity or quasi-unanimity. Consensus has in fact replaced confrontation.").

<sup>153</sup> *See generally* Erik Voeten, *Resisting the Lonely Superpower: Responses of States in the United Nations to U.S. Dominance*, 66 J. INT'L POLITICS 729 (2004); *see also* United Nations Programme No. 934, *The UN Security Council – from the Cold War to the 21st Century*, U.N. WORLD CHRONICLE (Mar. 30, 2004), moderated by Tony Jenkins (transcript available at <http://www.un.org/webcast/worldchron/trans934.pdf>).

<sup>154</sup> Compare chronologically the voting records of the resolutions adopted by the UN General Assembly at <http://research.un.org/en/docs/ga>.

organizations, three among seven applications could not go through because of the objection raised by one or two countries.<sup>155</sup>

Another reason a country would rather exclude language it opposes from the outcome is that the records of objection or reservation only appear in the report of the conference at best and may not become part of the outcome document itself. Consequently, they do not have a clear legal status, nor are they visible as in the adoption and ratification of a treaty, in which case a reservation, declaration, understanding, interpretative statement, etc. are officially attached to partly exclude or modify the legal effect of the treaty.<sup>156</sup> In other words, there is no legitimate ground for non-compliance given to a country that made objections or reservations to a proposal but ultimately agreed to include that proposal in the final outcome. In most cases, therefore, a state blocks all that it cannot take, allowing only what it finds acceptable to survive in the outcome text.<sup>157</sup>

The Declaration on the Rights of Indigenous Peoples, one of the recent declaratory instruments, is a good example. Before its final adoption in 2007, the Declaration had a pre-history of negotiations, longer than that of many treaties. Negotiations on the Declaration were first started by the Working Group on Indigenous Populations in 1982. The UN Economic and Social Council (ECOSOC) established the working group, instigated by a report titled "Study of the Problem of Discrimination against Indigenous Populations" by José R. Martínez Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities drafted.<sup>158</sup> However, twenty-five years' discussion could not clear all obstacles. The African Group led by Namibia raised their voice in 2006 in the form of an aide-mémoire several months after the text of the declaration was first adopted in the Human Rights Council.<sup>159</sup> They argued that the Declaration should be adjusted to reflect African concerns before the General

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<sup>155</sup> U.N. GAOR 71st Sess. U.N. Doc. A/C.6/70/SR.10, 11, 16, 24, 27, 29 (see the summary records of the meetings of the 6th Committee of the UN General Assembly for the agenda items 168 to 174.)

<sup>156</sup> See Vienna Convention on the Law of Treaties, *supra* note 94, arts. 19–23.

<sup>157</sup> Of course, there are cases in which states neglect to take action or allow negotiations to run their own course, due to lack of resources and capacity, or simply incidentally. However, such mistakes are not only found in negotiations for soft law text, but would also happen in the treaty-making process.

<sup>158</sup> José R. Martínez Cobo, *Study of the Problem of Discrimination Against Indigenous Populations*, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (1986), <http://repository.un.org/handle/11176/354767>.

<sup>159</sup> Draft Aid Memoire on the United Nations Declaration on the Rights of Indigenous People, AFRICAN GROUP, ¶ 9.2 (Nov. 9, 2006), <http://www.iwgia.org/images/stories/int-processes-eng/decl-rights-ind-peop/docs/AfricanGroupAideMemoireOnDeclaration.pdf> [hereinafter Draft Aid Memoire].

Assembly adopted it.<sup>160</sup> In the face of their hesitation, African delegations were advised that the Declaration was not a legally binding document and a state could just choose to ignore it.<sup>161</sup> However, the African Delegations famously replied that a declaration had been more than a non-binding political document:

[F]or the common people in the street of Africa, there is no difference between a politically non-binding [d]eclaration and a [t]reaty. What is important to them would be the fact that Governments or the United Nations have committed themselves to specific actions.<sup>162</sup>

The delegation also argued that the Declaration might form part of international customary law in the foreseeable future.<sup>163</sup> As a result, they concluded that “it would be inappropriate to adopt the Declaration with its shortcomings simply because it is considered to be a declaration and therefore not legally binding.”<sup>164</sup> The memo further suggested, “If it is envisaged that there would be legal and constitutional implications arising from the adoption of the Declaration then the time to address such matters is before and not after adoption.”<sup>165</sup> For these reasons, African countries requested more time to review the text,<sup>166</sup> which the General Assembly approved by its resolution, and one more year must pass before the declaration is adopted.<sup>167</sup>

It is also interesting to see the record of objection raised by the Member States of the UN during the prolonged negotiations. Some of their complaints were premised on the assumption that the Declaration might put their governments under legal obligations in conflict with existing domestic laws or treaties. States which did not live up to the wording of the Declaration would be “doing more than simply neglecting a political statement.”<sup>168</sup> While there were attempts to register an understanding that

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<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* ¶ 9.3.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* ¶ 9.4.

<sup>167</sup> Rachel Murray, *The UN Declaration on the Rights of Indigenous Peoples in Africa: The Approach of the Regional Organizations to Indigenous Peoples*, in *REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES* 485, 502–04 (Stephen Allen & Alexandra Xanthaki eds., Hart Pub. Ltd. 2011).

<sup>168</sup> *Id.* at 503.

the declaration was not a legally binding instrument, many more participants were ambivalent about the legal status of the declaration:

The Declaration is explained by its supporters as being an aspirational document intended to inspire rather than to have legal effect. New Zealand does not, however, accept that a State can responsibly take such a stance towards a document that purports to declare the contents of the rights of indigenous people. We take the statements in the Declaration very seriously. For that reason we have felt compelled to take the position that we do.<sup>169</sup>

Immediately after the adoption, their worries turned out to be real. The Supreme Court of Belize delivered a judgment months later with its interpretation that the Declaration contained the “principles of general international law,” and was thereby legally binding.<sup>170</sup>

As a consequence of such a process, what is included in the outcome document may represent the greatest common denominator of participants in the conference. It is not unusual that the majority of state participants show compliance with the principles once adopted in an international conference. Perhaps, it is the true meaning of Louis Henkin’s brilliant observation that “[i]t is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”<sup>171</sup>

#### *D. Conditions to Make Principles International Law*

What would be the meaning of this legislative process, which is serious enough and thus likely to grant legal status to declared outcome principles? Thus far, a thesis may be put forth that principles produced by the major UN environmental conferences can be law insofar as principles as an international law source are law. This is because offenses and defenses for the two instruments are alike, as was evidenced by the analyses of their context, jurisprudential nature, textual similarity, drafters’ intention, and

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<sup>169</sup> U.N. GAOR, 61st Sess., 107th plen. mrg. at 14–15, U.N. Doc. A/61/PV.107.

<sup>170</sup> Aurelio Cal et al. v. Attorney General of Belize & Minister of Natural Resources and Environment (Maya Village Cases), Supreme Court of Belize Claim No. 171, 172, at 63 ¶ 131 (Oct. 18, 2007).

<sup>171</sup> LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 42 (Frederick A. Praeger, Publishers 1968); see generally Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2599–2659 (1997).

subsequent practices. The legislative process surrounding the major UN environmental conferences may add value to these comparative analyses between outcome principles (conventionally recognized as a soft law) and principles under the ICJ Statute (conventionally recognized as an international law), demonstrating procedural safeguards to find outcome principles as a source of international law. To evaluate the impact of this norm-making process in the historic UN environmental conferences on the legal status of principles, it may be helpful to refer to H.L.A. Hart's theory on the concept of law.<sup>172</sup> He explains law as a union between two types of rules—the primary and secondary rules.<sup>173</sup> The former directly govern conduct and the latter create, alter, or repeal the former.<sup>174</sup> Among the secondary rules, he thought that what is called “the rule of recognition” was essential in differentiating norms that have the authority of law from those that do not.<sup>175</sup> For Hart, the status of a norm builds largely upon this rule, and therefore it will enable us to discern whether a principle is indeed law.<sup>176</sup>

Some argue that the rule of recognition as a criteria used to identify which norms are law is already integrated in the format of the instrument where a norm in question is found.<sup>177</sup> The legal status of a principle depends upon its container because it characterizes what kind of recognition that the principle receives. For instance, if the container is a treaty ratified between states, it is probable that the norms established by that treaty are law. However, apart from the irony that a treaty could not bind state parties in practice on many occasions, not all treaty norms are in theory law. A treaty consists not only of legal provisions but also of simple statements of facts, aspirational language, as well as a weak form of recommendations that do not necessarily serve the binding character of the treaty. The same logic is applicable to softer instruments. They may comprehend law as well as non-law regardless of their formats. In the case of an international environmental conference, an advance decision has been made to provide the direction of the preparatory process for the conference as well as the format of draft outcome(s) of that conference. However, it does not at all have the full control over what kind of norms are ultimately to be included in the outcome.

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<sup>172</sup> Payandeh, *supra* note 81.

<sup>173</sup> Murphy, *supra* note 82, at 168–69.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> It also needs to be noted that this theory does not distinguish soft law principles from international law principles. It evaluates the legal status of principles themselves.

<sup>177</sup> Stephen V. Carey, Comment, *What is the Rule of Recognition in the United States?*, 157 U. PA. L. REV. 1161, 1163 (2009).

That is why Hart himself made an exception later that a norm can be qualified as international law in the absence of the rule of recognition.<sup>178</sup> His exception at least implies the possibility that when a container instrument is hard, some of its content remain non-law. Or, while the container is soft, its content can nonetheless stand as law. However, if Hart were to examine the processes of norm making in all major UN environmental conferences up until today, he might have wanted to revise his theory to properly count them as a “rule of recognition in international law.” In the revised theory, his main concept is still valid insofar that being law entails an expectation of compliance where agreed norms will be followed. But this expectation is now guaranteed by some sort of sound and dense social mechanisms comprising the newly evolving international legislative process that exercises a sufficient amount of pressure for observances and against violations.<sup>179</sup> This is not merely about the vague language of “moral right or wrong, good or bad” testing the substance of a norm.<sup>180</sup> It describes a discernible rule based on particular social constructs embedded in the norm-making process of the monumental UN environmental conferences where the highest-level participants are well aware that they are discussing what norms they should reflect in their behavior in international spheres and follow in policy-making at the domestic level. With such rules of recognition, there is a high probability that these principles are indeed law.

According to the established practice at UN conferences, rules necessary to recognize a norm as law can be satisfied particularly when a large number of the heads of state and government adopt a set of norms with pledges to commit to implementing the norms. Those states or governments ought to be bound, in most circumstances, by what their highest representatives adopted and pledged. Of course, there might be cases of weaker observance or non-compliance, but they are not likely to happen more often than in the application of other hard international law sources. The UN General Assembly expressly determined that the format of the outcome of Rio+20 be a concise political document.<sup>181</sup> However, the legal status of the Rio+20 outcome went beyond this formal rule of drafting. The outcome document contained principles with legal significance as a response to the evolving context and persistent environmental problems therein.<sup>182</sup> It is the same with

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<sup>178</sup> Murphy, *supra* note 82, at 168.

<sup>179</sup> See H.L.A. HART, *THE CONCEPT OF LAW* 232–237 (2d ed., Clarendon Press 1994) (1961).

<sup>180</sup> Murphy, *supra* note 82, at 168.

<sup>181</sup> G.A. Res. 64/236, *supra* note 16, para. 20(b).

<sup>182</sup> U.N. Dep't of Pub. Info., Rio+20 in Numbers, U.N. DEP'T OF ECON. & SOC. AFFAIRS (June 23, 2012), <http://www.uncsd2012.org/index.php?page=view&nr=1304&type=230&menu=38>.



other seminal UN environmental conferences. Conferences brought hundreds of heads of state or government and 500 ministers from almost all countries. During the proceedings, their firm will was stated to make the outcome principles the norms governing these environmental problems, and so was their promise to be in compliance with the principles even without textual guarantees to punish non-compliance.

While the international community still does not have—and likely never will have—a global legislature, court, and police force, it does have a rather striking array of ways in which rules are made, interpreted, monitored, and complied with, suggesting the presence of a system of “law,” albeit an unusual one.<sup>183</sup>

In addition to the scope and level of participation, the *modus operandi* of the preparation for the conference and the actual conference proceedings is also important. There should be a sufficient period of serious negotiations, during which fair working methods to reach a consensus must be applied. The major UN environmental conferences spent approximately two years before presenting the final draft outcome to the conference. As explained, this excludes the period of preliminary steps to raise international public awareness and trigger the relevant General Assembly procedure. Furthermore, keen interest on the part of participating countries and the international community as a whole has to be demonstrated.<sup>184</sup> In both the Johannesburg Summit and the Sustainable Development Summit, for example, many governments competitively proposed their plans and promises to enhance sustainable development strategies. Zeal for promoting the green economy was very strong in Rio+20 following the memorable economic recession that occurred right before the initiation of its preparatory process. Indeed the will of members of the international community has greatly affected the normative status of legal instruments at the time.

Besides these special characteristics of the legislative process, follow-up measures by international organizations and conference participants are other factors that determines whether the outcome principles are indeed a source of

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<sup>183</sup> Murphy, *supra* note 82, at 169.

<sup>184</sup> Mainly due to resource constraints, major UN conferences themselves are planned when there are both compelling needs for norm-making and expectations in the international community for a significant outcome.

international law.<sup>185</sup> Since the aftermath of the Stockholm Conference, the UN Secretariat and the Member States have launched new organizational bodies, operated monitoring mechanisms, and convened relevant international meetings according to the outcomes, as well as reaffirmed the principles by future conferences.<sup>186</sup> These four parameters can always be seen to govern a global agenda in the context of international norm-making, and they interact and interfuse one another closely to the extent that separate identification is often less useful. For instance, the scope and level of participation in a conference is one reliable indicator for strong interest behind outcome principles and perhaps for a solid *modus operandi* applied throughout the whole process to get the outcome principles. Most likely, it may also result in sincere follow-up measures.

This rule of recognition is premised on the same norm-making environment for hard and soft international laws and applies equally in evaluating the legal status of both kinds of principles. Thus, the scope and level of participation in the conference, the sincerity of the proceedings, the interest of participants, and the effectiveness of follow-ups; all are part and parcel of a possible rule of recognition in international law that Hart today

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<sup>185</sup> Consideration of any subsequent practice is part of the general rule of interpretation of a treaty per Article 31(3)(b) of the Vienna Convention on the Law of Treaties. *See* Vienna Convention on the Law of Treaties, *supra* note 94, art. 31(3)(b).

<sup>186</sup> After the General Assembly approved or endorsed the outcomes of the Stockholm and Rio Conferences, for instance, the UN Secretariat underwent significant structural reforms, including the creation of the UN Environment Programme (UNEP) and the Commission on Sustainable Development. The Secretariat also provided various services to effectively manage new or reformed forums. When Rio+20 envisioned in its outcome an expansion of membership in the UNEP Governing Council into a universal one, UNEP started providing services for this new forum later called the “World Environmental Congress” to accomplish this goal. It is noteworthy that there was no objection by the participating States to establish forums or expand membership according to relevant paragraphs of the outcome document, even though under traditional international legal theories they were only recommendatory in nature rather than obligatory. *See* The Future We Want, *supra* note 64, para. 88; *see also* U.N. Environment Assembly, U.N. Environment Programme, <http://www.unep.org/unea/about.asp>. Paragraph 162 of the Rio+20 outcome document further states that participating states “commit to address, on an urgent basis, the issue of the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction, including by taking a decision on the development of an international instrument under the Convention on the Law of the Sea.” The member states followed this guideline and actually took the requested decision. Although substantively there were severe confrontations on many issues due to diametrically different positions among States Parties to UNCLOS, no delegation contended that it need not implement what had been addressed in the Rio+20 outcome because it was merely a declaration, and legally speaking, not binding. *See generally* G.A. Res. 69/292, Development of an international legally binding instrument under United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (June 19, 2015).

may approve as necessary to determine and constitute the ultimate legal status of any outcome. The theory of these novel attributes attached to the rule of recognition in international law also reinforces the previous conclusion that a certain type of recognition by the international community is constitutive in making principles an effective source of international law.<sup>187</sup> This is precisely what Article 38(1)(c) means when it enlists “general principles of law recognized by civilized nations,” and how soft law principles may well become recognized as a source of international law. Therefore, it is highly probable that principles, whether contained within a soft-law or hard-law instrument, are a source of international law if the adoption of those principles underwent a sufficient period of serious negotiations that took place under fair working methods, attracted universal and high-level participation with will and interest, including in particular in the actual conference for their adoption, and took measures for the implementation of the principles in the adopted outcome.

If a set of principles meet the aforementioned four conditions, it means that they are substantively paramount to legally govern a field of international concern and thus may well fall in the category of the third source of international law under the ICJ Statute. Moreover, it should also mean that their applicable boundary extends beyond the list of state participants who drafted and adopted the principles. As seen thus far, it is probable that when such principles have been recognized by most countries, we may call them the general principles of law that the ICJ, one of the most authoritative international courts at the present time shall apply.<sup>188</sup> Ultimately, the principles that acquired designation as international law are applicable not only to the participant states in the conference, but also to other members of the international community. In this way, the principles declared by consensus in the monumental UN environmental conferences

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<sup>187</sup> See P.C.I.J. ADVISORY COMMITTEE PROCEEDINGS, *supra* note 108, at 215 (noting Fernandes’s statements).

<sup>188</sup> Article 38(1) of the Statute of the International Court of Justice is different from Article 38 of the Statute of the Permanent Court of International Justice. The PCIJ Statute only prescribes that the Court shall apply the four sources listed in its Article 38 and does not specify their legal character. The ICJ Statute, however, adds a new parenthesis to explain the function of the court and in doing so clarifies the legal character of the four sources listed in its Article 38(1). By applying them, the court is to decide a case a new “in accordance with international law.” It means that the ICJ Statute recognizes that they are the sources of international law, one of which is the general principles of law recognized by civilized nations.

carry great legal significance in international law and governance, affecting all states.<sup>189</sup>

## V. CONCLUSION

At the start of this inquiry, we saw in a memorandum drafted by the UN Office of Legal Affairs that the declaration, a formal and representative soft-law instrument, acquires normative power by enunciating principles of great and lasting importance.<sup>190</sup> In response to the criticism that “[w]here there is no law, the strong make the law,”<sup>191</sup> the drafters of the PCIJ replied in defense of principles as a solid source of international law that such an era had already passed. Nonetheless, they had to suffer another world war. Interestingly, the drafters of the ICJ Statute again accepted this controversial provision without further discussion. The interwar period was one in desperate need of “a co-ordinated [sic] system based on principles of justice in international affairs” replacing “the inevitably unreliable system of the balance of power.”<sup>192</sup> Whether this era has fully receded into history may still be an important question to address as we commemorate seventy years since the UN was founded at the end of World War II.<sup>193</sup>

Principles as a source of international law, which many mistakenly understood to be restricted to bind states only with the most foundational legal axioms common to all domestic law systems, were a more creative device designed to avoid the denial of a trial being *non liquet* and pursue justice in situations where a treaty or custom could not govern. To fulfill this aim, the principles should at least be those that are recognized by the legal conscience of civilized nations or refined consistent with international public opinion. However, this does not lead to a prejudged affirmation that only a very small number of principles deserve to be the source of international law. International environmental law is an area of law that began developing relatively late in the 1960s. As environmental consciousness and awareness grew in the international community, the UN convened several large-scale high-level summits that proposed to the world the basic principles of international environmental law. Increasingly, a considerable portion of

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<sup>189</sup> The UN Secretariat is most likely to abide by declarations adopted at the UN forums. Its compliant actions often lead to compliance by Member States and affect the implementation of global agendas in international relations as intended by the conferences, thereby effectively serving governance of the target field.

<sup>190</sup> Shelton, *supra* note 33, at 70.

<sup>191</sup> P.C.I.J. ADVISORY COMMITTEE PROCEEDINGS, *supra* note 108, at 320.

<sup>192</sup> P. Van Dijk, *Equity: A Recognized Manifestation of International Law?*, in INTERNATIONAL LAW AND ITS SOURCES 7 (1989).

<sup>193</sup> P.C.I.J. ADVISORY COMMITTEE PROCEEDINGS, *supra* note 108, at 324.

those principles are put forth to form the body of the source of international law; the rest are fast evolving towards the same end. Still, there are not many court decisions that applied these principles and their reflection in the harder instruments such as treaties or customs is in its initial stages. Nonetheless, the principles produced throughout the UN environmental conferences are significantly influencing the development of international environmental law.

Whether the whole or part are acknowledged as a source of international law in the meaning of Article 38 of the ICJ Statute—as I argue more should be in this Article—these principles will continue to steer the future direction of international environmental law, which will ultimately coincide with their evolutionary path. In addition, at the increasing speed that the soft law hardens, these environmental principles will possibly be consolidated in the form of treaties and customs. We are once again resorting to principles, faced with an unprecedented challenge to regulate global environmental issues and associated phenomena through law and justice, like the creators of the PCIJ who dreamed of peace at the end of World War I. It is my sincere hope that this time the expansion of the normative value of principles leads to a true transnational rule of law that can successfully govern the world's environment as it stands on a precipice.