The Sources of International Environmental Law: Interactional Law

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I. Introduction

Most international environmental law textbooks give pride of place to the topic of sources, using Article 38 of the Statute of the International Court of Justice (ICJ) as the point of reference.¹ The goal is to convey to readers what they need to know about treaties, custom and general principles (Article 38(1)(a)-(c)), and about judicial decisions and the work of eminent publicists as ‘subsidiary means for the determination of rules of law’ (Article 38(1)(d)). After outlining the key features, and strengths and weaknesses, of these ‘traditional sources,’² the discussion tends to turn to the growing significance of various forms of ‘soft law.’³ Perhaps not surprisingly, there is relatively little direct engagement in the textbooks with the deeper questions about the nature and function of sources of international law that animate this Handbook.⁴ After all, international environmental law is a sub-field of international law, which emerged from the application of international law to environmental issues. Hence, it is said that ‘[t]he sources of international environmental law are, of course, the same as those from which all international law emanates.’⁵ Furthermore, international environmental law is a relatively pragmatic discipline, focused on problem solving, including through alternative standard-setting modes and compliance mechanisms. Seen from this vantage point, whether a given approach is ‘law’ in the traditional sense may be secondary. What matters is which approach is best suited to achieving the desired results in a given context.⁶ Finally, genuine engagement with the ‘sources’ topic leads to a much more fundamental question: what are

² Birnie et al., International Law and Environment, p. 15.
⁴ But see Bodansky, Art and Craft, Chs. 5–7.
⁵ Birnie et al., International Law and Environment, p. 14.
⁶ For a nuanced discussion, see Bodansky, Art and Craft, Chs. 5 (‘Varieties of Environmental Norms’) and 12 (‘Is International Environmental Law Effective?’).
‘sources’ in the first place? Answering this question does require reaching beyond the confines of the field, and grappling with both the concept of ‘sources’ and its function in international law.

In this chapter, I undertake such a deeper inquiry, looking behind the invocation of Article 38 and the ‘sources’ that it lists. I place ‘sources’ in quotation marks in order to highlight that, although the term is commonly used when referring to the Article 38 list, the items so labelled are more accurately thought of in terms of law-making processes and their products. Article 38 is but a starting point for an exploration of international law’s ‘sources,’ or the legal status of a particular norm. It also is not an exhaustive list of contemporary law-making processes, but rather a list of the processes and their outputs that existed at the time of the provision’s drafting. Furthermore, the once, and perhaps still, dominant state positivist understanding of Article 38 and its ‘sources’ no longer provides a compelling account of law creation, if it ever did. Yes, states continue to emphasize the role of consent in the creation of legal obligations, but this preference neither translates into a convincing explanation of the Article 38 ‘sources’ as such, nor fully grapples with the rise of alternative standard-setting modes and the diversification of participants in standard-setting.

What, then, should we make of the ‘sources’ listed in Article 38, and how should we understand other standard-setting processes that may have emerged? To answer that question, it is important to bear in mind that, while provenance from certain ‘sources’ may be ‘shorthand’ for a norm’s legal quality, the shorthand must not be mistaken for a complete explanation. Indeed, that is why various strands of positivism look to a sovereign, a grundnorm, or a rule of recognition, and natural law to higher values or reason, as anchors for law’s authority. In such ‘linear’ understandings, in other words, ‘[l]aw . . . is held up by a string, and someone or something must hold the end of that string.’ However, the weakness of these accounts is that they must locate ‘law’s starting point in something other than law itself.’

I argue that it is not possible, or necessary, or even desirable, to identify a single source to which norms emanating from various law-making processes must be traceable to count as ‘legal.’ For, what gets called

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10 This is also, or perhaps especially, true for developing states. See e.g. Pan Junwu, ‘Chinese Philosophy and International Law’, Asian Journal of International Law 1 (2011), 233–48, 240–2.


‘sources’ are not sources of law as a spring might be said to be the source of a stream. Rather, the notion of ‘sources’ is best understood as referring to the role of distinctively legal materials in the continuous practices through which legal norms are made, maintained, and changed. A robust account of law, therefore, is ‘circular’ in the sense that authority derives from a ‘web’ of ‘intrinsic qualities’ that are internal to law, maintained by as well as shaping interactions among the participants in the legal system.

In advancing this alternative, practice-based understanding of ‘sources,’ I draw on the ‘interactional’ theory of international law that I have developed elsewhere. It builds on three interlocking propositions: first, legal norms arise from social norms; second, when norm creation meets specific requirements of legality and, third, meets with norm application that also satisfies these legality requirements, actors can pursue their purposes and organize their interactions through law.

I begin with a sketch of the interactional law framework, highlighting its implications for the ‘sources’ question. Next, I survey the evolution of law-making practices in international environmental law. As will become apparent, the alternative understanding of ‘sources’ set out above does not entail that the law-making methods listed in Article 38 of the ICJ Statute have ceased to matter in international environmental law – far from it. The interactional law framework takes seriously what international actors do, both as they continue to rely on ‘sources’ listed in Article 38, and as they develop new ways of making international law. My analysis, therefore, explores the law-making practices listed in Article 38 in turn, and then moves on to consider newer processes. The interactional framework and its practice-based understanding of legality illuminate the existence of resilient and relatively stable law-making processes, as well as the emergence of new law-making processes.

II. Interactional International Law and the Sources Question

The interactional account of international law that I developed with Stephen Toope connects insights from constructivist international relations theory to the legal theory of Lon Fuller. Our framework has three interrelated elements. First, drawing on the ‘practice-turn’ in constructivism, we posit that legal norms can only arise in the context of social norms based on shared understandings. Second, what distinguishes law from other types of social ordering is adherence to a series of criteria of legality commonly associated with the rule of law and most comprehensively set out by Fuller: generality, promulgation, non-retroactivity, clarity, non-contradiction, not asking the impossible, constancy, and congruence between rules and official action. For the purposes of interactional international law, we understand the last criterion of ‘congruence’ in an expansive sense, encompassing not merely conformity of official action with a given norm, but a wider range of practices through which all participants in the international legal

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16 I thank David Dyzenhaus for this phrasing.
17 See also David Dyzenhaus, ‘Constitutionalism in an Old Key: Legality and Constituent Power’, Global Constitutionalism 1 (2012), 229–60, 233 (on qualities ‘that give law its authority and without which there is neither law nor authority’); and Walters, ‘The Unwritten Constitution’, p. 33 (on the notion of a ‘web’).
19 Lon L. Fuller, The Morality of Law, rev. ed. (New Haven: Yale University Press, 1969). We take the notion of “interactional law” from Fuller. He used the term to highlight the limitations of “the prevailing conception of law as a one-way projection of authority.” See Fuller, Morality, p. 221. It was also meant to stress the need to appreciate law as closely tied to its social context. See Lon L. Fuller, ‘Human Interaction and the Law’, American Journal of Jurisprudence 14 (1969), 1–36.
21 Brunnée and Toope, Legitimacy and Legality, pp. 39, 46–90.
system demonstrate adherence to the norm as well as support its legality. Indeed, what Fuller termed ‘congruence,’ in our account plays a central role as the third element of interactional law: the ‘practice of legality.’ We suggest that, when norm creation meets the requirements of legality and, third, is matched with norm application (e.g. legal argumentation, interpretation, implementation or enforcement measures) that also satisfies these requirements – when there exists a practice of legality – actors can pursue their purposes and organize their interactions through law.

The notion of the ‘practice of legality’ reveals that ‘congruence’ is more than just ‘compliance’ (conformity of conduct with a given rule). At the same time, the congruence requirement can be met even when some actors violate or distort existing legal norms, provided that other participants in the legal system work to maintain those norms. Alternatively, depending on the circumstances, patterns of contestation may result in strengthened, modified, or new norms. Widespread failures to respect and uphold a given norm, however, will eventually lead to its erosion. In short, the emphasis on the practice of legality highlights that law application, interpretation and enforcement are all part of a continuum that either supports or undermines legal norms.

The interactional account of international law speaks to both law-ascertainment and law’s authority. The two questions are tightly interwoven, but interactional law can zero in on each. As noted in the introduction, international law’s authority derives from the interplay between the three elements of interactional law (grounding in shared understandings, adherence to criteria of legality, and practice of legality). This authority is internal to law and ‘circular’ – it is maintained by as well as shapes the interactions among participants in the legal system, generating distinctive legal legitimacy and a sense of commitment. The criteria of legality also serve as law-ascertainment criteria; they illuminate the role of what is commonly referred to as ‘sources’ of international law as well as the legality of particular rules or regimes. The criteria themselves rest on social practice, but they have proven to be resilient over time.

The relevant practice, arguably, is largely that of lawyers working on behalf of a wide range of actors, including states and international organizations and, increasingly, judicial bodies, civil society organizations (NGOs), corporations and individuals. In turn, the requirements of legality, supported by practices of legality, underpin, albeit to varying degrees, the classic ‘sources’ of international law as well as newer ‘sources.’ Yet, seen through the lens of interactional law, the individual ‘sources’ as such are more accurately understood as a sort of ‘shorthand’ for legality. Interactional law would still require an

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22 Brunnée and Toope, *Legitimacy and Legality*, pp. 20–33.
24 The salient practice could also include actions of non-lawyers like activists, technical experts, or journalists, immersed in a given regime or issue area and familiar with the legal aspects. Furthermore, a much wider range of actors, including ‘ordinary’ citizens, is engaged in the creation of the shared understandings that support the social norms in which IL is grounded. Sometimes, these actors also constitute an active audience for the legal deliberations or justifications provided by governmental actors. See e.g. Brunnée and Toope, *Legitimacy and Legality*, pp. 1–2, 142–4.
25 See Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford: Oxford University Press, 2007), Ch. 2. See also d’Aspremont, *Formalism*, pp. 203–13 (distinguishing the wider range of ‘law-applying authorities’ for law ascertainment purposes from ‘formal international law-maker[s]’).
assessment of whether or not individual norms or sets of norms meet the requirements of legality, and whether or not they are supported by practices of legality. It is on this basis that we have argued that some treaty norms may fall short of interactional law, whereas some norms that have attracted the label of ‘soft law’ may well be law in interactional terms.27

In brief, the interactional account posits the need for ‘congruence all the way down’ – shared understandings and a specific type of social practice must support the requirements of legality themselves, support any so-called ‘sources’ of international law, and support individual norms or regimes in international law. In this sense, the interactional account is empirical. But it also has a normative dimension; it considers adherence to the requirements of legality to be not only constitutive of law but also desirable, for two interrelated reasons. First, adherence to legality requirements accounts for law’s capacity to provide guidance to autonomous actors, enabling them to make decisions and set their own priorities in light of the law. Second, because the requirements of legality are primarily formal in nature,28 they guide and constrain the ability of actors to proceed in arbitrary or entirely self-serving fashion, but they do not themselves entail thick substantive commitments.29 Such a thin conception of law is particularly suited to international society’s highly variegated political context.30 It illuminates how international (environmental) law can operate in the absence of shared substantive values and goals, or support actors’ work towards shared substance.

III. The Sources of International Environmental Law

The interactional account facilitates a nuanced assessment of the role and relative importance of the Article 38 ‘sources,’ and the rise of new international law-making processes. International environmental law offers fertile terrain for an exploration of the evolving range of law-making practices.

1. Treaties

Treaties can assist the crystallization and specification of pre-existing shared understandings. Indeed, given the practical challenge of capturing and communicating shared understandings in international settings, a treaty will often be an important step in interactional law-making. After all, the number of actors in the international arena is large and the opportunities for direct interaction are so limited that ‘snap shots’ of the common ground are often necessary to advance the law-making process. Treaties also facilitate the involvement of non-state actors, such as NGOs or representatives of salient expert communities in this process. While states remain the formal lawmakers, the non-state actors engaged in a given regime have considerable scope to inform and even influence the law-making process. Treaties can also provide for robust legality, grounded in the basic rules and practices of treaty making and treaty application, framed by the Vienna Convention on the Law of Treaties.31 It is no accident that these universally supported rules and practices reflect, to a very large extent, the criteria of legality set out

27 Brunnée and Toope, Legitimacy and Legality, p. 8.
28 While Fuller referred to the requirements as ‘procedural,’ the term ‘formal’ arguably better captures their nature and function.
above. Through these rules, treaty law provides an array of mechanisms aimed at ensuring that a given treaty accords with the requirements of legality. As a general matter, therefore, treaties provide not only law-making processes, but also ‘places’ where binding legal rules can be found.

Yet, notwithstanding the strong legality traits of treaty law as such, it is possible that particular treaty norms do not produce interactional law. For example, in some cases, terms will be enshrined in a treaty that are not grounded in shared understandings, in the hope that the norm may become a reference point around which new law may coalesce. Such terms are not law simply by virtue of having been ‘posed,’ but may become so over time if they meet the criteria of legality and engender a practice of legality that actually comes to shape the actions of parties. Sometimes treaty-making is also a means by which parties enable largely procedural forms of the practice of legality to unfold within a regime. Such arrangements can provide space for substantive understandings to evolve over time, or they may simply create a stable setting for states and other actors to interact in relation to a given issue.

International environmental law provides ample examples of these dynamics playing out. Multilateral or global environmental concerns typically involve multiple, interconnected issues, require adaptation of the law to changes in the nature of the concern, knowledge or technical and economic capacity, and require coordinated action by actors with widely diverging priorities. Hence, multilateral environmental agreements (MEAs) establish long-term environmental regimes, characterized by institutionalization of expert networks and decision-making, the instantiation of a range of iterative law-making and standard-setting modes, and the development of treaty-based transparency and accountability mechanisms.

The conventional wisdom in international environmental law has been that the framework-protocol model of environmental regime development is particularly conducive to promoting cooperation and progressively more ambitious norm building. The initial framework agreement is focused upon the articulation of overarching goals and principles, and the creation of decision-making rules and procedures; it is constitutive, rather than regulatory. The framework’s provisions are designed to create background rules that enable shared understandings to be cultivated and more specific normative structures to be created.

Although environmental agreements have employed this approach with great success, normative development is often slow and the trajectory is by no means inevitable. For example, it took twenty-three years for the objective of the 1992 UN Framework Convention on Climate Change (UNFCCC), which is to avert dangerous climate change, to assume an agreed meaning – that global temperature increases must be held to well below 2° Celsius above pre-industrial levels. Similarly, although the principle of

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36 Consider the 1985 Convention for the Protection of the Ozone Layer (Vienna Convention) (Vienna, 22 March 1985, 1513 UNTS 324) with its 1987 Protocol on Substances that Deplete the Ozone Layer (Montreal, 16 September 1987, 1522 UNTS 3).
38 See Paris Agreement, UN Doc FCCC/CP/2015/L.9 (12 December 2015), Art. 2.1(a). See also Brunnée and Toope, *Legitimacy and Legality*, pp. 146–51, 208–9 (on the evolution of shared understandings concerning the regime objective).
common but differentiated responsibilities and capabilities was articulated in the convention,\(^{39}\) key aspects of its meaning have remained contested and are only now being settled. The evolution of these two provisions over time illustrates my earlier point: while enshrining an objective or principle in a treaty is an important step, in itself it does not suffice to produce a fully-fledged norm. Arguably, the lack of shared understandings concerning these central factual and normative parameters contributed to the climate regime’s difficulties in producing a comprehensive, long-term emission reduction scheme.\(^{40}\) Nonetheless, states and other actors have continued to interact under the auspices of the UNFCCC and its procedural rules and relatively robust legality practices, although by no means without difficulties, have proven remarkably resilient.\(^{41}\)

Treaties remain the dominant ‘source’ of international environmental law. Formal treaty making activity in the field has not so much slowed from previously high levels, as may be the case in other areas of international law,\(^{42}\) as returned to its prior pace after reaching a high point in the period between 1990 and 1992 – the years leading up to the Rio Earth Summit.\(^{43}\) These patterns must be considered in light of the fact that, by the 1990s, treaty regimes had been devoted to most international environmental concerns. Hence, the gradual slowing of environmental treaty activity since the 1990s has gone hand-in-hand with a shift from the adoption of new treaties or protocols to the adoption of amendments to existing treaties.\(^{44}\)

A finely calibrated range of relatively more or less formal decision making processes has emerged to facilitate the iterative norm development and standard-setting that is characteristic of MEAs.\(^{45}\) At one end of the spectrum, changes to the basic structure of the underlying treaty (e.g. decision-making rules or entry-into-force rules) and new substantive commitments (e.g. emission reduction commitments) tend to require formal consent by a specified majority of parties. For other changes, such as updates of a technical or administrative nature to existing commitments (e.g. tightening the phase-out schedule for, or adjusting the ozone depleting potential of, an already regulated substance), MEAs typically stipulate that parties’ consent is presumed unless they explicitly opt out within a given period of time. At the informal end of the spectrum, MEA plenary bodies adopt steady streams of formally non-binding, consensus-based decisions. These decisions often contain detailed, mandatory regulatory or procedural standards and, notwithstanding their formally non-binding nature, parties routinely implemented them. It is true, therefore, that another

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\(^{39}\) See UNFCCC, preamble and Art. 3.1.

\(^{40}\) Brunnée and Toope, *Legitimacy and Legality*, p. 218.


\(^{42}\) Pauwelyn et al., ‘Stagnation and Dynamics’.

\(^{43}\) 1992 was the high-water mark in environmental treaty activity around the world. Between 1990 and 1992, 106 multilateral environmental agreements (MEAs) were concluded. By comparison, between 1970 and 1972, 33 MEAs were concluded, and between 1980 and 1982, 45 MEAs were concluded. In turn, between 2000 and 2002, 88 MEAs were concluded and between 2010 and 2012, 57 MEAs were concluded. See Ronald B. Mitchell, International Environmental Agreements Database Project (Version 2014.3) (2002–2015), accessed 29 October 2015, <http://iea.uoregon.edu/page.php?query=summarize_by_year&yearend=2012&inclusion=MEA> (using the notion of MEA to encompass new treaties, protocols to existing treaties, and amendments to existing treaties).

\(^{44}\) Consider these numbers, compiled on the basis of the database maintained by Mitchell: 1970–1972: 33 MEAs (21 new, 3 protocols, 9 amendments); 1980–1982: 45 MEAs (19 new, 9 protocols, 17 amendments); 1990–1992: 106 MEAs (50 new, 21 protocols, 44 amendments); 2000–2002: 88 MEAs (37 new, 15 protocols, 47 amendments); and 2010–2012: 57 MEAs (11 new, 10 protocols, 36 amendments).

significant trend in international environmental law-making has been the rise of various modes of informal standard-setting under the auspices of MEAs, a trend that I explore in section III.5 below.

2. Customary Law

Customary law-making engages the elements of the interactional account in somewhat different ways than treaty law, although the differences are not as large as one might expect. For example, whereas it is possible to produce formal treaty norms that are not grounded in shared understandings, one would assume that customary law cannot arise without widely shared, and practiced, understandings. In fact, however, the relevant understandings may be relatively thin among some states, seeing as it is typically a smaller number of interested states that engage in specific practice, while the inaction of other states counts as acquiescence. In turn, the requirements of legality do not as explicitly structure the rules governing customary law-making as they do treaty law-making, and there continues to be debate on what exactly counts in the production of custom. And yet, legality is coded into customary law. After all, it is not enough for states’ conduct simply to align with a given norm. In interactional law terms, that norm will emerge as customary law only when it is supported by robust practices of legality. This enriched form of practice is what traditionally has been called opinio juris. The interactional framework is frank that it is practice itself that grounds obligation, but provides coherent criteria for evaluating that (physical or verbal) practice by asking whether it is rooted in the requirements of legality. Thus, the interactional law theory helps to dissolve the paradox of opinio juris in customary law-making. It offers a more objective account of how a general practice can be recognized as ‘as accepted as law,’ maintaining the distinction between social and legal norms.

In drawing this distinction, the interactional account also brings some of the strengths and weaknesses of customary law-making into focus. For example, although the diffuse, fluid nature of the customary law-making process does not negate promulgation and clarity, it does make it harder to identify the precise point at which law arises than does treaty making with its emphasis on written terms and detailed rules on entry-into-force. Perhaps surprisingly, other requirements of legality will fare as well, or better, in customary than in treaty law. For example, customary law by definition accords with the principles of generality and congruence. It also is less likely to make impossible demands and more likely to meet the constancy, non-contradiction and non-retroactivity requirements.

The customary law-making process is a subtle combination of unilateral acts – the practices of legality described above – and collective action – the requirement that practice must be widespread in order to serve as foundation for custom. Hence, although customary law is inherently dynamic, it is also far more stable than one might assume at first glance. States’ practices and legal opinions tend to maintain existing rules, and initiating a shift in the practices and views of a sufficient number of states to generate a new

46 See Pauwelyn et al., ‘Stagnation and Dynamics’, p. 740.
49 See Brunnée and Toope, Legitimacy and Legality, pp. 47–8.
50 Statute of the International Court of Justice, Art. 38(1)(b).
51 The ILC’s report on customary international law acknowledges the difficulties of separating practice and manifestations of opinio juris, while affirming the importance of both. See Wood, Third Report, at paras. 13–8.
customary norm is relatively difficult. Furthermore, due to these features of the law-making process, customary rules tend to provide broadly textured ground rules for interaction.

The role and evolution of customary norms in international environmental law provide a good illustration. The stock of customary international environmental norms has remained largely unchanged over many decades, revolving around the duty to prevent transboundary harm and states’ related procedural obligations. This rule, in turn, grew from deeply rooted understandings in international law, such as the proposition that ‘[t]erritorial sovereignty... has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability,’ and the notion that it is ‘every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.’ Hence, ‘the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory.’ International environmental law’s harm prevention rule first evolved in the course of efforts to resolve inter-state disputes about transboundary harm, was affirmed and fleshed out through countless MEAs and other international instruments, and was eventually confirmed by the ICJ to be a ‘general obligation of States... part of the corpus of international law relating to the environment.’

By contrast, customary law has had difficulty adapting to the increasingly regional or global scope of many environmental problems. To be sure, various concepts have emerged to deal with such challenges. The no harm rule itself evolved to include an obligation to protect not only the environment of other states, but also of ‘areas beyond national control.’ The idea that certain environmental problems are the ‘common concern’ of humankind and that all states have ‘common but differentiated responsibilities’ to cooperate in addressing them has also gained currency. In addition, the precautionary principle and the notions of sustainable development and intergenerational equity have emerged to address the growing complexity and intergenerational dimensions of environmental degradation. Each of these concepts has come to be reflected and, to varying degrees, fleshed out in the context of treaty regimes. But, with the exception of the expanded harm prevention rule, it would be difficult to show that they are supported by

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52 But see Bodansky, Art and Craft, pp. 197–203 (questioning the customary law status of the harm prevention rule, considering it to be a ‘general principle’).
53 Island of Palmas Case (Netherlands v USA) (1928) 2 RIAA 829, 839.
54 Corfu Channel Case (UK v Albania) (Merits) [1949] ICJ Rep 4, 22.
56 Trail Smelter Case (USA v Canada), (1938/1941) 3 RIAA 1905, 1965; Lac Lanoux Arbitration (France v Spain), (1957) 12 RIAA 281.
59 Nuclear Weapons.
62 However, there is little direct practice to suggest who would be entitled to invoke the harm prevention rule vis-a-vis a state’s failure to protect ‘areas beyond national control.’ See Brunnée, ‘Common Areas’, pp. 555–6.
sufficient shared understandings and practices of legality to give them general effect as customary law. For example, debate persists among states and commentators as to the precise contents and status of the precautionary principle.\textsuperscript{63} International courts and tribunals, while acknowledging the wisdom of precautionary approaches to environmental protection,\textsuperscript{64} have avoided pronouncing on its legal status.\textsuperscript{65} Similarly, the concept of common concern does not appear to have gained momentum outside of individual treaties.\textsuperscript{66} One might speculate that, whereas the harm prevention rule is strengthened by its resonance with core principles of international law, the evolution of these relatively more recent concepts is hindered by their linkage to international law’s continued struggle with community interests and \textit{erga omnes} norms.\textsuperscript{67}

In any case, the no harm rule, and the associated procedural duties to notify or warn,\textsuperscript{68} inform and consult,\textsuperscript{69} and cooperate with potentially affected states have proven extremely resilient.\textsuperscript{70} The interactional account suggests that the staying power of these norms rests in their consistency with universally shared, basic principles of international law, and the reasonable limits they impose on state sovereignty.

This assessment finds confirmation in what appears to be something of a renaissance of the no harm rule in the practice of neighbouring states. For example, three recent disputes, one concerning the construction of pulp mills on the boundary river between Argentina and Uruguay,\textsuperscript{71} one concerning aerial herbicide spraying by Colombia near its border with Ecuador,\textsuperscript{72} and one concerning various activities near a boundary river between Costa Rica and Nicaragua,\textsuperscript{73} revolved around the harm prevention rule, its relationship with procedural duties, and the content of the due diligence standard.

The due diligence duty also has played a role in relation to impacts on common areas and potential future impacts. In a recent advisory opinion, the Seabed Disputes Chamber of the International Tribunal of the Law of the Sea (ITLOS) addressed states’ responsibility to take appropriate measures to ensure that private entities operating in the deep seabed do not cause harm in that ‘commons’ area.\textsuperscript{74} The Chamber observed that the due diligence standard ‘may change over time … [and] in relation to the risks involved

\textsuperscript{63} See Birnie et al., \textit{International Law and Environment}, pp. 154–64; and Pedersen, ‘Precautionary Principle’.

\textsuperscript{64} See \textit{Gabčíkovo-Nagymaros}, para. 140; \textit{Pulp Mills}, paras. 164, 185. And see \textit{Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan)} (Order of 27 August 1999) ITLOS Reports 1999, 262, para. 77.


\textsuperscript{66} See, e.g., ILC (Drafting Committee on the Protection of the Atmosphere), ‘Statement of the Chairman’ (2 June 2015), 10 <http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2015_dc_chairman_statement_atmosphere.pdf&lang=E> (noting that the committee opted to describe the protection of the atmosphere as a ‘pressing concern of the international community as a whole,’ rather than a ‘common concern of humankind’).

\textsuperscript{67} See Brunnée, ‘Common Areas’, pp. 555–6.

\textsuperscript{68} \textit{Corfu Channel}.

\textsuperscript{69} \textit{Lac Lanoux}.

\textsuperscript{70} \textit{Pulp Mills}, para. 145 (tracing the obligation to cooperate to the good faith principle in international law).

\textsuperscript{71} See \textit{Pulp Mills}.


\textsuperscript{73} See \textit{Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)}, 16 December 2015.

\textsuperscript{74} Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion, 1 February 2011) ITLOS Reports 2011, 10.
in the activity." In the Chamber’s reasoning, due diligence provides a conceptual bridge between the duty to prevent harm and the proposition that states, in certain circumstances, also must take precautionary measures. The Chamber described the precautionary approach as ‘an integral part of the general obligation of due diligence,’ applicable ‘in situations where scientific evidence concerning the scope and potential negative impact of the activity in question is insufficient but where there are plausible indications of potential risks.’ Indeed, a state ‘would not meet its obligation of due diligence if it disregarded those risks.’ It remains to be seen whether this fluid understanding of preventive and precautionary duties will be embraced by international practices of legality. But it is noteworthy that the Chamber chose to build its reasoning on the widely supported no harm rule, rather than press the precautionary principle’s own customary law status.

In sum, while treaty law plays a dominant role in dealing with international environmental problems, custom has remained relevant. Especially the harm prevention rule and its associated principles continue to be invoked and developed by international actors. As with treaty law, the primary actors in this context continue to be states, and perhaps intergovernmental organizations. But the customary law process is also more porous than it may first appear. The practices of non-state actors do matter, at least in influencing or constraining the salient practices of states. Indeed, not only states but also non-state actors have invoked customary law to support legal arguments raised in various processes, for example in the climate change context.

3. General Principles

Treaty and customary law processes are widely supported by states and other international actors, and both have strong legality traits. By contrast, inconsistency undercuts the role of ‘general principles’ as one of the ‘sources’ of international law listed in Article 38. Notably, although the drafters of Article 38 attempted to strike a compromise, disagreements remain on what counts as a general principle in the first place. Some commentators ground general principles in natural law. Others consider the term to refer to principles of domestic law that are found in all major legal systems, such that they can be considered to be ‘general principles’ at international law. Yet others maintain that evidence is needed that a principle has found support directly in international law, such that it has become a part of customary international law. The International Court of Justice, for its part, has treaded carefully around general principles, preferring to find evidence of state consent rather than draw them directly from an assessment of domestic legal systems.

75 Responsibilities in the Area, para. 117.
76 Responsibilities in the Area, para. 131.
77 Responsibilities in the Area, para. 131.
78 Responsibilities in the Area, para. 131.
79 See Responsibilities in the Area, para. 135 (observing only that there was a ‘trend towards making [the precautionary principle] customary law’).
80 See Wood, Third Report, paras. 68–79.
81 See e.g. Inuit Circumpolar Conference, Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (7 December 2005), 99–100 <http://inuitcircumpolar.indelta.ca/index.php?ID=316&Lang=En>.
84 See Thirlway, Sources, pp. 94–6.
85 See Thirlway, Sources, pp. 93, 98–102.
From an interactional law standpoint, a rigorous assessment of whether or not a given principle is common to the major legal systems, might actually yield robust evidence of a widely shared normative understanding. But the consent focus of the traditional sources doctrine, playing out in state practice and much commentary has hindered the evolution of coherent criteria for the identification of general principles. To be sure, none of this precludes the emergence of a particular principle as interactional law, i.e. a shared normative understanding that meets the criteria of legality and is supported by practices of legality. However, given the lack of clarity surrounding the indicators for the existence of a ‘general principle,’ combined with the resultant limited and inconsistent practice, it is difficult to identify the shared understandings and adherence to the requirements of legality that would support the conclusion that the category of ‘general principle’ as such constitutes a strong indicator of international legality. In short, the interactional law analysis helps explain why the concept of general principles plays a limited role as a ‘source’ of international law, including in international environmental law.

The perhaps most passionate and detailed defence of general principles in international environmental law was recently mounted by Judge Cançado Trindade, in his lengthy separate opinion in the Pulp Mills case. In the Judge’s view, the general principles of international environmental law include the principle of prevention and the precautionary principle, as well as the principles of intergenerational equity and sustainable development. For Cançado Trindade, these principles constitute independent, ‘(formal) sources of international law’ under Article 38(1)(c) of the ICJ Statute, emanating from the ‘universal juridical conscience’ that is the ‘ultimate material “source” of all law.’ Cançado Trindade’s (linear) view of general principles as ‘an expression of an objective “idea of justice”,’ contrasts with Judge Weeramantry’s effort, in a separate opinion in the earlier Gabčíkovo-Nagymáros case, to trace elements of the concept of sustainable development back to principles embraced by legal cultures from across the world. The ICJ as a whole did not engage with the notion of general principles in either case, which tracks its abovementioned general wariness of Article 38(1)(c). In the international environmental law literature, some leading commentators consider general principles to be a more plausible ‘source’ than custom for norms like the harm prevention rule, suggesting that the ICJ implied as much by referring to the rule broadly as ‘part of the corpus of international law.’ Most commentators, however, prefer to focus on the emergence of a given principle as custom, or on the role that principles, such as the

86 See Awalou Ouedraogo, ‘Éléments d’une philosophie du droit International en Afrique’, African Yearbook of International Law 18 (2010), 41–80 (on general principles as basis for a new type of cosmopolitanism, reflecting the values of diversity and dialogue).
88 See also d’Aspremont, Formalism, p. 171 (‘the ascertainment of general principles of law is devoid of any formal character’); Thirlway, ‘The Sources’, p. 109 (‘this particular source of law is of less practical importance’).
89 Cançado Trindade, Pulp Mills, para. 6.
90 Cançado Trindade, Pulp Mills, paras. 17, 19.
91 Cançado Trindade, Pulp Mills, para. 52.
92 Cançado Trindade, Pulp Mills, para. 192.
93 Vice-President Weeramantry (separate opinion), Gabčíkovo-Nagymáros, pp. 106–7.
94 See Cançado Trindade, para. 5 (chiding the ICJ for its failure to do so).
95 See Bodansky, Art and Craft, pp. 199–203; Bodansky, ‘Non-Treaty Norms’, p. 122. See also Beyerlin and Marauhn, International Environmental Law, p. 285 (on the maxim of sic utere tuo ut alienum non laedas as a general principle that subsequently evolved into the harm prevention rule).
96 See e.g. Pierre-Marie Dupuy, ‘Formation of Customary International Law and General Principles’, in Bodansky et al., Oxford Handbook, pp. 449–66, 461 (suggesting that general principles differ from custom only in terms of ‘the generality of their formulation’).
precautionary principle or sustainable development, can play in legal reasoning regardless of their formally binding status.\textsuperscript{97} I explore this latter phenomenon further in section III.5 below.

4. Judicial Decisions and Scholarship

In the classic paradigm, judicial decisions, let alone the writings of eminent publicists, do not constitute ‘sources’ of international law.\textsuperscript{98} Nonetheless, they are deemed to offer influential assessments of the state of international law. Interactional law aligns with and extends the latter proposition. In settling disputes and pronouncing themselves on the applicable international law, international tribunals are important participants in interactional law-making. Their procedural frameworks and judicial reasoning methods anchor them in a strong foundation of legality. However, judicial process and method alone do not guarantee successful participation in interactional law-making. Interactional law suggests that judicial decisions and advisory opinions are more or less influential depending on the extent to which they resonate with relevant shared understandings, and the extent to which, in interpreting and applying legal rules, they adhere to the requirements of legality. To be sure, when a decision or opinion pushes beyond these parameters, it may well consolidate or even give impetus to the emergence of a new rule or new interpretation. But a tribunal will never single-handedly make or change international law. Whether or not it influences the development of international law depends in large measure on the responses of states and other participants in the international legal system.\textsuperscript{99} Article 38 acknowledges that these participants include a particular category of non-state actor – eminent publicists, whose ‘teachings’ are taken to be of value in ascertaining the law. Interactional law has no difficulty with this notion. Indeed, it accepts, much as in the case of treaty law and customary international law, the potential role of a considerably broader range of non-state actors. This role, of course, is not limited to reactions to judicial decisions but extends to the potential for influence being exerted throughout the law-making process.

Seen through this lens, arbitral and judicial decisions certainly have contributed to the development of international environmental law. Especially in the field’s early days, and notwithstanding the relatively small number of cases, courts and tribunals contributed significantly to the clarification and consolidation of customary international environmental law.\textsuperscript{100} Indeed, it is noteworthy that, still today, judicial or arbitral opinions have been most important in relation to customary environmental law, even when the underlying case involved a treaty between the parties to the dispute at hand. For example, the Pulp Mills case, although dealing with the interpretation of a treaty between Argentina and Uruguay, gave the ICJ the opportunity to expand on the notion of due diligence, on the relationship between substantive and procedural obligations, and on the emergence of an environmental impact assessment duty at customary law.\textsuperscript{101} Similarly, while the ITLOS Chamber offered important clarifications concerning the environmental responsibilities of states under the auspices of the seabed regime,\textsuperscript{102} its opinion has been at least as important in fleshing out core concepts in customary law. International courts and tribunals have played a limited role in the interpretation of MEAs, which may be in part due to the absence of binding

\textsuperscript{97} See e.g. Alan Boyle, ‘Soft Law in International Law-Making’, in Evans, \textit{International Law}, pp. 122–40; Lowe, ‘Sustainable Development’, p. 31 (speaking of ‘interstitial normativity’).

\textsuperscript{98} See e.g. Birnie et al., \textit{International Law and Environment}, pp. 28–9.

\textsuperscript{99} See also Boyle and Chinkin, \textit{The Making of International Law}, p. 311.


\textsuperscript{101} See Pulp Mills, paras. 26–7.

\textsuperscript{102} Responsibilities in the Area, paras. 50–6.
dispute settlement clauses in these agreements, and their increased reliance on informal non-compliance procedures.

Respected experts on international environmental law, ‘the most highly qualified publicists’ in the language of Article 38, also contribute to the development of international law. In the early days of the field, they played significant roles in elucidating its conceptual framework, for example by helping to tease its basic rules out from the rules and principles surrounding sovereignty, or by exploring the scope for conceptual development beyond the sovereignty paradigm. Today, a large expert community of increasingly specialized authors continues the work of explaining, clarifying, reinforcing, and advancing the concepts, rules, and approaches of the field. They exert influence through individual publications or through reports prepared by scholarly associations, such as the International Law Association (ILA), or by UN bodies, such as the International Law Commission. They also participate quite directly in the development of international environmental law by taking on the roles of judges, advocates, NGO advisers, or delegation members in environmental treaty negotiations, to name but a few. This mobility of experts is but one illustration of the permeability of boundaries between state and non-state actors. The interactional account acknowledges this influence, including on the development of shared understandings, while also showing how it is disciplined and supported by adherence to the requirements of legality.

5. Other ‘Sources’ of International Law

Finally, international lawyers continue to debate the phenomenon commonly referred to as ‘soft law.’ Some commentators state categorically that soft law is not law, insist that the term is redundant because the traditional binary conception of law can serve soft law’s purported functions, or even consider it a danger to international law. Others accept that soft law is a relevant, albeit fluid, category that encompasses norms with a range of legal effects. The multi-faceted nature of ‘soft law’ has prompted

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103 See Birnie et al., *International Law and Environment*, pp. 258–60 (on the relatively greater dispute settlement activity under the Law of the Sea Convention).
105 See e.g. Günther Handl, ‘Territorial Sovereignty and the Problem of Transnational Pollution’, *American Journal of International Law* 69 (1975), 50–76.
some to underscore the importance of analytical rigour, especially in distinguishing between identifiers of ‘softness’ based on, respectively, the legal act that created the norm in question, and its content.\textsuperscript{114}

Indeed, what is being labelled ‘soft law’ is made in a range of ways and comes in a great variety of forms, many of which interact or overlap with one or more of the traditional ‘sources’ of law.\textsuperscript{115} For example, some ‘soft’ norms are precursors to customary law;\textsuperscript{116} others are generated by states ‘in non-binding form according to traditional modes of law-making;’ yet others may be produced by or directed at non-state actors.\textsuperscript{117} However, distinctions between ‘hard’ and ‘soft’ law in terms of content and effects can be difficult to draw.\textsuperscript{118} For example, ‘hard’ law is sometimes combined with ‘soft’ dispute settlement processes or ‘soft’ sanctions.\textsuperscript{119} Conversely, although ‘soft’ norms do not figure in the ‘causes of action’ allowed in international adjudication, they can figure in practical legal reasoning of courts, states, and other international actors.\textsuperscript{120} And, just as binding treaties may contain non-obligatory or vague terms,\textsuperscript{121} ‘soft’ standards may contain mandatory and extremely detailed terms.\textsuperscript{122}

All of these manifestations of so-called ‘soft law’ can be found in international environmental law, where an array of ‘soft’ norm-setting processes has taken root, along with recourse to ‘soft’ content in otherwise ‘hard’ instruments. Not surprisingly, then, most of the main international environmental law textbooks give ‘soft law’ pride of place in the discussion of ‘sources.’\textsuperscript{123} Suffice it for present purposes to highlight some key dimensions of ‘soft law’s’ significance in the field, beginning with the phenomenon of treaty-based standard-setting.

The arguably most extensive practice of ‘soft’ standard-setting has evolved under the auspices of MEAs, through decisions taken by plenary bodies. Typically adopted by consensus, these decisions take immediate effect for all parties since, unlike new treaties or amendments, they do not require adoption and subsequent ratification or approval by parties. In principle, therefore, they enable speedier, more responsive standard-setting and they avoid the differentiation of treaty commitments among parties that can result from progressive treaty amendments.\textsuperscript{124} Some of these standards are phrased in mandatory terms, even using language normally reserved for binding law (‘shall’). The relevant standards may be designed to apply at the inter-state level, or intended to be applied by domestic authorities or, in some cases, by non-state actors.\textsuperscript{125}

\textsuperscript{115} See Boyle, ‘Soft Law’.
\textsuperscript{118} See Bodansky, \textit{Art and Craft}, pp. 96–107 (arguing that ‘legal’ / ‘non-legal’ may not always be the most salient norm qualities).
\textsuperscript{119} Chinkin, ‘Normative Development’, p. 40.
\textsuperscript{121} Boyle, ‘Soft Law’, pp. 130–2; Bodansky, \textit{Art and Craft}, pp. 13–4.
\textsuperscript{122} Brunnée, ‘COPing’.
\textsuperscript{125} See Brunnée, ‘COPing’. 

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In many respects, these treaty-based standards resemble regulations or guidelines adopted pursuant to national legislation. And, indeed, they are also often treated by states in ways not dissimilar to their responses to binding international law. The decisions are negotiated with the same care as binding law and implemented domestically as carefully as binding international law. For example, under the UNFCCC and its Kyoto Protocol, much of the regulatory detail to make the treaty operational was adopted through simple decisions of the plenary body. Thus, rules on crucial matters ranging from inventory and reporting requirements, to the mechanisms for trading of emission units or reduction credits, to the non-compliance procedure, were developed in lengthy negotiations and adopted through a set of plenary decisions, collectively referred to as the Marrakech Accords. The decisions imposed extensive requirements states had to meet to participate in the Kyoto Protocol and its trading mechanisms. Indeed, non-compliance with some of these decisions, such as inventory and reporting requirements, had specific consequences for states, notably the loss of eligibility to participate in emissions trading. What is more, protocol parties accepted both the need to comply with these requirements and the authority of the non-compliance regime, notwithstanding their ostensibly non-binding nature. Although the days of the Kyoto Protocol are now numbered, its approach to decision-making is part of a much larger standard-setting practice under the UNFCCC. Hence, the outcome of the 2015 climate meetings in Paris hooks into a well-developed law-making process, using a combination of instruments (treaty and plenary decision), even as it further pushes the international law-making envelope by relying in part on nationally determined, rather than internationally negotiated, emission reduction commitments. An especially interesting dimension of this approach is how it deploys formal procedural commitments enshrined in the treaty so as to monitor, guide, and even direct informal substantive commitments that are nationally determined.

A range of formally non-binding devices also have been used outside of treaty-settings, to articulate principles of general application. Two of the most prominent examples are the 1972 Stockholm Declaration on the Human Environment and the 1992 Rio Declaration on Environment and Development. The principles set out in these instruments made a range of important contributions to the evolving practice of international environmental law. Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration, for example, were important strands in the consolidation and development of the harm prevention rule in customary law. Other principles, such as Principle 7 of the Rio Declaration on common but differentiated responsibilities or Principle 15 on the precautionary approach, may not have attained customary law status, but have had important impacts in guiding the development of treaties. The same is true for the concept of sustainable development, which threads through the Rio Declaration. Through its inclusion in the preamble of the WTO Agreements, for example, the concept became an entry point for a more environmentally minded interpretation of trade law by dispute settlement panels and the

126 Brunnée, ‘COPing’.
127 See Brunnée and Toope, Legitimacy and Legality, p. 136.
128 See Brunnée and Toope, Legitimacy and Legality, pp. 201–4.
130 See section III.2 above.
Appellate Body. The precautionary principle and sustainable development have also figured in the reasoning of other judicial bodies, and, albeit only obliquely, even of the ICJ.

Sometimes, states and international bodies also resort to non-binding instruments, such as codes of conduct, to harmonize the practice of states where treaties are unattainable. A good example is the International Code of Conduct on the Distribution and Use of Pesticides, adopted by the FAO in 1985. The development of the code, which outlined a prior informed consent system, was prompted by concerns of developing countries over safe handling of hazardous substances imported from industrialized countries. The code was complemented, in 1987, by the London Guidelines for the Exchange of Information on Chemicals in International Trade of the United Nations Environment Programme (UNEP). These non-binding documents were widely implemented by states, thereby also preparing the ground for the adoption the Convention on Prior Informed Consent in 1998.

Non-state organizations too play a role in promoting the clarification and development of norms applicable to states, including the expert organizations such as the ILA, mentioned in section III.4 above. Yet other non-state norm development initiatives target the conduct of non-state actors. For example, the Forest Stewardship Council, established in 1993, after the Rio Earth Summit failed to yield a concrete global framework on forest practices, comprises individuals and representatives from NGOs, forest owners, timber industries, aboriginal organizations, community groups and forest certification organizations. It has developed a global certification system involving a set of principles and criteria directed at non-state actors but framed in mandatory language, and designed to ensure that forest products originate from forests subject to responsible management practices.

This range of manifestations of ‘soft law’, combined with the degree to which it is intertwined with and at times difficult to clearly distinguish from the outputs of established sources of international law, has led some commentators to prioritize ‘family resemblance’ over ‘jurisprudential scruples about the proper definition of law.’ Others insist instead that ‘a convincing sources doctrine should somehow come to terms with’ the new, wider spectrum of law-making activities. The interactional account provides an overarching set of criteria of legality, allowing rigorous assessment of the traits of diverse standard-setting processes, as well as the qualities of the resultant norms and of the practices they engender.

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134 See Gabčíkovo-Nagymaros, para. 140; Pulp Mills, para. 185.


141 Klabbers, ‘Constitutionalism’, p. 92.
The interactional law framework transcends the traditional distinction between ‘hard’ and ‘soft’ instruments, and explains why some ‘soft’ norms are not ‘legal,’ while others are as ‘legal’ as norms derived from established ‘sources.’ Briefly put, ‘soft’ law-making processes are ‘sources’ of law to the extent that they are grounded in shared understandings, meet the requirements of legality and are supported by practices of legality. Indeed, ‘soft’ law-making practices have evolved to such an extent that it is possible to identify certain processes that have produced ‘places’ at which international legal norms generally can be found.\(^{142}\) It stands to reason that treaty-based ‘soft law,’ for example, is one such ‘source,’ given parties’ prior agreement on the standard-setting process, the opportunity for all concerned parties to participate in the development and adoption of the standards, the generality of their application to all parties, the nature of their content, and their firm grounding in legality practices. Of course, as with all ‘sources,’ it is still necessary to assess whether particular norms too meet the demands of the interactional law framework. But the fact alone that violations of ‘soft’ standards do not have all of the same legal consequences as violations of treaty or customary law does not suffice to exclude them from the range of sources international law.

IV. Conclusion

Notwithstanding the importance of argumentative, interpretative, or justificatory practices, international law tends not to be understood primarily as ‘practice,’ or generated by practices. Rather, law is the ‘product’ of certain sources, a finished product that is then applied through legal practice.\(^{143}\) This separation of practice from the concept of law leads back to Article 38 and its list of ‘sources.’ The common assumption that the ‘sources’ listed in Article 38 serve to identify ‘valid law’ likely explains why relatively few scholars explore the traits and practices that distinguish legal norms from other norms. In the interactional law framework, norm properties and legal practices are intertwined. By tracing out distinctive features of legality, interactional law can conceive of international law as finding its sources in social practice, while also positing its relative autonomy from politics.

A leading commentator recently observed that, when offering an alternative explanation of how international law is created, one must ‘contemplate a modification of legal thinking that, logically, can only take effect through the medium of the existing system.’\(^{144}\) Hence, a new source of law cannot ‘come into being beside the old categories’ by ‘lif[ing] itself by its own bootstraps.’\(^{145}\) As this chapter has illustrated, conceiving of international law-making processes as marked by the features and practices of legality does not entail a wholesale discarding of the ‘sources’ listed in Article 38. Instead, the interactional framework illuminates the existing system and helps explain why some ‘sources’ contemplated by Article 38 retain their importance within that system, while others are on shakier ground. The additional, so-called ‘soft,’ ‘sources’ in the environmental field and, arguably, beyond did not emerge through ‘boot-strapping,’ but by drawing on the very web of understandings and practices that tie international law together. These understandings and practices remain primarily those of states, but the interactional law framework also highlights the ways in which a growing range of other actors participate.


\(^{143}\) See Wibren van der Burgh, ‘Essentially Ambiguous Concepts and the Fuller-Hart-Dworkin Debate’, *Archives for Philosophy of Law and Social Philosophy* 95 (2009), 305–26 (distinguishing ‘law as practice’ and ‘law as product’).

\(^{144}\) Thirlway, *Sources*, p. 200.

\(^{145}\) Thirlway, *Sources*, pp. 200, 160 (describing Article 38 as listing a ‘closed category’).
in international law-making processes and influence them to greater or lesser extent. I return to my starting proposition: international law is made and maintained by a distinctive practice, a practice that is guided and shaped by the requirements of legality. This practice of legality is both resilient and dynamic; it is what gives international law its relative stability and the capacity to change.

\[146\] See also Pauwelyn et al., ‘Stagnation and Dynamics’, p. 745.