CHAPTER 4

International Law Making

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1 Introduction

Since the seventies of the last century, the system of international law making has changed dramatically. Until then the development of new international rules rested on bilateral international agreements or multilateral ones prepared by legal experts, predominantly the International Law Commission, as was the case with the Vienna Convention on the Law of Treaties. Multilateral treaties developed spontaneously at a multilateral conference were few in number but had a lasting effect on international relations. Prime examples were the Hague Conferences of 1899 and 1907, which codified the first comprehensive regime on the rules in international armed conflicts. Meanwhile multilateral agreements are gaining ground and in relevance concentrating on issues which are in the interest of the international community. Or to describe the situation differently – the agreements elaborated rather than developing international law merely codify it. What do I mean by the reference to community interest-oriented agreements? These are multilateral treaties, which serve the interests of the international community. One may differentiate between three different types of issues which may be qualified as such:

– Treaties on international spaces – which means spaces which are not under the jurisdiction of a State such as the high seas or outer space;
– Issues which cannot be managed without the participation of at least most States such as treaties concerning the protection of the world climate; and
– Issues which constitute the ethical basis for international law such as the international human rights regime.

The content of such new international regimes, which occupy a growing space in the international normative system have resulted in new forms – or you may say procedures of law making or, in other words, in new institutionalized forms of the international normative order resulting in the acknowledgement of further actors besides States and international organizations. The new actors are NGOs, interest groups and other representatives of civil society.
This development took place hand in hand with a particular procedure for the establishment of new regimes and new fora for deliberations such as multilateral conferences inaugurated and prepared by an international organization, conferences of parties, and treaty bodies. All constitute institutionalized forms of cooperation among States. These new forms of institutionalized cooperation between States are considered more flexible as far as the implementation of the mandate of each forum is concerned.

However, the relevance of other sources of international law underwent significant changes. This is true for General Principles of Law, customary international law, decisions of international organizations and unilateral acts of States (such as unilateral declarations).

2 The Institutional Aspect

2.1 Multilateral Conferences
Multilateral conferences constitute the main fora to develop or prepare the development of new international norms, mostly international treaties. They have undergone a significant development since one of the first of such conferences in Europe, namely the Vienna Conference of 1815.¹

As already indicated, multilateral conferences may be differentiated as to whether they work on the basis of a draft agreement prepared by an expert body or which operate on the basis of political guidelines such as the Third UN Conference on the Law of the Sea (Codification Conferences v. Law Making Conferences). The differences in mandate have an influence on the working methods. The Rio Conference on Environment and Development, 1992 and the subsequent conferences thereto may serve as an example. In these conferences, not only States participated but also international organizations, intergovernmental institutions and non-governmental organizations² as observers. The widening in participation is one of the hallmarks of modern multilateral conferences with the mandate to develop regimes, which serve international community interests.

¹ The Westphalian Peace Conferences, ending the Thirty Years’ War in Germany, often referred to as multilateral conferences, were different in structure and format from subsequent multilateral conferences, in particular the peace conferences in The Hague 1899 and 1907.
2.2 **Conferences/Meetings of Parties**

All multilateral agreements concerning the protection of human rights, the protection of the environment, on international trade as well as other issues serving the interests of the international community have established conferences/meetings of parties. They constitute a form of institutionalized cooperation of parties different from international organizations and multilateral conferences. Since all State Parties to the international agreement concerned are automatically the members of such conferences/meetings, these are often explicitly referred to as the supreme body of the international agreement concerned. These conferences/meetings of parties are the necessary institutional feature if a regime is to be qualified as serving community interests. They guarantee the permanent influence of the international community on the development of the regimes in question. Their decisions may be considered as subsequent practice and as such contribute to the interpretation of the norm in question. The Meeting of States Parties referred to in Article 319 UNCLOS does not fit into the traditional pattern of responsibilities of other Meetings of States Parties.

2.3 **Treaty Bodies (Human Rights)**

Treaty bodies consist of experts selected by the States Parties for a defined period of time. They are obliged to act independently and impartially, and the treaties concerned provide that all geographical regions are adequately represented.

The mandate of all human rights treaty bodies can be generally described as monitoring the implementation of the international human rights agreement concerned. However, the functions of human rights treaty bodies have developed beyond what is being provided for in the human rights treaties concerned. By general comments or general recommendations they contribute to the interpretation of the relevant regime.

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3 The terminology varies. The term “Conference of parties” is mostly reserved to the “mother-agreement” often a framework Convention such as the UN Framework Convention on Climate Change, 1992, (ILM vol.31 (1992) p. 849), whereas in respect of the Kyoto Protocol the equivalent plenary body is referred as meeting of parties. In spite of the fact that the membership in the mother-agreement and the Protocol to such an agreement may differ frequently the Conference of parties serves as the Meeting of Parties. In such a case States parties to the mother-agreement but not to the Protocol serve as observers.
2.4 Other Actors (Individuals, NGOs, Multinational Enterprises)

There are several other actors in international relations such as individuals or groups thereof, NGOs and multinational enterprises. An increasing literature argues that individuals have become subjects of international law.\(^4\) I do not share this view although it cannot be denied that individuals are directly addressed by international law.

The situation is different in respect to groups of individuals. For example, the representations of the various groups of indigenous peoples exercise some influence in international relations, although the scope of their activities is limited to issues directly affecting the rights of indigenous peoples. An example to that extent is their participation in the Arctic Council.

NGOs,\(^5\) although frequently considered as new subjects or actors, have been active in international relations for a long time. Several such organisations were founded in the 19th century pursuing idealistic or scientific objectives. The term “non-governmental organisations” has been defined by ECOSOC Resolution 1996/31 as “any such organization that is not established by a governmental entity or international agreement.”

NGOs concentrate on human rights, international humanitarian law, disarmament and environmental law (national as well as international). Due to the amalgamation of environmental and developmental policies,\(^6\) the focus of NGOs has broadened. NGOs perform functions on the international norm-making level as well as on the implementation of international law. NGOs play a significant and by now established role at multilateral conferences and summits. However, they also initiate new policies either by approaching UN organs or regional organizations or political organs at the national level. Their influence is particularly significant as far as implementation of international norms.


is concerned. Finally, some international courts and tribunals accept amicus curiae briefs from NGOs.\(^7\)

It is frequently argued that NGOs reflect the views of the international society.\(^8\) In such generality this statement is hard to sustain. NGOs focus on particular aspects without necessarily taking into account other equally valid concerns. Frequently it is unclear why a particular policy is being pursued and to what extent funders may have a direct or indirect influence on the policy pursued. However they were, the persistent promoters of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and Their Distraction, 1997,\(^9\) the Biodiversity Convention and the Rome Statute, just to name some examples.

As far as multinational enterprises (or Transnational Corporations) are concerned, it is of relevance to ask whether they may be directly obliged under international law. This is relevant in respect of environmental law as well as under international human rights regimes or in respect of minimal social and labour standards. In particular the core international labour standards come into play. International law has developed or is in the process of developing under the notion of “global governance”\(^10\) mechanisms, which fence in activities of multinational enterprises with the consequence of direct responsibility in case of non-compliance. The mechanisms used to that extent are the establishment of standards and practices being of a non-legal nature. Nevertheless, they are enforceable and are enforced.

3 The Normative Influence of the Main Actors

3.1 The Role of States in Respect of Forming the International Normative Order

As far as the normative contribution of individual States is concerned, one has to distinguish between the different levels on which international norms


\(^8\) Agata Kleczkowska, ‘Armed Non-State Actors and Customary International Law’, in: Summers and Gough (eds.), Non-State Actors and International Obligations (Leiden, Boston: Brill Nijhoff, 2018), at 60–85 seems to argue that the participation of NGOs would strengthen the legitimacy of the regime concerned. This is not the position taken here.

\(^9\) 2056 UNTS, 211.

are being initiated, developed and adopted. It is in practice rare that a single State imitates the deliberations of an international norm (treaty or soft law instrument). Mostly, this is the undertaking of a group, which may involve other actors besides States. However, there are exceptions to that. For example, the development of the regime on deep seabed mining was initiated by the permanent representative of Malta to the United Nations, Ambassador Arvid Pardo, by addressing the General Assembly. However, the general practice is that such initiatives are carried formally by a group of States such as in the case of marine biological resources beyond national jurisdiction (BBNJ).

3.2 The Normative Contributions of International Organizations

Only a few international organizations have direct legislative functions such as the Security Council of the United Nations or the International Seabed Authority or the Meeting of Parties of the Montreal Protocol. Others have a more indirect influence on the normativity of the international order.

3.3 The Normative Contributions of Multilateral Conferences

Multilateral conferences, even so-called law-making ones, have, strictly speaking, no law-making functions. International treaties developed in this context have to be ratified by States to enter into force. Therefore, such multilateral conferences just constitute an intermediary stage in the development of an international normative order. However, the legal impact such draft treaties may have should not be underestimated. The results reached at such conferences may be of relevance for State practice even before the draft treaty in question enters into force.

Most relevant is the development of general principles, agendas and work programs by multilateral conferences. The Rio Conference of 1992 and the subsequent conferences thereto are telling examples about how multilateral conferences may shape the international normative order.

3.4 The Normative Influence of Conferences and Meetings of Parties

The functions of conferences/meetings of parties differ significantly if the regime concerned is administered by an international organization. Two examples may illustrate this point. According to article 319(2)(e) UNCLOS the Secretary General shall “...convene necessary meetings of State Parties in accordance with this Convention.” The functions of these meetings of States Parties are of an administrative nature. The mandate of “freestanding” conferences/meetings of Parties is substantially different. For example, the powers...
and functions of the UN Framework Convention on Climate Change\textsuperscript{11} are as follows:

The Conference of the Parties, as the supreme body of this Convention, shall keep under regular review the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention.

The mandate for conferences/meetings of other multilateral environmental agreements is similar.

In spite of all differences mentioned so far, all conferences/meetings of Parties enjoy legislative competences in varying degrees. This mandate oscillates between interpretation and law making.

The second type of decisions of conferences/meetings of parties are the ones which are binding without the consent of the States concerned. They are issued by the conferences/meetings of parties based on an authorization by the “mother agreement”. The Montreal Protocol may serve as an example. Its article 14(4)(b) and (c) provides that the Meeting of Parties decides on any adjustments or reductions referred to in paragraph 9 of article 2(c) and on any addition to, insertion in or removal from any annex of substances and on related control measures in accordance with article 2(10). These decisions broaden the scope of the applicability of the Montreal Protocol and the Meeting of Parties has made ample use of this mandate. They are adopted by a two thirds majority and are binding upon all States Parties. The basis for such law-making is a delegation of legislative competences by a decision of the States Parties.

The Paris Agreement developed a sophisticated system of delegating legislative competences to the Meeting of Parties. It provides two avenues for the Meeting of Parties to issue legally binding obligations, first by adopting them in mandatory language based on a treaty provision that provides for a legal obligation for each Party, for example under articles 4(2), 8, 9, 11 et seq. of the Paris Agreement. These nationally determined contributions are to be qualified as unilateral acts of States reflecting a binding commitment.

The second avenue is a treaty provision that authorizes to adopt binding decisions as provided for under article 4(8) and 4(13) of the Paris Agreement.\textsuperscript{12}

\textsuperscript{11} Article 7(2) UNFCCC.
In both cases, the guidelines or the decisions of the Meeting of Parties are based upon a mandate of the Paris Agreement and accordingly covered by the consent of the States Parties. The Paris Rulebook to the Paris Agreement\textsuperscript{13} elaborates on this point further.

The third type of rules developed by conferences/meetings of Parties are those which are not explicitly mandated in the mother-agreement. Even in this situation a conference/meeting of parties may function as a legislator, albeit the mandate is limited in substance. As has been stated by the\textit{ILC}: “[I]t cannot simply be said that because the treaty does not accord the Conference of States Parties a competence to take legally binding decisions, their decisions are necessarily legally irrelevant and constitute only political commitments”.\textsuperscript{14}

3.5 \textit{Normative Contribution of Treaty Bodies (Human Rights)?}

As already mentioned, the human rights treaty bodies have transformed the mechanism of General Comments/General Recommendations into a veritable tool of progressively developing the human rights treaties concerned. The policy and practice of the treaty bodies differ considerably though; the most active treaty body is the Committee of the International Covenant on Economic, Social and Cultural Rights (\textit{ICESCR}).

The General Comment No. 8 of the Treaty Body (17th session) dealt in detail factually and legally with the relationship between economic sanctions and the respect for economic, social and cultural rights. In particular in Iraq, the treaty body came to the conclusion that economic sanctions were in violation with the Covenant. This statement influenced the sanctions system of the United Nations.

General Comment No. 15: The right to water\textsuperscript{15} establishes a new economic right, namely the right to water, invoking articles 11 (right to food) and 12 (highest attainable standard of health) of the Covenant. Through this the scope of the\textit{ICESCR} has been expanded. This right to water has become a mechanism

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\textsuperscript{13} Decision of the Conference of Parties acting as Meeting of Parties to the Paris Agreement, 1/CP.21 FCCC/CP/2015/10/Add.1.
\textsuperscript{14} ILC Report covering the work the seventieth session to the General Assembly, UN Doc. A/73/10, ILC Yearbook, 2018, vol. 11, Part Two. Commentary to draft conclusion 11, para. 26.
\textsuperscript{15} Twenty-ninth session (2002), UN Doc. HRI/GEN/1/Rev.9 (Vol. 1), 97.
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on the implementation of international environmental law concerning
surface and ground water.

The same mechanism is being used by the conferences/meetings of parties
referred to above. There is, however, a significant difference between the two
institutions.

3.6  **The Contribution of Internationally Accepted Standards
as Mechanisms for the Development of the International
Normative Order**

Internationally accepted standards are often developed in soft law instru-
ments. This format is chosen to avoid the rigidity of international treaties. They
are frequently referred to as guidelines, codes of conduct or recommendations.
They may be developed by a group of enterprises, with or without governmen-
tal involvement or by international organizations. The involvement of experts,
interest groups and representatives from civil society groups is standard.

As to their content some variety exists; they may be dealing with a specific
subject only or be of a general nature. By way of generalisation, one may dis-
tinguish between those instruments which supplement international legally
binding norms and those which stand for themselves instead of an interna-
tional treaty. This distinction is fluid.

An example where the development of international standards has been
transferred to expert bodies by an act of delegation of legislative powers
are the standards concerning sanitary and phytosanitary measures by the
Agreement on the Application of Sanitary and Phytosanitary Measures (SPS
Agreement)\(^\text{16}\) to certain other functional institutions. According to article 3(1)
of the SPS Agreement, States Parties are called upon to “harmonize sanitary
and phytosanitary measures on as wide a basis as possible” based on “inter-
national standards, guidelines or recommendations, where they exist”. The
SPS Agreement itself does not contain any international standards, nor does
it provide for such standards by the WTO; it rather refers to standards devel-
oped by the Codex Alimentarius Commission, the standards developed by
the International Office of Epizootics (for animal health) and the standards
developed under the auspices of the Secretariat of the International Plant
Protection (for plants).\(^\text{17}\) These standards are not binding but they are made
binding upon the assumption of the article 3(2) SPS Agreement that provides

\(^{16}\) Text in https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm.

\(^{17}\) Oliver Landwehr, Article 3 SPS, in: WTO: Technical Barriers and SPS Measures, Max Planck
Commentaries on World Trade Law (R. Wolfrum, P.T. Stoll and A. Seibert-Fohr, eds.),
national measures based upon these standards are considered compatible with WTO law. One of these standards is the *Codex Alimentarius* developed by a committee established by FAO and WHO which involves experts, representatives of interest groups and of the civil society.

International standards are also developed by the IMO. According to its Statute, it has the mandate “to encourage and facilitate the general adoption of the highest possible standards in matters concerning the maritime safety, efficiency of navigation in prevention and control of marine pollution from ships.”\(^{18}\) The IMO adopts a great number of codes of conduct, guidelines, standards and recommendations to prevent and control pollution from ships. These instruments are technically non-binding; nevertheless, they are accepted in practice and implemented by States. They are even enforced against vessels under a foreign State by coastal States and port States.\(^{19}\)

The OECD has been engaged in standard setting intensively; they are commonly issued as recommendations. It is the particularity of these standards that they constitute norms in themselves and are not interwoven with hard law like the standards developed by IMO and ICAO. Standards issued by OECD are non-binding and form part of the extensive body of the soft law produced by the organisation. Within the OECD recommendations entail a strong political commitment by members which are expected to take measures for the implementation of the recommendation concerned. Often, these recommendations include reporting obligations concerning implementation. Such reporting obligations exercise a pressure to implement. This approach is comparable in object and purpose to the reporting system common concerning the implementation of international human rights as well as in respect of more recent multilateral environmental treaties such as the Paris Agreement. Apart from the internal effects of OECD recommendations, it is to be noted that some of them worked as a blueprint beyond the realm of OECD. In particular, OECD developed the first comprehensive code for corporate social responsibility,\(^{20}\) which had a significant impact in international law in general. It is the particularity of these guidelines that they provide for a dispute settlement procedure. It should be noted that the Council of the OECD in 2019 issued Recommendations on Artificial Intelligence\(^{21}\) which refers and establishes relevant Guidelines in the Sustainable Development Goal set out in the 2030...
Agenda for Sustainable Development. One recent example shall complete this point. The OECD issued a guideline concerning the origin of certain minerals. This soft law instrument was included into an EU Regulation 2017/812, which will become effective on 1 January 2021.

Finally, the FAO Code of Conduct on Responsible Fisheries has been developed as an alternative for a treaty-based regime covering the same regulations. This Code of Conduct is freestanding as are the OECD guidelines, that is to say it is implemented without any recourse to any international legally binding norm. It is implemented via a system of reporting obligations. This Code is not unique.

4 Concluding Remarks

The foregoing has demonstrated that the contributions of various actors to the international normative order are multifaceted. In general – and this constitutes a simplification – one may identify several different levels of norm making: The initiation of new norms is undertaken by all actors and further developed by politically oriented fora; the new norms may be negotiated on the basis of the outcome from the politically oriented fora in multilateral conferences. However, the process does not end here. The international norms established are not static. They are progressively developed by means of interpretation by conferences/meetings of parties and treaty bodies. Finally, one should add a new and growing category of norms, namely international standards, mostly not developed by actors in international relations but by institutions governed or influenced by professional societies and representatives from the civil society. These standards are integrated into international norms through blanket rules – these are rules, which have to be filled and concretized before they can be implemented. This development briefly outlined here has significantly altered international normativity.