

LAW OR NOT? CONSIDERING THE VALUE OF INTERNATIONAL SOFT LAW IN ADDRESSING ENVIRONMENTAL PROBLEMS

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ABSTRACT

While more than 500 multilateral environmental agreements and 200 treaty-based institutions have been created in recent decades, there has also been the emergence and continued development of 'soft law'. Soft law is a concept that jurists grapple with because the concept is ambiguous; this paper addresses this concern by defining the term. This paper then explores the function of soft law in the development of international environmental law by examining its role in the development of customary law, its role in the development of standards, and its flexibility. Some of the criticisms of soft law are raised; these are acknowledged and rebutted. Ultimately, it is concluded that soft law is extremely valuable in addressing environmental problems.

I INTRODUCTION

Earth is a marvel; there are countless extraordinarily rare features of this rocky planet that have combined to produce the conditions that sustain life.¹ Irrespective of one's beliefs as to how these conditions materialised, Earth faces a long list of environmental problems.² The United Nations Environment Programme, in considering environmental problems, notes that human activities are 'increasing[ly] challeng[ing]...the planet, which will result in fundamental, unprecedented[,] and unpredictable changes in the [E]arth system...'.³

International law is one means through which environmental challenges are being addressed. While more than 500 multilateral environmental agreements and 200 treaty-based institutions have been created in recent decades,⁴ there has also been the emergence and continued development of 'soft law'.⁵ Soft law is a concept that 'jurists feel uncomfortable analyzing...' because the concept is ambiguous;⁶ this paper addresses this concern by defining the term. This paper then details the function of soft

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Ved Nanda and George Pring, *International Environmental Law and Policy for the 21st Century* (Martinus Nijhoff Publishers, 2nd ed, 2012) 3.

² *Ibid* 4.

³ United Nations Environment Programme, *21 Issues for the 21st Century: Results of the UNEP Foresight Process on Emerging Environmental Issues* (UNEP Foresight Process Biennial Report, 20 February 2012) 3.

⁴ *Gaps in international environmental law and environment-related instruments: towards a global pact for the environment – Report of the Secretary-General*, UN Doc A/73/419 (30 November 2018).

⁵ Pierre-Marie Dupuy, 'Soft law and the International Law of the Environment' (1991) 12 (Winter) *Michigan Journal of International Law* 420, 420.

⁶ *Ibid*.

law in the development of international environmental law, to conclude that soft law is extremely valuable in addressing environmental problems.

II WHAT IS SOFT LAW?

Dupuy defines ‘soft law [as]...not yet or not only law...’.⁷ In other words, soft law ‘falls outside the principal sources of law...’.⁸ Therefore, defining soft law requires an examination of the sources of international law.⁹ Although the *Statute of the International Court of Justice (ICJ Statute)* establishes the International Court of Justice, Article 38 has evolved into a generally accepted definition of the sources of international law.¹⁰ Article 38(1)(a) of the *ICJ Statute* lists ‘international conventions...[as]...establish[ed] rules expressly recognized by...states...’.¹¹ Further, the *Vienna Convention on the Law of Treaties* defines a treaty as an ‘international agreement governed by international law...whatever its particular designation’.¹² Therefore, it is generally accepted that a treaty is international law and is binding if the states intend it to be binding,¹³ states being the original actors in international law.¹⁴ Article 38(1) of the *ICJ Statute* lists ‘international custom...[,] the general principles of law recognized by civilized nations[, and]...judicial decisions and...teachings of...publicists...’ as three further sources of international law.¹⁵ While there are ‘[a]lmost as many definitions of soft law...as there are writers about it’,¹⁶ the significant peer support for Dupuy’s definition highlights its value and justifies its use.¹⁷

However, this definition cannot stand alone. Generally, ‘the “softness” of an instrument corresponds to the “softness” of its contents. After all, the very nature of “soft” law lies in the fact that it is not in itself legally binding...’.¹⁸ Nevertheless, when analysing international law, it is necessary to distinguish between the content

⁷ Ibid.

⁸ Mark Drumbl, ‘Actors and law-making in international environmental law’ in Malgosia Fitzmaurice, David Ong, and Panos Merkouris (eds), *Research Handbook on International Environmental Law* (Edward Elgar Publishing, 2010) 3, 14.

⁹ Ibid.

¹⁰ Timo Koivurova, *Introduction to International Environmental Law* (Routledge Taylor & Francis Group, 2014) 60.

¹¹ *Statute of the International Court of Justice* art 38(1)(a).

¹² *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 2(1)(a).

¹³ Andrew Guzman and Timothy Meyer, ‘International Soft Law’ (2010) 2(1) *Journal of Legal Analysis* 171, 188.

¹⁴ Timo Koivurova, *Introduction to International Environmental Law* (Routledge Taylor & Francis Group, 2014) 54.

¹⁵ *Statute of the International Court of Justice* art38(1)(b)-(d).

¹⁶ Joseph Gold, *Interpretation: the IMF and international law* (Kluwer Law International, 1996) 301.

¹⁷ See, eg, Mark Drumbl, ‘Actors and law-making in international environmental law’ in Malgosia Fitzmaurice, David Ong, and Panos Merkouris (eds), *Research Handbook on International Environmental Law* (Edward Elgar Publishing, 2010) 3, 19; Andrew Guzman and Timothy Meyer, ‘International Soft Law’ (2010) 2(1) *Journal of Legal Analysis* 171, 180; Stephen Toope, ‘Formality and Informality’ in Daniel Bodansky, Jutta Brunnee, and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2008) 107, 121.

¹⁸ Pierre-Marie Dupuy, ‘Soft law and the International Law of the Environment’ (1991) 12 (Winter) *Michigan Journal of International Law* 420, 429.

and the instrument of the law because these components are not always aligned.¹⁹ Firstly, there are examples of formally non-binding instruments where the content has been so precisely defined that, aside from the usage of certain modal auxiliary verbs, provisions could be easily integrated into a binding agreement.²⁰ Secondly, and in contrast, there are many international agreements, binding on the parties through the operation of *pacta sunt servanda*,²¹ where the substance of the phrasing is such that 'it seems impossible to consider them as creating a precise obligation or burden...'²² A notable example is the *Convention on Long-Range Transboundary Air Pollution* where the parties' 'shall endeavour to limit and, as far as possible, gradually reduce...' their pollution.²³ Manifestly, defining soft law facilitates subsequent evaluation of instruments.

III FUNCTION OF SOFT LAW

A Development Of Customary Law

It is irrefutable that soft law has developed customary law to address environmental problems.²⁴ Soft law's development of customary law has occurred because states choose soft law 'when they are uncertain...whether the rules they adopt today will be desirable tomorrow[,] and when it is advantageous to allow...states...to adjust expectations in...changed circumstances...'²⁵ Soft law can develop into customary law because the process of making customary law is the same in international environmental law as it is in general international law.²⁶ At the risk of simplifying an extraordinarily complex process, the custom must enjoy state practice and recognition as being binding on states,²⁷ which when considered with the express or tacit consent of states, must

¹⁹ Ibid.

²⁰ Pierre-Marie Dupuy, 'Soft law and the International Law of the Environment' (1991) 12 (Winter) *Michigan Journal of International Law* 420, 429. See, eg, *Report of the United Nations Conference on Environment and Development*, UN Doc A/CONF151/26(Vol.1) (12 August 1992) annex I (Principles 8, 9, 12, 14).

²¹ Peter Lawrence and Daryl Wong, 'Soft law in the Paris Climate Agreement: Strength or weakness?' (2017) 26(3) *Review of European, Comparative & International Environmental Law* 276, 282.

²² Pierre-Marie Dupuy, 'Soft law and the International Law of the Environment' (1991) 12 (Winter) *Michigan Journal of International Law* 420, 429. See, eg, *Convention on Long-Range Transboundary Air Pollution*, opened for signature 13 November 1979, 1302 UNTS 217 (entered into force 16 March 1983) arts 2-6.

²³ *Convention on Long-Range Transboundary Air Pollution*, opened for signature 13 November 1979, 1302 UNTS 217 (entered into force 16 March 1983) art 2.

²⁴ See also *Gaps in international environmental law and environment-related instruments: towards a global pact for the environment – Report of the Secretary-General*, UN Doc A/73/419 (30 November 2018) 5, 7.

²⁵ Andrew Guzman and Timothy Meyer, 'International Soft Law' (2010) 2(1) *Journal of Legal Analysis* 171, 171.

²⁶ Pierre-Marie Dupuy, 'Formation of Customary International Law and General Principles' in Daniel Bodansky, Jutta Brunnee, and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2008) 449, 452.

²⁷ Arnold Pronto, 'Understanding the Hard/Soft Distinction in International Law' (2015) 48(4) *Vanderbilt Journal of Transnational Law* 941, 947.

be sufficient for the creation of an international custom.²⁸ This benchmark is achieved because ‘[s]oft law establishes shared understandings that [gradually] limit the practical ability [of states] to withhold consent...’.²⁹ Arguably there are several examples, but the least contentious is the evolution of the prevention principle.³⁰ The contemporary prevention principle can be traced to the Stockholm Declaration,³¹ although its origins in other forms predate this document.³² In the aftermath of the Stockholm Declaration, multiple treaties and soft-law documents were adopted concerning various areas of international environmental law; however, they all reaffirmed the prevention principle explicitly,³³ or implicitly.³⁴ Consequently, with time, because of relevant state practice in environmental treaties and this codification, the prevention principle evolved into a ‘well-established...customary norm of international law...’.³⁵ Further, the *ICJ* has, on several occasions, recognised the customary grounding of the prevention principle.³⁶ The historical contribution of soft law to the development of customary international law, in addition to the potential for this mechanism to continue to develop customary international law addressing environmental issues, demonstrates that it is extremely valuable.

B Development Of Standards

Soft law, although non-binding, through the articulation of rules and principles leads

²⁸ Pierre-Marie Dupuy, ‘Formation of Customary International Law and General Principles’ in Daniel Bodansky, Jutta Brunnee, and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2008) 449, 454.

²⁹ Stephen Toope, ‘Formality and Informality’ in Daniel Bodansky, Jutta Brunnee, and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2008) 107, 122.

³⁰ *Gaps in international environmental law and environment-related instruments: towards a global pact for the environment – Report of the Secretary-General*, UN Doc A/73/419 (30 November 2018) 11.

³¹ *Report of the United Nations Conference on the Human Environment*, UN Doc A/CONF48/14/Rev1 (12 August 1992) art II(Principle 21).

³² Leslie-Anne Duvic-Paoli and Jorge Vinuales, ‘Principle 2: Prevention’ in Jorge Vinuales (ed), *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press, 2015) 107, 108-9.

³³ See, eg, *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, opened for signature 29 December 1972, 11 ILM 1294 (entered into force 30 August 1975) preamble; *Convention on Long-Range Transboundary Air Pollution*, opened for signature 13 November 1979, 1302 UNTS 217 (entered into force 16 March 1983) preamble; *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) arts 192-4.

³⁴ Leslie-Anne Duvic-Paoli and Jorge Vinuales, ‘Principle 2: Prevention’ in Jorge Vinuales (ed), *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press, 2015) 107, 109. See, eg, *Convention for the Conservation of Antarctic Seals*, opened for signature 1 June 1972, 11 ILM 251 (entered into force 11 March 1978); *Convention for the Conservation of European Wildlife and Natural Habitat*, opened for signature 1 June 1982, UKTS 56 Cmnd 8738 (entered into force 1 November 1983); *Convention on the Conservation of Migratory Species of Wild Animals*, opened for signature 23 June 1979, 19 ILM 15 (entered into force 1 November 1983).

³⁵ Leslie-Anne Duvic-Paoli and Jorge Vinuales, ‘Principle 2: Prevention’ in Jorge Vinuales (ed), *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press, 2015) 107, 120.

³⁶ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, para 29; *Gabcikovo-Nagymaros (Hungry/Slovakia)* [1997] ICJ Rep 7, para 140.

to a 'beneficial educative effect and can open up avenues for future advocacy...'.³⁷ That is, soft law addresses environmental problems through the development of standards. Academics describe this phenomenon in various formulations but, nevertheless, there is broad agreement that it occurs.³⁸ For example, the Article 3 of the *United Nations Framework Convention on Climate Change (UNFCCC)* asserts that the '[p]arties should protect the climate system...in accordance with their common but differentiated responsibilities and respective capabilities...'.³⁹ While the *UNFCCC* is a binding instrument, the 'should' ensures this provision is soft law. The *UNFCCC* was opened for signature on the first day of the United Nations Conference on Environment and Development, which ultimately produced the Rio Declaration on Environment and Development (Rio Declaration). The Rio Declaration further acknowledged that given historical contributions, '[s]tates have common but differentiated responsibilities...'.⁴⁰ Subsequently, the *Kyoto Protocol* was adopted to strengthen the commitments of primarily developed nations and operationalised the principle.⁴¹ The principle was later identified as a significant contributor to the failure of the *Kyoto Protocol*.⁴² Nevertheless, almost two decades later, the binding obligations of parties in the Paris Agreement are qualified by the requirement that commitments 'reflect...[parties'] common but differentiated responsibilities...'.⁴³ A similar evolution occurred with the concept of 'sustainable development'. Sustainable development was originally introduced as humanity's 'capability to transform...surroundings...[because,] if...[resources are] used wisely...[, they] can bring to all peoples the benefits of development...'.⁴⁴ It has

³⁷ Stephen Toope, 'Formality and Informality' in Daniel Bodansky, Jutta Brunnee, and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2008) 107, 118.

³⁸ Ilhami Olsson, 'Four Competing Approaches to International Soft Law' (2013) 58 *Scandinavian Studies in Law* 177, 182, 185; Gunther Handl, William Reisman, Bruno Simma, Pierre-Marie Dupuy and Christine Chinkin, 'A Hard Look at Soft Law' (1988) 82 *Proceedings of the Annual Meeting (American Society of International Law)* 371, 380; Gregory Shaffer and Mark Pollack, 'Hard versus Soft Law in International Security' (2011) 52(4) *Boston College Law Review* 1147, 1165.

³⁹ *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1994) art 3(1).

⁴⁰ *Report of the United Nations Conference on Environment and Development*, UN Doc A/CONF151/26(Vol.I) (12 August 1992) annex I (Principle 7).

⁴¹ *Report of the Conference of the Parties on its third session, held at Kyoto from 1 December to 11 December 1997*, UN Doc FCCC/CP/1997/7/Add1 (25 March 1998) 4; *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 16 March 1998, 2303 UNTS 162 (entered into force 16 February 2005) art 10, annex B ('*Kyoto Protocol*').

⁴² Stephen Toope, 'Formality and Informality' in Daniel Bodansky, Jutta Brunnee, and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2008) 107, 118.

⁴³ *Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015*, UN Doc FCCC/CP/2015/10/Add1 (29 January 2016) annex(art 2(2)).

⁴⁴ *Report of the United Nations Conference on the Human Environment*, UN Doc A/CONF48/14/Rev1 (12 August 1992) arts I(3), II(Principles 2,3,5).

since been included in binding obligations⁴⁵ and become normative.⁴⁶ These are brief examples of how soft law brings legitimacy and expertise to eventually enforce ‘norms and standards’ addressing environmental problems,⁴⁷ which demonstrates its value.

C Flexibility

Soft law functions to address environmental problems by being ‘flexibl[e]... [and thus encouraging] widespread participation...[, and] speed...’,⁴⁸ all of which demonstrate soft law’s value.⁴⁹ This flexibility is important because ‘many reasons... exist...which prevent the conclusion of a formal treaty [or binding obligation but]... do not interfere with...’ soft law.⁵⁰ The flexibility of soft law is evident in its ability to achieve the widespread participation of states. The Paris Agreement substantiates this; one of the core obligations, Article 4(2), states that ‘[p]arties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions...’.⁵¹ While ‘shall’ compels mitigation measures, the last clause, ‘with the aim of’, indicates this obligation is satisfied if action is taken aimed at achieving the mitigation measures rather than actually meeting the requirements of the mitigation measures. The Paris Agreement achieved 195 signatories. In contrast, the binding obligations of the *Kyoto Protocol* contributed to the participation of just 83 signatories.⁵² A further example of state participation due to soft law is the decision of the Fourth Meeting of the Parties to the Montreal Protocol to provide for a non-compliance procedure providing parties with discretion, through the word ‘may’, to choose whether to utilise the procedure.⁵³ The flexibility of soft law is, therefore, valuable in addressing environmental problems.

⁴⁵ See, eg, *United Nations Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) preamble, arts 1, 2, 6; *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1994) art 2; *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, opened for signature 3 March 1973 (entered into force 1 July 1975) art 2(1).

⁴⁶ *Resolution adopted by the General Assembly on 25 September 2015*, GA Res 70/1, UN Doc A/Res/70/1 (21 October 2015) 44; *United Nations Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) art 8(e).

⁴⁷ Filippo Zerilli, ‘The rule of soft law: An introduction’ (2010) 56 (Spring) *Focaal – Journal of Global and Historical Anthropology* 3, 10.

⁴⁸ Ilhami Olsson, ‘Four Competing Approaches to International Soft Law’ (2013) 58 *Scandinavian Studies in Law* 177, 188.

⁴⁹ Kenneth Abbott and Duncan Snidal, ‘Hard and Soft Law in International Governance’ (2000) 54(3) *International Organization* 421, 434.

⁵⁰ Remigiusz Bierzanek, ‘Some Remarks on Soft International Law’ (1988) 17 *Polish Yearbook of International Law* 21, 37.

⁵¹ *Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015*, UN Doc FCCC/CP/2015/10/Add1 (29 January 2016) annex (art 4(2)).

⁵² United Nations Treaties Collection, ‘Paris Agreement’, Status as at 28-01-2019 (Web Page, 28 January 2019) <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-d&chapter=27&clang=en>; United Nations Treaties Collection, ‘Kyoto Protocol to the United Nations Framework Convention on Climate Change’, Status as at 28-01-2019 (Web Page, 28 January 2019) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-a&chapter=27&clang=en>.

⁵³ *Report of the Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, UN Doc UNEP/OzLPro/4/15 (21 June 1991) annex IV(1).

The flexibility of soft law further achieves widespread participation through greater participation of non-state actors. This is notable because ‘there exists a significant gap in international environmental law regarding effective participation by non-[s]tate actors...’.⁵⁴ Emphasis on this is evident in the Rio Declaration and the report from the United Nations Conference on Sustainable Development.⁵⁵ Lastly, the flexibility of soft law is evident in its speed. The *Vienna Convention for the Protection of the Ozone Layer* was negotiated and rapidly became legally binding, despite scientific disagreement because it established a framework of mechanisms to approach the issue,⁵⁶ including soft law provisions.⁵⁷ In contrast, the Third United Nations Conference on the Law of the Sea lasted almost ten years before negotiations of the *United Nations Convention on the Law of the Sea* were concluded.⁵⁸ The advantages of soft law’s flexibility are especially significant when one considers ‘the future development of international environmental law is likely to require more, rather than less[,]...flexibility...’, which further corroborates the value of soft law in addressing environmental problems.⁵⁹

IV THE VALUE OF SOFT LAW

Despite the elucidated advantages of soft law facilitating the development of international environmental law, there are significant critiques of its value. The most prevalent criticism is that soft law generates a complex web of conflicting obligations with varying legal influence.⁶⁰ This web of obligations results in actors no longer being sure what rules to apply, with what force they should be applied, and what consequences they face for violations. As such, the provision of order, predictability, and stability of the international legal order are lost.⁶¹ While the number of obligations has increased, this criticism appears hyperbolic. The emergence of soft law in international environmental law occurred almost fifty years ago and the international legal system arguably still

⁵⁴ *Gaps in international environmental law and environment-related instruments: towards a global pact for the environment – Report of the Secretary-General*, UN Doc A/73/419 (30 November 2018) 5, 35.

⁵⁵ *Report of the United Nations Conference on Environment and Development*, UN Doc A/CONF151/26(Vol.I) (12 August 1992) annex I(Principle 10); *Resolution adopted by the General Assembly on 27 July 2012: the future we want*, GA Res 68/288, UN Doc A/Res/66/288 (11 September 2012) annex I(1).

⁵⁶ Geoffrey Palmer, ‘New Ways to Make International Law’ (1992) 86(2) *American Journal of International Law* 259, 273.

⁵⁷ See, eg, *Vienna Convention for the Protection of the Ozone Layer*, opened for signature 22 March 1985, 1513 UNTS 293 (entered into force 22 September 1988) arts 2(1), 3(1)-(2).

⁵⁸ Codification Division Publications, ‘Third United Nations Conference on the Law of the Sea’, Diplomatic Conferences (Web Page, 2019) <http://legal.un.org/diplomaticconferences/1973_lo/>.

⁵⁹ *Gaps in international environmental law and environment-related instruments: towards a global pact for the environment – Report of the Secretary-General*, UN Doc A/73/419 (30 November 2018) 7.

⁶⁰ Jaye Ellis, ‘Shades of Grey: Soft Law and the Validity of Public International Law’ (2012) 25(2) *Leiden Journal of International Law* 313, 319; Stephen Toope, ‘Formality and Informality’ in Daniel Bodansky, Jutta Brunnee, and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 1st ed, 2008) 107, 117.

⁶¹ Jaye Ellis, ‘Shades of Grey: Soft Law and the Validity of Public International Law’ (2012) 25(2) *Leiden Journal of International Law* 313, 320.

provides the international legal system with order, predictability, and stability.⁶² Similarly, the ability of soft law to develop norms and standards has been criticised because the use of vague language is contended to ‘create the illusion of agreement and resolution...’.⁶³ Furthermore, there is a fear soft law allows ‘pseudo-norms...[to be] smuggl[ed]...into international law...’;⁶⁴ because they are easier to adopt, especially if the requirements ‘for the creation of legally binding rules can be circumvented...’.⁶⁵ Based on pseudo meaning ‘sham’ and ‘norm’ meaning ‘a standard’,⁶⁶ this criticism is subjective. However, advocates of norms likely would not consider them to be a sham, and the subsequent incorporation of some soft law norms into binding international law; therefore, this criticism is of limited value. Lastly, soft law’s flexibility is disputed because the way states negotiate soft law instruments can be complex, time-consuming, and costly.⁶⁷ While undoubtedly true for some negotiations, this point does not fault other advantages of soft law’s flexibility. Given the enormous advantages of soft law, criticisms such as the critical challenges of environmental issues, the urgency of action, and difficulties inherent in international law⁶⁸, can be refuted.

V CONCLUSION

As explored, soft law is law that is ‘not yet or not only law...’.⁶⁹ Soft law functions to develop customary international law, which is binding as a source of international law. Further, soft law develops new norms and standards that address the causes of environmental problems, implementation, and effectiveness. Soft law is a mechanism that is extremely flexible, which achieves many important outcomes. Crucially, it enables widespread participation of states and non-state actors in international instruments. ‘Law is itself an expression of the values that we trust to shape a better world...’.⁷⁰ Thus, the emergence and proliferation of soft law, first in international environmental law, reflects the trust and value humanity places in soft law in addressing environmental problems.

⁶² Gunther Handl, William Reisman, Bruno Simma, Pierre-Marie Dupuy and Christine Chinkin, ‘A Hard Look at Soft Law’ (1988) 82 *Proceedings of the Annual Meeting (American Society of International Law)* 371, 383; Monika Ambrus, ‘Between Pragmatism and Predictability: Temporariness in International Law’ (2014) 45 *Netherlands Yearbook of International Law* 1, 1; United Nations Environment Programme, *Environmental Rule of Law: First Global Report* (Report, 1, 24 January 2019) 380-1.

⁶³ Jaye Ellis, ‘Shades of Grey: Soft Law and the Validity of Public International Law’ (2012) 25(2) *Leiden Journal of International Law* 313, 318.

⁶⁴ Remigiusz Bierzanek, ‘Some Remarks on Soft International Law’ (1988) 17 *Polish Yearbook of International Law* 21, 39.

⁶⁵ Jaye Ellis, ‘Shades of Grey: Soft Law and the Validity of Public International Law’ (2012) 25(2) *Leiden Journal of International Law* 313, 320.

⁶⁶ *Macquarie Dictionary* (online at 29 January 2019) ‘pseudo’ (def 1); *Macquarie Dictionary* (online at 29 January 2019) ‘norm’ (def 1).

⁶⁷ Gunther Handl, William Reisman, Bruno Simma, Pierre-Marie Dupuy and Christine Chinkin, ‘A Hard Look at Soft Law’ (1988) 82 *Proceedings of the Annual Meeting (American Society of International Law)* 371, 389.

⁶⁸ *Gaps in international environmental law and environment-related instruments: towards a global pact for the environment – Report of the Secretary-General*, UN Doc A/73/419 (30 November 2018) 5.

⁶⁹ Pierre-Marie Dupuy, ‘Soft law and the International Law of the Environment’ (1991) 12 (Winter) *Michigan Journal of International Law* 420, 420.

⁷⁰ Stephen Toope, ‘Formality and Informality’ in Daniel Bodansky, Jutta Brunnee, and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2008) 107, 124.

Evidently, soft law is extremely valuable in addressing environmental problems. Although there are criticisms of soft law, these have been acknowledged and rebutted. The elucidated functions of soft law, as argued in this paper, demonstrate that soft law is invaluable in addressing environmental problems.