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International Soft Law, Hard Law, and Coherence

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I. Soft Law

The subject matter of traditional international law is the entitlements and obligations of states *inter se.* Yet judging from the spate of articles in the past few years about soft law, one might think that classical international law has been dislodged. In a forthcoming chapter in The Philosophy of International Law (Oxford Univ. Press), Samantha Besson discusses the sources of international law as if the product of those

sources is soft law exclusively. She regards soft law as the norms that arise from, and then apply to, individuals, organizations, and states. Furthermore, we find that the sources of soft law are far more bountiful than the triumvirate hard-law sources of custom, convention, and general principles.

Besson does not claim that when a norm of soft law conflicts with a norm of hard law, soft law trumps hard law. Rather, both sets of norms co-exist. In any event, we learn that the instrumental relation between soft and hard law is less important than the great difference in their goals. The goals, Besson assures us, involve facilitating a new world order based on co-operation, coexistence, democracy, morality, and justice. Goals such as these tend to make a putative critic of soft law feel like the Grinch who stole Christmas.

A. Provenance

Whence the concept of soft law? In 1926 Vladimir Vernadsky hypothesized that the Earth has gone through three stages: the geosphere (inanimate matter), the biosphere (life forms), and the noösphere (human cognition).[1] Just as the emergence of life fundamentally transformed the geosphere, the emergence of human cognition transformed the biosphere. Three decades later a theologian, Teilhard de Chardin, contended that the noösphere has evolved from the interaction of human thoughts into a

[1] Vladimir Vernadsky, The Biosphere (Synergetic Press, 1986).

transhuman consciousness.[2] For Teilhard, the ideas and their interactions that made up the noösphere were a greater reality than the humans who conceived them.

Another three decades passed when the German sociologist Niklas Luhmann took a more practical approach to the noösphere. He argued that ideational reality is achieved through communications. The world we live in is the social construct of these communications. According to the legal sociologist Gunther Teubner, the essentially egalitarian and horizontal character of communications led Luhmann to present world society "as a society without hierarchy and without a sovereign."[3] Luhmann found no need for statist mechanisms to evaluate or select from conflicting communications, for in his theory the social system is self-regulating.[4] Its internal needs and functions are bordered by a filter that allows a few select environmental communications to osmose into the system.[5] Significantly from the standpoint of international law, Luhmann's social system transcends geopolitical boundaries (communications do not respect borders) and hence like customary international law it fills the global plenum.

B. Goals

Students of soft law are repelled by the sluggish pace of traditional international law in advancing human rights and protecting the global ecosystem. In the political arena, they find that traditional law bends too readily to accommodate transboundary

[2] Pierre Teilhard de Chardin, The Phenomenon of Man (NY: Harper, 1959).
[3] Gunther Teubner, "The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy," 31 Law & Society Review 763, 783 (1997).
[4] The self-regulating theory of systems, called autopoiesis, is further discussed in Anthony D'Amato, "International Law as an Autopoietic System," in Developments of International Law in Treaty Making 335 (Wolfrum & Roben, eds., Max Planck Institute, 2005).
[5] The environment is always external to the system, by definition.

projections of armed force. States seem to be arbitrarily mapped land masses that cling to international law for whatever protection it gives them from the intrusions of other states. Enter soft law: a kind of strange attractor that influences the direction of the traditional vectors of international law into a noösphere where the norms are disconnected from idiosyncratic state interests and state power, leaving them free to self-aggregate into a *omnium* of norms. As norms, they are somehow purer than the harsh reality of state practice that either drags behind them or ignores them.

If we could travel through the noösphere, what would be the content of the norms that we would encounter? If Samantha Besson were our tour guide, we would see only norms that call for peace, justice, morality, co-existence, cooperation, multilateralism, pluralism, and democracy. If such norms were to take over or pre-empt any area presently governed by traditional international law, then that area would perforce be improved. Although Besson does not indicate the mechanism by which norms of soft law can come down and preempt norms of hard law, she is entitled to claim that to the extent of any such preemption it happens for the best.

But the flaw in her theory is her selectivity as a tour guide. The noösphere is not just filled with facilitative norms; it also contains norms that oppose the facilitative norms. For example, if there are a billion permissive norms in favor of abortion, there could be a billion prohibitive norms that call it murder. Conflicting norms would be generated in a public relations battle by the gun-control lobby against the gun-ownership lobby. We may encounter norms advocating the legalization of narcotics and opposing norms calling for a war on drugs. There are norms on both sides of sports hunting, whaling, homosexuality, pornography, corporal punishment of children, female genital mutilation,

public or private education, and progressive income taxation. The Sha'ria law, covering a billion people in Islamic countries, sends up many billions of norms that say a woman's testimony in court is worth one-half that of a man's testimony. Should the Sha'ria norms be discriminated against when they clash with norms from other countries that treat men and women equally? In international relations we find norms that allow or prohibit unilateral humanitarian intervention, transboundary abduction, patent and copyright protection, and nuclear proliferation. If this hodgepodge of norms were brought to Earth and actualized as binding international law, the result at best would be a stand-off and at worst the end of the rule of law.

C. Filters

Suppose, however, that a filter could be devised that would allow the norms approved by Besson to pass through while blocking the contrary norms. The resulting shower of purely facilitative norms upon the Earth could only lead to legal improvements and legal reform. As we have seen, Besson does not provide a filter; she trusts that soft law will co-exist with hard law by filling in unoccupied areas and gaps in the traditional legal system. But coexistence is hardly a solution when the contrary norms are mixed in with the facilitative ones. Wheat is only edible when separated from the chaff. In the absence of a mechanical filter, we might infer the necessary existence of a human picker-and-chooser in the Platonic form of a philosopher queen. But few states would be

inclined to mortgage their future to the unreviewable decisions of an individual who could change their governments, their territories, their way of life.

The soft-law advocate's ideal filter would be an international court. This actually happened just once in the idiosyncratic *Nicaragua* ruling of the International Court of Justice.[6] The judges, acting without benefit of adversary argument (the United states defaulted) and without law clerks, wrote an opinion that collected willy-nilly all the non-intervention norms, dubbed them customary law, and held that the United States violated the law by intervening militarily in Nicaragua.[7] Or to put the matter in the terms of the present Chapter, the ICJ filtered out all the contrary norms that permit intervention, such as using force to stop genocide, to attack terrorist camps when the host country refuses to act, to rescue nationals that are being held hostage, to restore a democratic Presidency that has been ousted by a fascist military coup, or to strike against a nuclear missile facility nearing completion in a nation run by an unstable tyrant. John Tasioulas has made the *Nicaragua* case the centerpiece of a noteworthy defense of soft law.[8] By aggregating all the non-intervention norms, he removes all the nuances of the customary law of projections of force across boundaries, just as candidates for national office reduce complex policies to one-sentence sound bites. He concludes that the resulting rule prohibiting all interventions is a significant step toward his world-order values. He does not seem to notice how deeply reactionary such a rule would be. For example, the new rule would make it illegal for nation A to intervene forcefully in nation B to stop the

[6] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 ICJ REP. 392 June 27, 1986

[7] Specification of these criticisms may be found in Anthony D'Amato, Trashing Customary International Law, 81 *American JIL* 101 (1987).

[8] John Tasioulas, "In Defence of Relative Normativity: Communitarian Values and the *Nicaragua* Case," 16 *Oxford JLS* 85 (1996).

government of B's genocide against a minority group of B's nationals within B's territory. The great human-rights breakthrough of the post-World War II period that extended international protection to *individuals against their own governments* for egregious human-rights violations (genocide, torture, slavery) should be reversed on the basis of one aberrant case that selected just the non-intervention norms and said they added up to a general international prohibition against forcible intervention. Inasmuch as Tasioulas agrees with Besson that the goals of soft law, and indeed the motivation for soft law, include justice, morality, human dignity, well-being, co-existence and cooperation, pluralism, and democracy, the reader might ask how *any* of these goals would be furthered by looking the other way while a government proceeds in a campaign of genocide against groups of persons within its own territory. A barrier to external intervention in such a case is equivalent to letting the genocide take its own course.

Perhaps the only remaining way to avoid perverse or unintended consequences like the genocide example would be to construct the filter out of the very goals that advocates of soft law wish to achieve. This might sound circular: let the Ends cause the Means so that the Means may cause the Ends. However, unlike the cart-before-the-horse aphorism, a convincing justification by Charles Taylor for inverting the Means-Ends relationship points to its utility here.[9] Taylor argues that whenever a sentient animal engages in a purposive activity, the purpose causes the activity. For example, a person who desires to go to a restaurant a block away will walk in that direction. It is the image or picture of the restaurant in her mind that causes her to move her body toward the restaurant. Thus the goal comes before the means.

[9] See Charles Taylor, The Explanation of Behaviour

Allen Buchanan, a contributor to the present book, wrote an earlier essay proposing that a filter (he did not use that term) could be constructed that would only allow passage to norms that are conducive to achieving justice, morality, and democracy.[10] Constructing such a filter would surely be a gargantuan task; the filter would have to pre-identify norms that would have an inclination, if actualized, to promote justice and democracy. But on the theoretical level, one might agree with Buchanan that the implementation problem can be postponed if the foundations of the theory are solid, And we know, before the implementation stage, that certain basic rules of traditional international law conflict with the justice-oriented and democracy-oriented rules of soft law. Thus at the theoretical stage those conflicts must be addressed.

The most basic of those traditional rules of customary international law is that states are equal before the law. However, Buchanan straightforwardly acknowledges that a democratic and just world order is incompatible with the legal equality of states. Legal equality operates as a shield for affluent states and undemocratic states to protect themselves from external interventions that could effectuate redistribution of wealth and assets. Thus the present international system of legal equality tolerates, legitimizes, and stabilizes extreme economic inequalities among individuals and among states.[11] Many states are lucky in having an abundance of mineral riches below their soil, others achieved their present wealth by past injustices. This unequal distribution of the world's resources, Buchanan charges, is *illegitimate* .Accordingly the have-not states arguably have a moral right under distributive justice to act *illegally* against the affluent states,

[10] Allen Buchanan, "From Nuremberg to Kosovo: The Morality of Illegal International Law Reform," 111 *Ethics* 673 (2001).

[11] Id. at 686.

stripping them of their claims of equality, reducing their legal status to one of subservience (especially in the case of non-democratic affluent states), and redistributing their wealth to the world at large. Such a wholesale rearrangement of the power and wealth relationships among states would be morally required as well as serving to bring the system closer to the ideal of the *rule of law*.

The reader may be forgiven for wondering whether the italicized words in the preceding paragraph were meant to be ironic. However, Buchanan is drawing out the implications of the goals of democracy, justice, and morality. He does not necessarily accept the implications himself.[12] Yet surely it is/ **NOT** hard to imagine the havoc that would be caused in the name of democracy, justice, and morality. Nations are not going to relinquish their wealth, resources, and power, just to satisfy a scholar's argument that justice requires that they do so. People whose homes provide ample room for themselves are not going to willingly invite poorer families from other countries to move in with them and share their rooms and facilities. Perhaps they would do so at the point of a gun. Yet Buchanan expressly disavows violence. He will only go so far as allowing legal reform to take place *illegally*. That there is a cognizable line between illegality and violence must apparently be taken on faith.

II. Hard Law

Hard law invites comparison with soft law from micro and macro viewpoints. At the micro level, a unit of soft law consists only of a norm, whereas a unit of hard law consists of a norm plus a coercive element. Consider a sign along a highway with the

[12] See his book.

number 65. In some countries drivers and police officials interpret this sign as indicating the recommended speed limit. In other countries the sign is compulsory in the sense that the driver who exceeds the speed limit is subject to arrest and a fine or other penalties. In the former countries the sign represents soft law, in the latter—because of the coercive element—it is hard law.

Now suppose a driver sees a string of signs along a highway a few feet apart from each other. Each has a number:65, 30. 95, 10, 40, 200, and 55. The driver would conclude that this is a soft-law country and that the signs each represent the recommended speed—the favored norm—of the person or group that erected the sign. For example, the Anti-Pollution League might have put up the sign saying 10, while the Racing Fans might be responsible for the sign saying 200. But all the signs except 65 would likely be removed by highway workers and police officers in a hard-law country. These examples illustrate what we have seen in Part I of this Chapter: that soft-law norms can contradict each other and probably will inasmuch as they come from such a wide diversity of non-hierarchical sources as described by Samantha Besson. On the other hand, there can be no contradictions among the rules of hard law, as we shall see later in this Chapter in the discussion on customary international law.

Hard law, like soft law, is goal-oriented. The main problem with the goals of soft law was that it was imposed upon the law by scholars writing about the law. This imposition required the scholars to provide filters, which they were unable to do. By contrast, the goal of all of hard law is self-imposed; it grows out of the nature of hard law. It is the goal of self-perpetuation. This is not necessarily a conscious goal; it has a far closer affinity to an evolutionary goal. From a Darwinian standpoint, a living organism

seeks its own perpetuation even if it has no brain or no consciousness. The many living entities that arose from mutations without seeking self-perpetuation simply were selected out of existence. Over 99% of nature's species have become extinct in the course of the earth's history. Of those that survive we can say that they have 'sought' survival even though the term is an anthropomorphism; the fact is that they happened to have genes that promoted rather than retarded survival.

Nations are entities that have survived the international struggle for existence by pursuing policies of self-preservation. They are not necessarily interested in the soft-law version of international law's goals—to guide them toward the moral, the just, or the democratic. They may not even wish to co-exist or cooperate with a state that is their sworn enemy. But all states share one goal: to settle disputes short of war. For the furies of war, once unleashed, can be unpredictable and indeterminate, threatening the existence of the attacker or the state that is attacked or both. Since war constitutes the gravest danger to a nation's survival, measures that can reduce or eliminate war become a nation's paramount defense mechanism.

A state is like a phenotype that contains norms (rather than genes). There are only so many norms, which have copies in all the states. These norms seek self-preservation. To survive, the norms are dependent upon their phenotypes. The norms seek to regulate the actions of their phenotypes in order to maximize their chances of survival. In other words, the norms of international law are peace-seeking.[13] International law perpetuates itself if the states in the aggregate perpetuate themselves. If war should break out, the

[13] Are the norms 'selfish' in Dawkins's sense? See Richard Dawkins, The Selfish Gene ( ). International norms are selfish in the sense that they want to preserve the aggregate of states. But since each state has the same norms (international law does not vary in content from state to state), each state has the same genetic heritage, like identical twins. Thus the true phenotype—if we want to continue the Dawkinian analogy—is the international system and not the individual states within it.

entire system of states and norms would be jeopardized. In this context, anarchy means the extinction of all states and norms. Thus the goal of all the norms of international law is to steer states toward stability and away from anarchy.

Thus we find in international law a civilized mechanism invented over four thousand years ago to help states either to avoid disputes with other nations (such as drawing boundaries between states to avoid endless boundary disputes that might escalate into war), or to minimize the breadth and severity of disputes that nevertheless arise, or to provide a pre-existing set of rules that can serve as a neutral reference-point for adjudicating and settling disputes without the parties' resorting to the use of armed force. International law can perform these functions because it is enforceable law, i.e., hard law, and for this reason, as we shall see, states take it seriously.

A. Types of international law

International law is either consensual or non-consensual. The former type is called conventional law or treaty law; the latter, customary law. It is often convenient to think of conventional law as written law and customary law is unwritten, but this distinction has no substantive significance.

Conventional law consists of treaties and other international agreements. Only the parties to these agreements are bound inter se by the specific mechanisms set forth in the treaty such as procedures for termination and dispute resolution. However, the norms within the treaty can spill over into customary law, the parties to the treaty having no

power to control the treaty's external effects.[14] Moreover, the parties cannot control the interpretation of the treaty's provisions for the reason that no text can specify its own interpretation without falling into infinite regress (each interpretation must itself be interpreted, and so on). Thus the interpretation of treaties must come from outside the treaty, namely the customary international law of treaty interpretation. A largely successful attempt to codify this branch of customary law is the Vienna Convention on the Law of Treaties. But if any provision in the Vienna Convention itself needs to be interpreted, then like any other treaty the interpretation must come from outside the Vienna Convention.

The interpretative regress reinforces what we know anyway about treaties: that they have gaps in their coverage and in any event cannot cover every subject matter that might be relevant to their object and purpose. By contrast, customary law is gap-free and theoretically unlimited. For as we shall see below in greater detail, customary law is purposive: in any case of an alleged tie or a *non liquet*, the tie is broken in favor of the rule or decision that tilts toward peace and away from anarchy. (Conventional law is not purposive; rather it is simply the product of the wishes of the parties, whatever those wishes might be.)

1. How 'Custom' Misleads

Ignoring the preceding taxonomy, many if not most commentators have somehow formed the belief that customary international law must have something to do with

[14] That is to say, the parties to a treaty cannot assert their exclusivity to the norms in the treaty because they cannot control the uses that nonparties may wish to make of the treaty's norms. Prior to the twentieth century, nearly all the norms of customary international law had their origin in treaties.

custom. Pitt Cobbett started it in 1892 by likening custom to footsteps across a common that eventually becomes a path habitually followed by all.[15] Charles De Visscher in 1957 added that some users, because of their weight, will mark the soil more deeply than others.[16] The problem with these similes is that they require a time interval before the path appears. Thus, before we can identify the norm, it must be preceded by a lawless interval during which the norm is being formed. There is an Alice-in-Wonderland quality here of rules being in a state of suspended animation while awaiting news of their own birth or deletion. That very absurdity should have been enough to dispel the custom industry before it had a chance to take hold.

Unfortunately, the problem is not just one of accuracy in nomenclature. Three notorious concepts, which should have been stillborn, have been spawned by the notion that the formation of customary international law is a gradualist process: opinio juris, persistent objector, and exceptionalism. Their result, singly or in combination, has been to obfuscate the scientific study of international law to the point where we find many authors offering their thinly disguised subjectivism on contested issues of international law.

i. Opinio juris

How the concept of opinio juris entered international law has been traced elsewhere and therefore can be incorporated here by reference.[17] What is important for

[15] 1 Pitt Cobbett, Leading Cases on International Law 5 (4th ed. 1922).
[16] Charles De Visscher, Theory and Reality in Public International Law 149 (1957). There are many similar analogies that lead us down the wrong path.
[17] Concept of Custom

present purposes is that customary international law, like God, are concepts (however real they might be) for which there is absolutely no evidence.

The concept of opinio juris must be placed in the general context of the practice of states. International law is solely and exclusively derived from state practice; there is no external observer, no God's-eye viewer,[18] no impartial Spectator, no well-qualified publicist, to tell the states what rules they should follow. A description of all the practices of states is usually summarized in the term 'usage.' The question is how a normative element can be introduced into usage. How do we get from the descriptive to the prescriptive? Since all usage cannot be normatized (which would entail the logical absurdity of normatizing opposed and conflicting practices), can some kind of normative filter be employed here?

Speaking for perhaps the majority of commentators, Ian Brownlie offers opinio juris as usage's missing ingredient.[19] The world court's first encounter with this question presented an intellectual challenge. In the *Lotus Case*, cited by Brownlie, France cited the absence of state practice (on a given point of contention) as tantamount to an international duty to abstain.[20] The Court correctly refused to normatize negative practice, but then went on to explain too much: "only if such abstention were based on [states'] being conscious of a duty to abstain would it be possible to speak of an international custom."[21] But the Court does not explain how a state can be conscious of anything. A state is, after all, an artificial construct. It has no feelings, no emotions, no consciousness. But suppose, to be generous for present purposes, we equate 'state' with the officials who

[18] Putnam, etc.
[19] 4th ed. Ian Brownlie, Principles of Public International Law (1990),.p.7.("it is in fact a necessary ingredient.")
[20] The Lotus Case, PCIJ Ser. A, no. 10, at 28 (1927).
[21] Id.

govern the state. Does the Court suppose that each official can be asked, "Do you believe that you have a duty to abstain from doing X?" In the first place, the vast majority of such abstentions occurred in the historical past; the state officials have long since passed away.

Can they be briefly resuscitated for the limited purpose of such an interview? Again, to be generous, let us omit dead officials and interview only those who are, or are generally accepted as being, alive. The majority are most likely never to have thought of such a question and therefore profess no views about it. Generously, we put them aside. As to those officials who have a view, they would most likely not want to commit their government to any position on the matter, preferring to keep their international-law options open. Thus they would reply that they know but cannot tell. However, we would most probably obtain statements from government officials of the two contesting parties to the case (here, France and Turkey). Here we should expect a clear division of opinion. The French officials would reply that, of course, they recognize a binding international-law duty to abstain from doing X. And the Turkish officials would reply that, of course, they are conscious of no duty to abstain from doing X.

What is true of a purported consciousness on the part of a state to recognize a duty to abstain is a fortiori true of a state consciousness to recognize a duty to act.[22] To ask for evidence of such a consciousness on the part of a state—an artificial entity—is to make a category mistake. To attempt to prove the consciousness of state officials is both to ignore the fact that state officials tend to place their duty to their government on a higher level than truth-telling, and to make the unwarranted assumption that what a group of interviewed state officials say is equivalent to what the government would say (for surely

[22] For a critique of other cases and instances of the purported application of opinio juris, including cases relied upon by Brownlie, see Anthony D'Amato, The Concept of Custom in International Law (1971).

the top officials would meet before they adopt a state position, and many may change their minds at such a meeting.) In brief, whether opinio juris is invoked in the context of abstention or action, it is totally resistant to proof.

None of this is to deprecate the importance of the use that Brownlie and others wish to make of the concept of opinio juris. They want it to serve as a filter between usages that form part of the set of obligations of international law, and those usages that are purely gratuitous such as ceremonial salutes at sea and the practice of exempting diplomatic vehicles from parking prohibitions (both mentioned by Brownlie),[23] or the old custom of writing the definitive text of treaties in French. But such a filter, like using a pile-driver to swat a fly, is too excessive for its own good. States in their diplomatic interchanges easily recognize the difference between comity and compulsion. Recently New York City began towing away illegally parked cars belonging to U.N. diplomats without violating international law. No one would have suggested, centuries ago, that a treaty not written in French was therefore invalid.[24] In any event, since opinio juris cannot be proven, it cannot operate as a filter.

ii. The Persistent Objector

It is said that a 'persistent objector' may opt out of a custom in the process of formation.[25] But as we have seen, there is no process of formation—no state of suspended animation, no lawless interval—in general international law (which is known

[23] Brownlie p. 5.
[24] Sometimes an in-between form of law is used by states when they want to have non-binding commitments. The Helsinki Accords is an example.
[25] Brownlie p. 9.

as customary international law). If this is true, the 'persistent objector' would have no opportunity to object. But if we assume for the moment that there is a persistent-objector doctrine, then international law would not apply to all states equally and generally. It would be a strange form of 'law' that would exempt some states and bind all the others.

We should not lightly assume that the world court dispensed with the doctrine of the equality of all states under international law in the opinion which commentators assert is the origin of the persistent objector doctrine. In the Anglo-Norwegian Fisheries Case, the Court held:

> In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she had always opposed any attempt to apply it to the Norwegian coast.[26]

Speed readers have concluded that the Court was talking about the formation of customary international law. But in fact the Court was talking about title by prescription. Much earlier in its well-reasoned but reader-unfriendly opinion the Court held explicitly that 'the ten-mile rule has not acquired the authority of a general rule of international law.'[27] To be sure, the Court's language in the previous quotation speaks of Norway's *opposition* to the ten-mile demarkation, but the context makes it clear that opposition is just a strong form of non-consent (stronger, for example, than saying nothing). It was this lack of consent that blocked Great Britain's claim to have acquired a historic right to Norwegian waters by prescriptive means.[28] Since prescriptive rights are specific to the

[26] Anglo-Norwegian Fisheries Case, ICJ Rep. 131 (1951).
[27] Id. at 68-69.
[28] See Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law," 30 BYIL 1, 39 (1953).

territory in question, they cannot be generalized into a rule of law settling all land claims everywhere in the world. Thus the court's decision affords no basis for inferring a persistent-objector exception to the formation of customary international law.[29]

iii. Exceptionalism

Exceptionalism is the extreme version of the persistent-objector doctrine. It says that a very powerful state may take exception to any existing rule of customary international law. This is the ultimate realist position in international relations. The realist claims that law is only effective when it is backed up by power. Since the top enforcer of international law is the superpower, it follows that the superpower is above the law in the old (and mistaken)[30] sense that the sovereign is above the law. In short, might makes right.

The realist believes that exceptionalism is simply a description of the power distribution among nations. But he also believes that international law is weak tea. Two of the most recent realists argue that from the present point of view of the United States, international law is nothing more than a set of policy considerations. Some of these considerations (rules of customary international law) have been relied upon by other states; hence there would be increased costs to the United States if it rejects those particular rules. But in some circumstances the cost of noncompliance with the rules of international law would be perceived to be cheap compared to its benefits.

[29] For further detailed analysis of the Fisheries Case, see Anthony D'Amato, "The Concept of Special Custom in International Law," 63 AJIL 211 (1969).
[30] See Hart, Concept of Law

However, there is no doubt that the reaction of every other state to a claim of exceptionalism will be decidedly negative. Exceptionalism does not only implicate a few rules that the superpower finds inconvenient; rather, it is an assault on the entire system of international law. Like the persistent objector, only more so, the exceptionalist is claiming that all states are not equal before the law. Is there anything the other states can do to discredit the claim of exceptionalism?

In fact there is no need for the other states to take any action because the claims of exceptionalism and persistent objection have not been seriously asserted in the practice of states. Their prominence is only due to the space accorded to them by scholars and publicists. Nearly everyone who writes about customary international law seems to have a need to pay obeisance to the concepts of opinio juris, persistent objector, and sometimes exceptionalism, apparently for reasons of easy credentialism.

During the Cold War neither the United States nor the Soviet Union ever asserted exceptionalism from the rules of international law. After the Soviet Union ended in 1991, the United States as the sole remaining superpower never claimed exceptionalism. Similarly, no nation in its international dealings has ever officially claimed that it is not bound by a given rule of customary law because it objected to that rule in the process of its formation. The reason that no nation has made this claim has already been shown: customary law does not go through a temporal process of formation.

2. Proving Customary Law

i. Instances of First Impression

In the short space allotted here, perhaps the most economical way to think about how customary international law is formed is to look at the way common law is formed. Common law grows and its rules become denser over time without any external help from a legislature or a king with lawmaking powers. Every case adheres to previous decisions in similar cases—the rule of precedent or *stare decisis.* What about the very first case? For present purposes we do not know the facts of that case or the weight of the equities in favor of either plaintiff or defendant. And of course in addition to not knowing the facts, we do not know the law because this is a case of first impression. Thus we are at the 50-50 point, and it would be unseemly to decide the case by a throw of the dice (as perfected by Judge Bridlegoose).[31] Since the case is evenly balanced, even a slight consideration favoring one side would tip the outcome. That consideration will always be: favor the outcome that leads to greater social stability than its opposite. This is not necessarily a built-in conservative bias, at least not in the political sense. But it is conservative in the sense that the court will choose the outcome that least disturbs the public's sense of order and stability.

Why is order (peace, stability) built in to the legal system such that it factors in as a weight to an otherwise evenly balanced case? The reason is of critical importance: that the legal system, of which judges, courts, marshals, and sheriffs are a part, seeks self-preservation against the sometimes hostile forces in a society. In order for law to preserve itself, it must have a stable and predictable environment—the opposite of anarchy. This goal of the legal system, as mentioned previously in this Chapter, is not externally

[31] See Rabelais, Gargantua et Pantagruel (1533).

imposed. It is a natural result of the evolution of any legal system. Just as mankind built houses for protection against the weather and animal predators, judges decide cases that protect the legal system against the forces of anarchy in the system's environment. Just as homebuilding is a conscious act of survival, judicial decision-making tends to choose the proffered rule that promises to make a positive contribution to societal stability.[32]

Of course the analogy of customary international law to common domestic law is imperfect. Missing is a key player, the neutral judge. For although an increasing number of international-law claim-conflicts are now decided by domestic or international tribunals, nevertheless the total is a very small percentage of all international controversies. Let us use the term 'controversies' for conflicts between states whether or not those conflicts are formally adjudicated in a court or tribunal.[33] We shall see that customary international law derives its content from the resolution of those controversies (the same way that precedent works in the common law), whether or not the resolution was in the form of a court's judgment:

COMMON LAW	CUSTOMARY LAW
Case	Controversy
Judgment	Resolution

The first and perhaps most important rule of customary law is the inviolability of interstate boundaries. In ancient Mesopotamia, Hittite kingdoms were scattered over the territory. As these kingdoms grew and started to radiate outward, they began to abut

[32] See the considerations in Kennedy's "introspective' analysis of a judge's reasoning.
[33] The United States Constitution, in its Cases or Controversies clause, ...

against other expanding kingdoms. The territory between two kingdoms became a battleground, as farmers and home-dwellers from each kingdom fought with one another for land and rights. The cure for these controversies quickly became obvious: draw a boundary line between the two states. The boundary usually consisted of a sharp ridge, or a clear valley, or most preferably a river, but even sight-lines from nearby mountain-tops were sometimes used. Now both sides could live in peace on their own side of the boundary line. Territorial boundaries are today among the most entrenched norms of international law; they are even specifically excepted from the treaty rule of changed circumstances.[34] Their longevity is obviously due to their clear utility in promoting international stability.

The earliest rule of international law may be bracketed with the most recent: the rule of 'no safe haven for terrorists.' The latter rule was articulated by President George W. Bush in an address to Congress nine days after the attack on the World Trade Center towers in Manhattan.[35] Under this new rule all states are obliged to destroy any terrorist camp or installation within their territory, and if they fail to do so, any other state is privileged to enforce the rule by aerial attack on the terrorist camp. It is clear that the terrorist danger to international peace and stability was so palpable, especially after the 9/11 World Trade Center attacks, that President Bush appears to have simply articulated a rule whose substance all nations had inchoately accepted. Despite being another exception to the porous principle of non-intervention (see the earlier discussion of John

[34] See Vienna Convention, Provision ___

[35] We are likely to find out, when archival records are released, that the United States Department of State vetted the proposed rule with several other nations in advance of the President's speech. An analogous situation was the vetting of President Truman's proposed statement on the Continental Shelf prior to its proclamation on 28 September 1945. See Zdemek Slouka, International Custom and the Continental Shelf, 1968, Nijhoff: The Hague.

Tasioulas's work), the no-self-haven rule illustrates the fact that customary international law does not require a process of formation but rather (like common law) can arise instantaneously.[36]

ii. Following Precedent

The archives and newspapers of the world, and now the internet, contain millions of accounts of interstate disputes, conflicts, and controversies. All were eventually settled. Most were settled by agreement among the contesting parties. The rest simply faded away in the course of time as the parties lost interest in them.

Let us turn once again to the analogy of customary law to common law. Every judicial decision adds to the development of the common law and becomes a precedent for future decisions. Similarly, every interstate agreement that settles a controversy adds to the corpus of international customary law and constitutes a precedential norm applying to similar situations in the future. The reason that judgments and settlements have such legal power in common law and customary law respectively is that they promote peace and stability. For any conflict between persons or nations can be 'resolved' forcibly, but resort to force is anarchy-producing instead of stability-seeking. Force can always be challenged sooner or later by opposing force that escalates rather than stabilizes the situation. Hence as an elementary matter and irrespective of content, any judicial decision

[36] When *Sputnik* in 1957 became the first artificial satellite to circle the globe, the question whether it violated the vertical jurisdiction of states it passed over was instantaneously answered in the negative: vertical jurisdiction does not extend above the atmosphere. However, a corollary was also quickly accepted: that the launching state is strictly liable for injuries caused by pieces of the satellite falling to the earth. Obviously this corollary rule did not require for its confirmation the practice of states; like the no-safe-haven rule, it was immediately obvious that any other rule could lead to instability and even war. See Bin Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?', 5 Indian JIL 23(1965).

or any international settlement is legally favored *per se.* The content of customary international law flows out of these settlements. Another recurrent analogy may be made to evolution. Plants and animals do not evolve according to pre-existing blueprints; rather, some few mutations turn out to be beneficial to the phenotype and accordingly helps it to survive and perpetuate itself. Similarly, customary international law does not know in advance the content of the norms that will enable the legal system to survive. Instead (except in cases of first impression) the norms are generated in settlement agreements. Norms that are included in and applicable to these settlements thus constitute the 'beneficial' norms of custom, whereas other alleged norms that were discarded in the course of negotiation and settlement are cast-offs (like deleterious mutations).

It follows that practitioners and students of international law who are faced with a difficult controversy that seems irresolvable by recourse to treatises and casebooks should look in state archives, library microfilms of old newspapers, and the internet, to find prior agreements and settlements that bear upon the matter at hand. A model of excellence in this kind of research scholarship is the opinion of the United States Supreme Court in *The Paquete Habana* (1900).[37] Through laborious research (in pre-internet days!) the Court examined five centuries' worth of controversies and settlements and used them as customary international-law precedents for reaching its decision.

iii. *Treaties as a Source of Customary Law*

[37] The Paquete Habana, 175 U.S. 677 (1900).

In its *Paquete Habana* decision, the Supreme Court drew no distinction between state practices that were memorialized in a treaties and practices that occurred outside of treaties or agreements. Yet some influential writers would excise from customary law all those norms and rules that originated in treaties. They analogize treaties to private-law contracts and conclude that the treaty norms apply only to the parties. Generations of students of international law have been misled by this false analogy. In the first place, treaties are made by states and not by private entities. Secondly, the parties to a treaty cannot control its externalities. If the international legal system wants to import into customary law the provisions of treaties, it does not need the parties' permission. Third, a treaty is a settlement agreement, just like the settlements discussed in the previous section.[38] Sometimes the parties to a treaty foresee a controversy and decide to settle it in advance by signing a treaty; treaties of friendship, commerce, and navigation are examples of advance settlements. Sometimes the treaty constitutes the settlement of a controversy; treaties of peace are an example. Finally, the history of international law is proof that the vast majority of customary norms originated in treaties.[39] Nearly every rule cited by Vattel—a positivist—had its inception in a bilateral or multilateral treaty.[40] On the other hand, hardly any rules of custom are traceable to Biblical law or natural law as understood by Grotius, Gentili, Bynkershoek, Suarez, and Vitoria. The principles these classicists announced were simply too broad and vague to serve as legal guidelines for states.

[38] The concept of treaties-as-settlements was introduced in
[39] For further specification see
[40] Vattel etc.

III. Coherence

The rules of international law comprise a ‘set’ in the mathematical sense of a collection of units that are interconnected. Speaking now only of hard-law rules, recall the earlier discussion that such rules consist of a norm plus a coercive element. How are the rules in the set connected to each other? The connection cannot be through the normative element because there are too many possible norms on entirely different subjects. Hence the connection must be through the coercive element attached to each norm. For example, consider the norm that each state is free to import goods from other states. Some years ago when Rhodesia was practicing apartheid among its citizenry in violation of their human rights, the international community responded by suspending Rhodesia’s freedom of importation. This trade sanction was enforced by a naval blockade among other means. Hence the deprivation of one norm (importation) was used to compel compliance with an entirely different norm (prohibition of apartheid). Domestic legal systems use the same mechanism. A person has freedom of movement, but that freedom can be abridged if the person commits a serious crime. Thus even though incarceration taken alone is a violation of one’s freedom of movement, it becomes legal when used as the coercive element connected with other norms (the norms that are safeguarded by the criminal law).

` This analysis implies that every norm of international law can play a double role: the role of a principle that guides conduct, and the role of the coercive element attached to some other norm. A mental picture of how this works is to imagine a fisheries-

conservation treaty between two neighboring coastal states A and B. The treaty stipulates certain seasons where fishing is permitted, the most important of which pertain to sedentary fishing and migratory fishing. Article 5 sets forth the time of year when sedentary fish may be harvested. Article 6 does the same thing for migratory fish. Suppose sedentary fishing is far more important to A's economy than to B's, while migratory fishing is far more important to B's economy than to A's. Under pressure from its fishing industry, A decides to allow sedentary fishing in the off-season. There are now three retaliatory choices open to B under Article 60 (1) of the Vienna Convention on the Law of Treaties which provides:

> A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

Thus B can either (1) suspend the operation of Article 5 on sedentary fishing, or (2) suspend the operation of Article 6 on migratory fishing, or (3) terminate the treaty in its entirety. The first alternative is not attractive to B because it plays into A's hands; A, after all, relies on sedentary fishing while B does not. But the second alternative is indeed attractive because B is its primary beneficiary.

Let us imagine that all the norms of international law are set forth in a gigantic treaty.[41] If a state violates one provision, the other states may deprive that state of the

[41] This gigantic treaty represents the aggregate consent of all the states, an 'emergent' phenomenon that is entirely different from adding the individual consents of the states. It means, for one thing, that when a new state is born it immediately takes on the rights and obligations of international law without consent.

benefits of a different provision. (This process could be called 'tit-for-a-different-tat'.)[42] There is a general constraint under customary international law: the deprivation must not be disproportionate to the initial norm-violation. (This is equivalent to the bar against excessive sentencing in domestic criminal law.)

Because each norm of international law can serve as the coercive element of a different norm, all the norms are connected to each other. The result is a closed system of law whose self-perpetuation is enhanced by the connectivity. Once a new norm of custom is admitted into the club (that is, the system), its strength increases by virtue of the legal connections it has with other norms. Thus rules of international law take on, as it were, a life of their own.

[42] For further elaboration see Anthony D'Amato, Is International Law Really 'Law'? 79 Nw. L .Rev. 1293 (1985).