
Softness in International Law: A Self-Serving Quest for New Legal Materials: A Reply to Jean d'Aspremont

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1 Introduction

As international law grows and spreads into non-traditional areas such as the international ecosystem, the global economy, and human rights, some say it is becoming fragmented. This notion can actually appeal to those scholars who want to become experts in a fragment without having the burden of connecting it to the rest of international law. Another group views the idea of isolated specialization with apprehension; they feel that international law is and must be a coherent set of principles and rules – coherent in the sense that no member of the set contradicts any other member. The burden of resolving the tension between the two groups seems unfairly allocated: the first group simply asserts that international law is incoherently pluralistic, while the second group feels the need of disproving that assertion.

To meet the burden of persuasion the second group needs to find an overarching theory of international law which could pull together most of the fragments into a coherent set and modify or delete the remaining fragments that do not fit. (One of the benefits of legal theory is that it works if it accounts for most of the evidence, whereas in physics a theory is falsified if there is a single piece of evidence that contradicts it. Indeed, contrary evidence in law amounts to violating the law. For if law were like physics and had no contrary evidence, there would be no violations. But without violations, there would be no need for law in the first place!)

Soft law if combined with hard law has been a candidate theory to unify (or de-fragmentize) the pluralistic approach. Jean d'Aspremont, in a recent article in this Journal, makes a strong case that pursuing the *scholarship* of soft law is largely cost-ineffective.¹ In this

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¹ D'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials', 19 *EJIL* (2008) 1075.

article I look more into the *substance* of soft law and reach a conclusion that is complementary to that of Professor d'Aspremont.

2 Soft Law

Whence the theory 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 noosphere (human cognition).² Just as the emergence of life fundamentally transformed the geosphere, the emergence of human cognition transformed the biosphere.

The German sociologist Niklas Luhmann 60 years later built upon Vernadsky's theory but took a more practical approach. He argued that ideational reality is achieved through communications. The world we live in is the social construct of these communications. The legal sociologist Gunther Teubner observed that 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. Teubner added, for in Luhmann's theory the social system is self-regulating.⁴ Its internal needs and functions are bordered by a filter

which 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, fills the global plenum.

The global perspective of the aforementioned conceptual structures animates soft law as it has been presented and described in law journals. Most 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 projections of state power. States appear as arbitrarily mapped land masses which cling to international law for whatever protection it gives them from progressive change. Enter soft law – a strange attractor which diverts the traditional vectors of international law into a noosphere where the norms are disconnected from idiosyncratic state interests and state power, leaving them free to self-aggregate into an *omnium* of norms. If Luhmann is right that law and other social interactions reduce to communications, then the very communicative act of publishing articles in journals about soft law may enhance its power. Writing

² V. Vernadsky, *The Biosphere* (1986).

³ Teubner, 'The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy', 31 *Law & Society Review* (1997) 763, at 783.

⁴ The self-regulating theory of systems, called autopoiesis, is further discussed in D'Amato, 'International Law as an Autopoietic System',

in R. Wolfrum and V. Roben (eds), *Developments of International Law in Treaty Making* (2005), at 335, and in D'Amato, 'International Law as a Unitary System', in D. Armstrong (ed.), *Routledge Handbook of International Law* (2009), at 101.

⁵ The environment is external to the system, by definition.

about soft law may therefore become in the limit a self-fulfilling prophecy.

The essence of any soft-law rule is that it is not enforceable. A soft law is like a head without a body. The head knows where it wants to go but it lacks the means to get there. Yet a disembodied norm is nevertheless a communication which, because of its normativity, may be classified under performative utterances⁶ – as indeed is true of the notion of a command under positivist theory. It certainly would be an achievement if soft-law theory could explain the normative half of international law even if the coercive half awaits further research.

However, the fatal flaw in soft-law theory is not that it fails to be comprehensive – that is, failure to fill the global plenum. Rather, it is in a sense too comprehensive: it contains norms that contradict one another. No theory can be useful if its component elements are incoherent in the aggregate.

Examples of contradiction are legion. Consider the permissive norm in favour of abortion: we find its opposite in the prohibitive norm which calls abortion the murder of a human being. Pairs of norms that are opposed to each other come readily to mind. A norm which would legalize the use of narcotics is paired with a call for a war on drugs. We can find norms on both sides of most social issues – sports hunting, homosexuality, pornography, corporal punishment of children, female genital mutilation, public or private edu-

cation, and progressive income taxation. The *Sha'ria* law, covering a billion people in Islamic countries, contributes to the legal plenum a norm reducing the probative value of a woman's testimony in court to half of a man's; other domestic legal systems oppose such obvious discrimination. In international relations we find norms on both sides of issues such as unilateral humanitarian intervention, whaling, transboundary child abduction, patent and copyright protection, and nuclear proliferation. If the entire medley of opposing norms were brought to Earth and actualized as binding international law, they would cancel each other out and the result could be no-law, or anarchy.

A Filters

Soft-law theory could be saved if the desirable norms could be separated from their opposites by some kind of automatic filter. Maxwell's Demon was the name given to a hypothetical filter which could separate fast-moving molecules from slow-moving ones, resulting in different temperatures in the same container. Since such action would violate the second law of thermodynamics, it was soon found that the filter could not be constructed within a sealed container.⁷ Could an analogous filter work in the non-material world of law? If so it could choose positive human-rights norms and discard negative ones. The resulting shower of purely facilitative norms upon the Earth might then be hoped to lead only to legal improvements and legal reform. But how

⁶ J.L. Austin introduced the term 'performative' to account for the special case where the issuing of the utterance is the performance of an action: J.L. Austin, *How to Do Things with Words* (1962).

⁷ Basically the energy required to operate the filter would add external positive entropy to the system which would cancel out the negative entropy that the Demon was trying to achieve.

would the filter be designed? And who would tag each norm as either positive or negative? Indeed every alleged human right can be contested, especially when the opposing sides in the debate come from different cultures or civilizations. Suppose a positively-tagged filter proclaims the equality of men and women under the law. What would happen to the previous example of *Sha'ria* law which assigns to a woman's testimony half the weight assigned to a man's? An Islamic advocate would say that other aspects of Islamic law restore the imbalance by giving preferential treatment to women. The advocate then submits that when all the pluses and minuses are added up, the net effect is zero, which is to say that Islamic men and women are equal under the law.⁸ The bottom line is that no filter (or computer program, for that matter) could be designed which could adjudicate questions such as this one which arise from the deep beliefs of diverse civilizations.

Perhaps the ideal filter for soft law would be an international court. This was once actually demonstrated in the idiosyncratic *Nicaragua* ruling of the International Court of Justice.⁹ The judges, acting without benefit of adversary argument (the United States defaulted by not showing up for the argument) and without law clerks, wrote an opinion which separated non-intervention norms from interventionist norms. The Court then

labelled the non-intervention norms as customary law. It was just a short step to find that the United States violated the law by intervening militarily in Nicaragua.¹⁰ Or, to put the matter in the terms of the present article, the ICJ simply filtered out and discarded all the contrary norms which *permit* intervention, norms such as using force to stop genocide, to attack terrorist camps when the host country refuses to act, to rescue nationals who are being held hostage, to restore a democratic Presidency which 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.¹¹ Only the norms which prohibited intervention entered into the Court's opinion.

Nevertheless John Tasioulas, a philosopher who has recently discovered the existence of international law, makes the *Nicaragua* case the centrepiece of a spirited defence of soft law.¹² By aggregating only the non-intervention norms, he removes the nuances of the customary law of projections of force across boundaries, just as politicians excise nuances of policy in order to deliver one-sentence sound bites. Tasioulas concludes that the resulting principle prohibiting all interstate interventions (based on his pre-selected norms) is a significant step toward world-order values. He does not seem to notice how deeply reactionary

⁸ The Islamic advocate is going beyond the system of equal rights, in a fashion analogous to the problem with Maxwell's Demon. However, in legal argument, there is no *a priori* designation of the limits of a system.

⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, Jurisdiction and Admissibility [1984] ICJ Rep 392.

¹⁰ I spell out this argument with examples from the Court's opinion in D'Amato, 'Trashing Customary International Law', 81 *AJIL* (1987) 101.

¹¹ These are not necessarily the correct norms; they are simply the interventionist norms.

¹² Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the *Nicaragua* Case', 16 *Oxford J Legal Stud* (1996) 85.

such a principle would be. For example, the new principle would make it illegal for nation A to intervene forcefully in nation B to stop the government of B's genocide against a minority group of B's nationals within B's territory. It would rescind the great human-rights breakthrough of the post-World War II period which extended international protection to *individuals against their own governments* for egregious human-rights violations (genocide, torture, slavery). Since Tasioulas is one of those writers who assert confidently that the goals of soft law include justice, morality, human dignity, well-being, co-existence, cooperation, pluralism, and democracy, the reader may 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. The barrier to external intervention advocated by Tasioulas is equivalent to permitting state-assisted genocide so long as it takes place within the state's own territory.

Could Tasioulas have specified his goals in advance in order to use them as criteria for selecting norms? Perhaps if his goals were universal enough the methodology might seem a virtuous circle rather than a vicious one. In any event, five years after the publication of Tasioulas's paper, Allen Buchanan, a political scientist who has discovered international law, proposed allowing passage only to norms which are conducive to achieving justice, morality, and democracy.¹³ A filter which would accomplish such a task would have to be intelligent enough

to pre-identify norms which would have an inclination, if actualized, to promote justice and democracy. Yet at least on the level of pure theory one might agree with Buchanan that the implementation problem can be postponed if the foundations of the theory are close to the foundations of international law itself.

Buchanan is rightly concerned with the extremes of poverty and wealth among the states in the world. In order to achieve a just distribution of goods, he argues that the principle of the legal equality of states must be overthrown. For legal equality operates as a shield for egregious disparities in wealth and wealth-distribution. It protects the highly affluent states by condemning any use of force against them. These external uses of force might otherwise result in the forcible redistribution of wealth and national assets—the poorer states outnumbering the richer ones in such a war.

Thus, in Buchanan's view, the present international system of legal equality tolerates, legitimizes, and stabilizes extreme economic inequalities among states and their nationals.¹⁴ Many states are lucky in having an abundance of mineral riches beneath their soil; others achieved their present wealth by past injustices. But luck is arbitrary. Buchanan argues that the present unequal distribution of the world's resources is *illegitimate*. Accordingly the have-not states arguably have a moral right under distributive justice to act *illegally* against the affluent states, 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

¹³ Buchanan, 'From Nuremberg to Kosovo: The Morality of Illegal International Law Reform', 111 *Ethics* (2001) 673.

¹⁴ *Ibid.*, at 686.

large. Such a wholesale rearrangement of the power and wealth relationships among states would be morally required. Buchanan's finishing touch goes beyond morality: he argues that wholesale redistribution of wealth would bring the entire international legal system closer to the ideal of the *rule of law*.

The reader is entitled to wonder how a series of illegal and illegitimate acts can paradoxically result in strengthening the international rule of law. At first one might think that Buchanan is being intentionally ironic – that he does not really believe in strengthening the rule of law. But then what would be the point of stressing redistributive justice? Buchanan appears to believe deeply in the goals of democracy and justice. Does he also believe that nations accordingly will hand over to their weaker neighbours their wealth, resources, and military power so as to satisfy Buchanan's ideals? Will people whose homes provide ample room for themselves be required by domestic law to share their homes and facilities with poorer families from other countries? Perhaps universal altruism can be enforced at gunpoint. Perhaps Buchanan harbours a desire to start World War III in order to effectuate a wholesale redistribution of money, land, and housing. Yet he expressly disavows violence. He will only go so far as allowing legal reform to take place *illegally*. That there is no essential difference in winning a war by shots from artillery or by shouts of illegality is apparently a mysterious attribute of soft law that Buchanan may want to keep secret from the reader.

B Comparison with Hard Law

Does soft law have a place in the international legal system? From the viewpoint

of any legal system, whether domestic or international, the basic difference between soft law and hard law can be identified by the system's reaction to violations. A soft-law system will allow an infraction to be cost-effective: that is, a violator of a norm of soft law may suffer a reputational loss, but reputational damage may be well worth the benefits that are derived from non-compliance with the norm. By contrast, a hard-law system must, without exception, endeavour to make every violation cost-ineffective. Of course, this is not to say that violations do not occur; indeed, every system of law is occasionally tested by a law-violator. Prisons are built on the reasonable expectation that a number of people will violate the law.

The ordinary term 'penalty' can now be employed, with the understanding that it stands for the forcible imposition of a cost upon the law-violator which is calculated to exceed the expected utility to be derived from the violation. This allows us to simplify the difference between soft law and hard law: soft law may be thought of as a naked norm, whereas hard law is a norm clothed in a penalty. Sometimes the same rule can be naked in one context and clothed in another. For example, a sign saying 65 along a highway can be a soft norm in some European countries (recommending a speed limit of 65 kilometres an hour) and a hard norm in the United States (notifying drivers that a speed limit of 65 mph is legally required). In contrast to soft law which enjoys a plethora of laudable goals (democracy, co-existence, morality, justice, etc.), hard law from the legal system's viewpoint has only one goal: self-perpetuation. Since the system is composed of rules, it must

act decisively to preserve the evolutionary fitness of its rules by penalizing violators. If a rule is not enforced it begins to unravel and, like a breach in a fabric, the unraveling tears apart nearby rules. The danger to the system could not be greater, for, as the unravelling spreads to all the rules, anarchy results. Anarchy is the equivalent of the death of the legal system.

Consider Prohibition – the banning of alcoholic beverages in interstate commerce in the United States from 1920 to 1932. Prohibition rapidly led to smugglers importing whiskey from Canada, to the home brewing of gin in bathtubs, to the rise of ‘speakeasies’ (nightclubs where alcoholic beverages were served clandestinely). Prohibition was being violated on a wide scale, yet so long as it was the only rule that was violated the system might cope with it. However, disobedience breeds disobedience. Soon criminality spread to neighbouring rules. Racketeers and other criminals branched out into operations other than bootlegging. They began to invest their organizational capital in shaking down businesses which even complied fully with the laws of Prohibition, such as hotels and restaurants. Then they moved into the protection racket where they would sell ‘protection’ to ordinary merchants and storekeepers. ‘What are you protecting me from?’ a storekeeper might ask, and the reply would be ‘From us!’¹⁵

¹⁵ Selling protection was one of the earliest forms of crime. A group of armed bandits would go from farm to farm selling farmers protection against their own predation. Soon the bandits by co-optation became the king’s soldiers, and the protection payments they extracted became known as ‘taxation’. It is not altogether edifying to look too closely into the origins of governments.

Crime became increasingly organized and ‘crime families’ became common. The entire legal system was in danger of being undermined. From a theoretical standpoint we might say that the initial decision to enact Prohibition set in motion forces which could unravel the legal order in its entirety. Accordingly it was expected, and indeed it occurred, that the United States government would save itself by repealing Prohibition.¹⁶

If there were a maladaptive rule in the international legal system analogous to the rule of Prohibition in the United States in the 1920s, we could expect international law to discard the rule. However, it is extremely unlikely that the practice of states would ever generate such a rule for the simple reason that maladaptive rules tend to be legislative in origin, whereas the international legal system has no legislature. Thus the lack of a legislature turns out to be a strength of the international legal system – contrary to the influential view of H.L.A. Hart who believed that international law was primitive.¹⁷ For although it is possible for legislatures to enact rules which are arbitrary and even self-destructive, general rules of international law do not arise unless they are consonant with the aggregate interest of the states, including

¹⁶ Franklin Delano Roosevelt’s campaign in 1932 for the Presidency hardly mentioned or alluded to Prohibition or the widespread criminality accompanying it. He saw no point in getting into a debate over theology or morality. Yet when he was elected, one of the first things he did was to sponsor and encourage the 21st Amendment to the Constitution which repealed Prohibition.

¹⁷ See H.L.A. Hart, *The Concept of Law* (1861), at 213. For an early critique see D’Amato, ‘The Neo-Positivist Concept of International Law, 59 *AJIL* (1965) 321.

especially the interest in self-preservation. Inasmuch as rules of hard law (but not norms of soft law) come from no source other than the states which create and are subject to those rules, one can rely on the emergence of rules that are always in the states' collective self-interest.¹⁸

3 Evolution

Hard law, like soft law, is goal-oriented. The main problem with the goals of soft law, as we have seen, was that they were deduced by scholars writing about the law. There is of course nothing improper about deducing goals; indeed it is one of the services that scholars perform. But when inferences lead to inconsistent goals, then a filter is required to separate the wheat from the chaff. So far scholars have been unable to provide a filter for soft law. By contrast, there is a single, provable filter for hard law. It is programmed to facilitate the law's goal of self-perpetuation.

International law has evolved over time, withstanding violations by nations and nay-sayings of writers.¹⁹ Evolution is a fact that is proved by law's present existence. In the biological history of the earth, the many living entities that arose from mutations lacking in dominant genes for self-preservation simply lost the struggle for survival.²⁰ Over 99 per cent of nature's species have become

extinct. We see today only the successful 1 per cent. The genes having a survival instinct themselves survived because of the evolutionary fitness of their phenotypes. Their survival mechanism was the simple fact that their phenotypes happened to have genes the mutations of which were benign in terms of organizing the phenotype for self-protection (such as an ability to outwit predators).²¹

We have up to now taken the perspective of the legal system itself. It is time to go down one level to focus on nations. Nations can be characterized as Darwinian phenotypes. Existing nations have survived the struggle for existence by pursuing policies of self-preservation. States 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, for such goals may lead them to take risks in foreign policy which may lead to their defeat or extinction.²² Accordingly, nearly all states today share the single goal of avoiding war. For the furies of war, once unleashed, can be unpredictable and indeterminate, threatening the existence of the attacker or the state which is attacked or both. Since

¹⁸ Exercising due caution, however, the international law system has *anticipated* maladaptive rules. These are called rules of *jus cogens*.

¹⁹ For example, the authors of a widely read book reduce international law to game-theoretic strategies, thus losing sight of international law itself: see J.L. Goldsmith and E.A. Posner, *The Limits of International Law* (2005).

²⁰ See generally M. Ridley, *Evolution* (2nd edn, 2004), at 91–132.

²¹ In turn the predators also survived if they were *partially* successful in overcoming the prey's defences. However, if they were *too* successful and extinguished their prey, they would also become extinct.

²² The perspective we now have on World War II is that Hitler's primary motivation was a genocidal desire to rid Europe of Jews and Slavs. These goals conflicted with Germany's optimal military strategy, to the consternation of his generals. In particular, Hitler's biggest military blunder was to leave Great Britain alone while opening a second-front war against the Soviet Union in 1941. His motivation was not military but rather to rid the world of Slavs (whom he sometimes confused with Jews). See, e.g., D. Irving, *Hitler's War* (2002).

war constitutes the gravest danger to a nation's survival, measures which can reduce or eliminate war quickly rise to become a nation's primary defence mechanism. Material mechanisms are of course a matter of resources, but there is only one immaterial defence mechanism—international law. Since states are equal under the law there is no point in trying to get 'more' of it, whereas there is a point in improving it. Thus nearly all states have an incentive to assist international law in its evolutionary struggle for survival. We see unsurprisingly that the goal of self-perpetuation of the legal system works reciprocally with the goal of self-preservation of the states that are its members.

Accordingly, we should consider the state as a phenotype which contains norms instead of genes. The state's norms are those which have survived along with the phenotype's survival over the years. The norms, in parallel with the state itself (or more accurately the 'voice' of the state), seek self-preservation. As previously mentioned, the norms are dependent upon the survival of their phenotypes (they go down with the ship, so to speak). 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 which are culled from the peace-seeking norms of the aggregate of states are themselves peace-seeking.²³

International law perpetuates itself as a consequence of the states in the aggregate striving to perpetuate themselves. If war should break out, the entire system of states and norms would be jeopardized. Once again it should be emphasized that anarchy is equivalent to the extinction of all the norms and possibly of the states themselves. Hence the goal of all the norms of international law, both from the international and the national perspective, is to steer states toward stability and away from anarchy. (The emergence of war crimes regulating the ways opposing armies are permitted to kill each other is an extraordinary group-survival gene which represents an advanced stage of international evolution.)

Thus we find in international law a civilized mechanism invented over 4,000 years ago²⁴ to help states either to avoid disputes with other nations (such as drawing boundaries between states to avoid endless boundary disputes which might escalate into war), or to minimize the breadth and severity of disputes which nevertheless arise (the laws of war), or to provide a pre-existing set of rules which can serve as a neutral reference-point for adjudicating on 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.

4 Practice

Can soft law fit in with the ideas of custom and state practice which for many

²³ Are the norms 'selfish' in Dawkins's sense? See R. Dawkins, *The Selfish Gene* (1976). 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.

²⁴ The ancient Hittites had already developed the following rules of international law: legal equality of states, sanctity of boundaries, *pacta sunt servanda*, diplomatic immunity, and return of fugitives. See G. Beckman, *Hittite Diplomatic Texts* (2nd edn, 1999).

scholars constitute the bedrock of general international law? That soft law is nothing other than the alleged component of custom known as *opinio juris* has to be one of the wildest ideas in recent scholarship. There is a strange logic to it: soft law is a norm looking for an empty home, while *opinio juris* is an empty concept looking for a norm.

Many commentators have formed the belief that customary international law must have something to do with custom.²⁵ Pitt Cobbett started it all in 1892 by likening custom to footsteps across a common that eventually become a path habitually followed by all.²⁶ Charles De Visscher in 1957 added to the confusion by arguing that some users, because of their weight, will mark the soil more deeply than others.²⁷ A major problem with these similes is that they require a time interval before the path appears.²⁸ 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 in

a state of suspended animation while awaiting news of their own birth or demise. That very absurdity should have been enough to dispel the custom industry before it had a chance to take hold. However, it was saved in the nick of time by *opinio juris*.

Surely the mere practice (or usage) of states cannot itself give rise to a rule of customary law because practices can go in any arbitrary direction.²⁹ For instance, if some states engage in torture, genocide, slavery, infanticide, suttee, or military targeting of civilians, can such practices generate self-legitimizing rules of customary law? Clearly, whatever states do cannot automatically become what they must do.³⁰ Only some state practices can generate custom; others violate custom; and the rest (for example, acts of comity) have no legal consequence. Since all of international law arises from state practice (there is no world legislature, and neither government officials nor scholars invent rules of international law), some kinds of practices must be separated from other kinds. There is need for a criterion for determining whether or not a given practice generates custom, violates it, or is neutral.

²⁵ Customary law arguably more closely resembles common law.

²⁶ I Pitt Cobbett, *Leading Cases on International Law* (4th edn, 1922), at 5.

²⁷ C. De Visscher, *Theory and Reality in Public International Law* (1957), at 149. His book was hailed as being realistic in according legal deference to the most powerful states. In fact his theory is deeply unrealistic. If international law gave greater preference and privileges to powerful states over the weaker states, then the latter would reject it. Law is a constraint on power, not a servant of power. Moreover there would be conceptual absurdities: for example, if a state acquires nuclear weapons, will it suddenly get more rights under international law? And who would parcel out those extra rights? And who would defer to them?

²⁸ In addition, different observers will observe the emergence of a path at different times.

²⁹ Some writers regard the term 'state practice' as including *opinio juris*. Clarity is served, however, by keeping apart the material and psychological elements of custom.

³⁰ Many states engage in torture; does that mean it is a general practice of states? Professor Arthur Weisburd so asserted, in a criticism of my views in Weisburd, 'Customary International Law: The Problem of Treaties', 31 *Vanderbilt J Transn'l L* (1988) 1. I replied that the practice of states was to outlaw and criminalize torture; this near-universal practice belied the claim that the illegal act of torture constituted international customary-law practice: see D'Amato, 'Custom and Treaty: A Response to Professor Weisburd', 21 *Vanderbilt J Transn'l L* (1988) 459.

For over 100 years, *opinio juris* appeared to meet that criterion. The existence of *opinio juris* is like the existence of God: some people take it on faith while others define faith as an absence of evidence. For all the lip service paid to *opinio juris*, there has never been any evidence to support it.

The inability to find evidence of *opinio juris* may be shown by a thought experiment. Let us consider a hypothetical case which is loosely based on recent events. State A, the coastal state, has a conservation season for halibut fishing. However, the halibut have a migratory tendency to swim outside the state's 200-mile exclusive economic zone before returning to A's spawning areas. While on the high seas, they are caught by fishing vessels of state B, a state which is geographically remote from the disputed fishing area.

State A claims that B's fishing violates customary international law by undermining A's conservation regime. State B responds that fishing on the high seas is open to all. Moreover the lawyers for state B argue there is not enough custom to generate a rule. The present dispute is the only practice where custom could possibly get a toehold. However, to continue the pedestrian analogy, using the present case to give it a toehold would be like pulling oneself up by one's own bootstraps.

Both A and B agree that customary international law can apply, but they disagree as to whether any such law has emerged from the practice of states. Let us for the moment go back to fundamentals. How is it that what states do become that which they are obliged to do? How do we get from the descriptive to the prescriptive? There must

be a criterion or filter which separates practices that are law-generating from those that are not. There have been two proposals for constructing such a filter, plus a third suggested in this article. They are:

- (a) a normative filter, such as *opinio juris*;
- (b) an articulating filter (which has been discussed elsewhere);³¹
- (c) a goal-oriented filter.

The venerable *opinion juris* filter selects only those state practices that are undertaken in the belief that they are legally obligatory. Of course this is circular reasoning, for in order to discover whether a practice generates a norm, we must construct a filter which permits only norm-generating practices to pass through. But who can tag these practices as norm-generating in advance of knowing whether they are norm-generating? The logical implications of using *opinio juris* as the needed filter were apparently not thought through by Judge Manley O. Hudson when he reported in 1950 for the International Law Commission that a key element required for the emergence of a rule of customary international law was the 'conception that the practice is required by, or consistent with, prevailing international law.'³² In short, the answer must be known in order to ask the question.

Perhaps empiricism can come to the rescue (this is, after all, an empirical age).

³¹ For a discussion of articulation as an objective substitute for *opinion juris*, see A. D'Amato, *The Concept of Custom in International Law* (1971), at 74–87.

³² International Law Commission, *Yearbook* (1950), at 26.

Let our data pool consist of those state officials of A and of B who participate in making decisions concerning high-seas fisheries. The Secretary-General of the UN appoints us to interview the officials individually about whether they believe that state customary international law requires all states to refrain from high-seas fishing if doing so would disrupt or undermine a coastal state's conservation regime. To be sure the expense involved in tracking down all these officials and inducing them to talk 'on the record' for a UN-designated special interviewer could be prohibitive. Fortunately, however, there is no need to conduct these interviews. We know in advance what the state officials would say to any interviewer (provided that they agree to talk at all). The officials of state A will say (assuming they wish to retain their jobs) that of course they recognize such an obligation. The officials of state B will say (if they wish to retain their official positions) that of course there is no such obligation.

This stand-off clearly will happen in every case where there is a dispute over *opinio juris*. Evidence of *opinio juris* depends on whom you believe when you know that both sides of a dispute will make self-serving assertions irrespective of truth. Hence the empirical approach will not rescue Hudson's criterion from being inconsistent. Indeed, no case has ever been decided or resolved in which an alleged rule-in-formation was found to be perfected on the basis of interviews of state officials.

But if *opinio juris* is ruled out, how can the halibut case between A and B be decided? Here the evolved principle of aggregate state self-preservation will have a real (as opposed to a philosophical) role to play. The common goal of all states,

including the states involved in this dispute or any dispute, is the preservation of the international legal order. This goal, it is here proposed, is at the inflection point between usage as a description of what states do and as a prescription of what they should do.

It is important to underscore the fact that the legal system's struggle for self-preservation is *not* normative. (If it were, then it would be no less question-begging than *opinio juris*.) It is not normative because evolution itself is not normative. Darwin's most important break with the theory of creationism that preceded him was his demonstration that the struggle for survival is factual. It is simply a datum of science that when an occasional benign mutation occurs in any living entity it aids that entity and its progeny in the struggle for survival. Normativity has nothing to do with it. Similarly, the legal system's struggle to perpetuate itself over time is simply a scientific fact about the evolution of the legal system. The term 'struggle' is of course anthropomorphic, but struggle is what Darwin, choosing his words carefully, called it.

Applying these thoughts to the hypothesized decision-maker in the halibut case, the decisive question is whether A's or B's position is more conducive to achieving the common goal of the system's survival.³³ Here, as presumably obtains in nearly every imaginable case, the answer is clear: examine the facts and decide in favour of the party

³³ In other words, the rule of law is the source of the rule of law. This seemingly paradoxical conclusion was reached, and I believe proven, by H.L.A. Hart in his famous *The Concept of Law* (1961).

whose acts or intended acts are more consonant with the perpetuation of the legal system itself. In the A–B case, accordingly, the decision should be that on condition, first, that A's conservation regime is supported by objective scientific evidence that it will accomplish its goal of preserving the halibut; and secondly, that A's conservation decrees contain no exemptions and no special privileges for any of A's nationals; and thirdly, there is no other statutory discrimination against foreign fishing vessels; then B's position must be rejected because it can lead to the extinction of the halibut species. This is not to say that fish have rights under international law, nor does it say the opposite. But it does say that fishing conservation regimes – as historical experience has proved many times over – are conducive to the self-preservation of all the states by governing the replenishment of the food supply. Of course, the ultimate goal – the self-preservation of the international legal system – is as previously argued dependent upon the aggregate survival of its member states.

The deconstruction procedure of Martti Koskenniemi suggests another way to reach this same conclusion.³⁴ Freedom of the seas includes freedom of fisheries on the high seas. A conservation regime impeding on the high seas seems to contradict the freedom of fisheries. However, the purpose of freedom to fish is to share the bounty of the commons with as many persons from as many states as wish to avail themselves of this international privilege. But that

goal is compromised if fishing stocks are depleted. Hence what seemed like a contradiction in fact promotes the goal of maximum sharing of the fishing stock of the high seas. Even so, the freedom of fisheries exerts pressure on the shape of the conservation regimes: they must not be too extensive in space or too lengthy in duration.

With these contentions we have imputed a legal requirement to B to desist from harvesting the halibut beyond the coastal state's 200 mile exclusionary zone during the conservation season. The important point is that the imputed obligation is not based on an assumed norm (if it were, it would beg the question, just as *opinio juris* begs the question, or freedom of action begs the question), but rather upon objective criteria relating to the efficacy of conservation regimes and their function in the high-seas commons.

5 Conclusion

It may seem either grandiose or simplistic to decide ordinary disputes on the basis of the ultimate goal of self-preservation of international law. But at least self-preservation is a standard which has factual content: A's position was consonant with the standard whereas B's clearly was not. Moreover, the self-preservation filter is not fuzzy, ambiguous, or devoid of content as are the *opinio juris* filter, the presumption of freedom of action, or any soft-law alternative. Finally, self-preservation of the system is just a tipping device which comes into play when both sides mount equally persuasive arguments based on existing international rules (as happened in the

³⁴ See M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2006).

Lotus case).³⁵ The ultimate goal is invoked not to prevent *non liquet* (as more classically trained scholars might assert), but simply because in close cases the inflection point must be tipped in favour of the continued existence (self-preservation) of the very law that will govern the resolution of the case.

Or, to put this final point in ordinary language, the attorneys for either side in an international dispute or controversy will naturally put forward conflicting arguments as to the governing law. But the one neutral criterion they can agree upon is that they are practitioners of international law, a law which exists only because it has survived. The survival of international law up to now is what makes possible their practice of law and their participation in the very case at hand. In order to make the practice of

law possible for their successors and for future generations of legal practitioners, the law itself must continue to survive. The attorneys are, in other words, in the middle of a stream of the evolution and survival of international law, a law which serves as the ultimate criterion for the resolution of their dispute and of all international disputes. The attorneys may dip into the stream but not divert it or dam it up. For they are taking advantage of a continuous stream, not one which has previously been blocked or diverted. If the attorneys for both sides disagree about everything else, the one thing they have in common is their joint participation as beneficiaries and facilitators in the continuing relevance of international law. And as law survives and thrives, world peace is carried along with it.

³⁵ PCIJ Rep., Ser. A, No. 10 (1927), at 4. The tipping point was the Court's finding that states are presumptively free to act unless blocked by a rule of international law. But international law is clearly not a set of discrete rules as legal positivism asserts. Quite the contrary: the rules are like valleys in a fitness landscape, the space between rules is hilly country. The base of a valley acts as a strange attractor upon nearby contentions, pulling them down into a rule if there is no competing contention. But in any conflict or controversy, there are always two sides to the story, two competing contentions. The valley is not deep enough to attract both contentions; they end up on the side of a hill. In brief, law is everywhere; it has greater attraction at low levels on the fitness landscape. But when it is not at low levels, it is still stronger than no law at all. There is no lawless zone where states have freedom of action.