

HIERARCHY AND THE SOURCES OF INTERNATIONAL LAW: A CRITIQUE

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INTRODUCTION: OF ANARCHY, HIERARCHY AND SOURCES ORTHODOXY

The discipline of international law, like all academic disciplines, is built around a set of accepted truths, intuitions, and histories, which together form its distinctive *episteme* as Foucault defines it; i.e., its paradigmatic structure of thought and

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argument.¹ One of these epistemic truths is that international law constitutes a distinctly anarchical order, not so much because it is chaotic and disorderly, but because it lacks a centralized and hierarchically structured law-making and law-enforcing authority.² Domestic legal systems do, as a norm, benefit from highly developed and sophisticated institutional machineries endowed with the power of legislation and lawful coercion. In comparison, international law is thought of as a largely horizontal system of governance in which juridical authority and the exercise of key legal functions (law-making, law determination, and law enforcement) are fragmented and decentralized.³

Horizontality—or the lack of hierarchy—is considered by most a central fact of international life and the starting point for theorizing about international law. Nowhere is this more obvious, perhaps, than in the doctrine of sources. Conventional accounts of international law-making depict an eclectic and uncoordinated system in which States, as sovereign equals, create rules for themselves through various techniques and processes which can be engaged simultaneously or in competition with one another, with no process being intrinsically superior, normatively, to the other.⁴ No constitution prevailing over ordinary statutes, no

1. MICHEL FOUCAULT, *THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES* 60 (2005). The concept of *episteme* was originally used by Foucault to define the set of rules that govern the production of knowledge across disciplines in a given culture and at a given time (for instance, the classical episteme of Western culture). The concept has also been used, however, to describe a discipline's own indigenous knowledge structure, or "regime of truth." *E.g.*, Dominique Chateau, *Quelques Réflexions sur l'Épistémè de l'Esthétique*, 0 *PROTEUS – CAHIERS DES THÉORIES DE L'ART* 59 (2010). On international law as a discipline possessing its own distinctive episteme, see Mirjam Sophia Clados, *Bioethics in International Law: An Analysis of the Intertwining of Bioethical and Legal Discourses* 44-57 (2012) (unpublished Ph.D. dissertation, Ludwig-Maximilians-Universität München), https://edoc.ub.uni-muenchen.de/15247/1/Clados_Mirjam_Sophia.pdf [<http://perma.cc/98GA-QJ32>].

2. This is anarchy as defined by Hedley Bull: a system of states that knows of no higher level of authority over states, and yet forms a society in which common rules and institutions provide elements of order. HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY IN WORLD POLITICS* 44 (2d ed. 1977).

3. ANTONIO CASSESE, *INTERNATIONAL LAW* 5-6 (2d ed. 2005); MALCOLM N. SHAW, *INTERNATIONAL LAW* 4 (7th ed. 2014); PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 3 (7th ed. 1997).

4. ALAN BOYLE & CHRISTINE CHINKIN, *THE MAKING OF INTERNATIONAL LAW* 100 (2007) (describing the system of international law sources as "eclectic, unsystematic,

statutory law superior to common law, no decisions of higher courts binding on the decisions of lower courts: sources of international law are said to be of equal rank and status, so that a norm derived from one source is not, as a matter of principle, of a higher value than a norm formed under another source.⁵ The concept of a formal, *a priori* hierarchy of sources is thus, under this view, alien to the structure of the international legal order.⁶

However, the functional equivalence of sources should not obscure the fact that international legal thought and practice are replete with varied forms of hierarchies which, though not necessarily openly acknowledged as such, nevertheless run deep in the system and inform the ways in which international law is conceptualized, made, and applied. This paper examines two types of source hierarchies. The first type concerns what may be termed “informal hierarchies of pre-eminence.” These informal hierarchies stem from the fact that, whilst acknowledging the functional or formal equivalence of sources, certain actors (e.g., states, adjudicators, scholars) tend to express preferences for particular sources because these sources are thought to possess some specific qualities or uphold certain values (e.g., determinacy, versatility, universality) that are deemed desirable. These are soft and transient hierarchies which, as shall become clear, very much depend on contexts, circumstances, the identity of legal subjects, and the projects they pursue. Nonetheless, these are hierarchies inasmuch as they involve a differentiation of sources “in a normative light,” i.e., normative judgments in which some sources are deemed superior (good, effective, democratic) and others inferior (bad, inefficient, illegitimate).⁷

The second type of source hierarchy is not concerned with the normative worth of individual sources, but rather with the way in

overlapping, and often poorly coordinated”).

5. CASSESE, *supra* note 3, at 154.

6. See, e.g., JAMES CRAWFORD, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 22 (8th ed., 2012); MARK VILLIGER, *CUSTOMARY INTERNATIONAL LAW AND TREATIES: A STUDY OF THEIR INTERACTIONS AND INTERRELATIONS WITH SPECIAL CONSIDERATION OF THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES* 35 (1985); Michael Akehurst, *The Hierarchy of the Sources of International Law*, 1975 *BRIT. Y.B. INT'L L.* 273, 274-75.

7. This broad understanding of hierarchy as “difference in a normative light” is borrowed from Martti Koskenniemi, *Hierarchy in International Law: A Sketch*, 8 *EUR. J. INT'L L.* 566, 567 & n.7 (1997).

which they operate in practice (the *pragmatics* of sources). These hierarchies stem from the fact that international law-making processes structurally favor particular actors, voices, and experiences (e.g., states, great powers, white men, transnational capital) whilst marginalizing others (e.g., non-state groups, small powers, brown women, labor). Despite a broad commitment to legislative equality, the international system accommodates, and at times institutionalizes, inequalities in the making of international law. These material hierarchies, though not exclusive to international law, are pervasive in the international order and the lack of formal, pre-determined hierarchies among recognized sources of international law in no way indicates that the international system is a level playing field. The making of international law is characterized by powerful hierarchies of influence. These hierarchies are not hierarchies *of* or *between* recognized manifestations of international law, but hierarchies *in* the sources of international law and their day-to-day operation. I shall refer to this second type of hierarchy as “material legislative hierarchies.”

The following analysis is, by necessity, schematic and impressionistic. The informal and material hierarchies addressed here are by no means the only hierarchical structures found in the doctrine and practice of sources. Due to space constraints, the focus remains on representative and characteristic examples, leaving other patterns, like class and racial hierarchies, to be analyzed elsewhere.⁸ For the same reason, two sets of questions have also been excluded at the outset from this paper. The first concerns the hierarchy of norms question; that is the relationship between individual norms or bodies of norms by reason of their content, irrespective of their source (e.g., the superior status of *jus cogens* over dispositive law). This problem is conceptually distinct from the hierarchy of sources and has been debated at

8. On racialized tropes, biases, and hierarchies in international law, see Makau Mutua, *Critical Race Theory and International Law: The View of an Insider-Outsider*, 45 VILL. L. REV. 841 (2000); Robert Knox, *Race, Racialisation and Rivalry in the International Legal Order*, in RACE AND RACISM IN INTERNATIONAL RELATIONS: CONFRONTING THE GLOBAL COLOUR LINE 175 (Alexander Anievas et al. eds., 2015). For a class approach to international law, see B.S. Chimni, *Prolegomena to a Class Approach to International Law*, 21 EUR. J. INT'L L. 57 (2010); Tai Maha, *Reading 'Class' in International Law: The Labor Question in Interwar Egypt*, 25 SOC. & LEGAL STUD. 567 (2016).

length in other works.⁹ The second concerns the relationship between the so-called traditional sources of international law and new forms of law-making “beyond the state” by public and private transnational governance bodies.¹⁰

The main argument of this paper is that the “no-hierarchy” thesis—as a central *leitmotiv* of the theory of sources—is deceptive. It implies that law-making in the international order is an essentially horizontal process marked by source equivalence and legislative autonomy, when in reality the law of sources is riddled with various forms of status differentiation (i.e., hierarchies). For that reason, I conclude with the argument that this thesis should be refuted, as it is both descriptively and normatively problematic.

I. INFORMAL HIERARCHIES OF PRE-EMINENCE

This section is concerned with, and seeks to offer important qualifications to, a central tenet of the “no-hierarchy” thesis: the view that sources of international law enjoy equal status as law-making procedures and exist in no predetermined order of importance or preponderance. This view requires a brief explicitation before it can be qualified. Article 38(1) of the Statute of the International Court of Justice—despite its well-known limitations and criticisms of being inadequate, incomplete, and outdated—remains the starting or rallying point for debates about international law-making and is widely believed to express

9. The hierarchy of sources concerns the relationship between law-making processes in the abstract. By contrast, the hierarchy of norms differentiates between norms or bodies of norms due to their content or substance, rather than their legal form. On the difference between the two types of hierarchies and how they can be mobilized to resolve normative conflicts in international law, see JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW* (2003). On the hierarchy of norms, see Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291 (2006); Juan Antonio Carrillo Salcedo, *Reflections on the Existence of a Hierarchy of Norms in International Law*, 8 EUR. J. INT'L L. 583 (1997); Jure Vidmar, *Norms Conflict and Hierarchy in International Law: Towards a Vertical International Legal System?*, in *HIERARCHY IN INTERNATIONAL LAW: THE PLACE OF HUMAN RIGHTS* (Erika de Wet & Jure Vidmar eds., 2012).

10. For a general overview of the problems posed by the rising (and largely uncontrolled) regulatory power of global governance bodies, see EYAL BENVENISTI, *THE LAW OF GLOBAL GOVERNANCE* (2014). On the heterarchical interaction of the national, international, and transnational legal orders, see NICO KRISCH, *BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW* (2010).

“the universal perception as to the enumeration of sources of international law.”¹¹ Sources are listed in Article 38 in a specific sequence (*a* to *d*) that looks, superficially, like a rough hierarchy.¹² During the drafting of Article 38, it was suggested that the sources listed in the provision should be considered in that specific order, with treaties prevailing over custom and custom prevailing over general principles.¹³ The proposal was rejected, however, and the order in which the sources are enumerated in Article 38 is generally thought to be of no legal relevance, though most scholars highlight the *summa divisio* established between primary and subsidiary sources of international law; the former (treaties and custom) standing as the only true sources of law whilst the latter (judicial decisions and doctrinal writings) are said to serve only the interpretation and ascertainment of existing norms, lacking the ability to create rights and obligations *ex nihilo*.¹⁴

Beyond this broad categorization, however, the consensus remains that Article 38 does not establish a rigid hierarchy of

11. SHAW, *supra* note 3, at 50. Scholars do debate, of course, whether Article 38 represents an authoritative and definitive statement of sources (i.e., the meta-norm of sources), or merely a clause of applicable law for the ICJ. Few dispute its pragmatic value as a rallying point for the doctrine of sources, however. See JÖRG KAMMERHOFER, UNCERTAINTY IN INTERNATIONAL LAW: A KELSENIAN PERSPECTIVE 208-10 (2011).

12. Article 38 states:

The Court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the consenting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055.

13. On the drafting history of Article 38, see Akehurst, *supra* note 6, at 274.

14. See JAN KLABBERS, INTERNATIONAL LAW 25 (2013) (“[J]udicial decisions and the writings of the most highly qualified publicists are listed as subsidiary means only . . . it follows from the organizing principle of sovereignty that [these subsidiary means] cannot make law, but only apply it.”); HUGH THIRLWAY, THE SOURCES OF INTERNATIONAL LAW 8 (2014) (“Neither a judge nor a scholar says ‘This is the law, because I say so’; they both lay down what they regard as established by one of the other sources.”).

sources, particularly when it comes to the relationship between customary law and treaties. These are said to exist alongside each other in no particular order of pre-eminence, in a kind of decentralized and pluralistic arrangement where no source ranks higher than the other.¹⁵ The fact that a norm was created via one or the other sources listed in Article 38—i.e., its formal pedigree—is thought to be of little or no relevance to its legal status and authority. At a practical level, the absence of inherent hierarchies among sources of international law means that adjudicators are left to resolve conflicts of norms on an *ad hoc* basis by means of interpretative techniques (e.g., harmonious interpretation) or conflict resolution principles (e.g., *jus cogens*, *lex specialis*, *lex posterior*).¹⁶ Unsurprisingly, these *ad hoc* resolutions nearly always lead to a prioritization of the tribunal's own body of law, in what may be termed a preference for the law of the forum or, more accurately perhaps, hegemonic assertions of jurisdiction. In these hegemonic struggles, conflicts of norms are thus rarely resolved in accordance with pre-established hierarchies and are instead largely determined by the identity of the adjudicator (i.e., who decides) and the project it was set up to defend (e.g., trade, human rights, security).¹⁷

The absence of rigid and formal hierarchies in the doctrine of sources should not, however, conceal the fact that states, adjudicators, and legal scholars have historically expressed clear preferences for particular sources, thus establishing informal

15. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v U.S.), Judgment, 1986 I.C.J Rep. 14, ¶ 176 (June 27) (“It cannot therefore be held that Article 51 [of the United Nations Charter] is a provision which ‘subsumes and supervenes’ customary international law [I]n the field in question . . . customary international law continues to exist alongside treaty law.”).

16. See Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Rep. of the Study Grp. of the Int'l Law Comm'n, ¶¶ 86, 88, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) [hereinafter Fragmentation Report]; PAUWELYN, *supra* note 9, at 89-109; Maarten Bos, *The Hierarchy Among the Recognized Manifestations (“Sources”) of International Law*, 25 NETH. INT'L L. REV. 334 (1978).

17. For a theory of fragmentation as struggle for institutional hegemony and normative authoritativeness, see Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 MOD. L. REV. 1 (2007); Martti Koskenniemi, *International Law and Hegemony: A Reconfiguration*, 17 CAMBRIDGE REV. INT'L AFF. 197 (2004).

hierarchies, if not of validity, at the very least of importance or pre-eminence among law-making processes.¹⁸ The theory and practice of sources, in other words, is not entirely alien to what Parry once called “logical scales of values,” i.e., the logical ordering of sources according to specific value judgments about their respective merits.¹⁹ Two such hierarchies are analyzed here, positing the superiority/primacy (if not the supremacy) of treaty law and customary law respectively. Other orderings are possible, however, and, as noted by David Kennedy, “[a]dvocates of all logically available positions exist” regarding the hierarchical relationship among the various Article 38 sources.²⁰

A. *The Treaty Primacy Thesis*

Legal reason is, fundamentally, a hierarchical form of reason “establishing relationships of inferiority and superiority between units and levels of legal discourse.”²¹ For this reason, and even though legal scholars are at one in arguing that there is no formal hierarchy among the sources of international law, they generally find it difficult to refrain from passing some form of judgment on the superiority of one or the other sources listed in Article 38 (and, by implication, on the inferiority of the others). The leading view in this regard, as far as modern international law is concerned, is that treaties are the “most prominent,” “most important,” “most fundamental,” “dominant,” “major,” “principal,” or “primary” source of international law.²² To some scholars, the pre-eminence

18. CASSESE, *supra* note 3, at 155; Akehurst, *supra* note 6, at 274.

19. CLIVE PARRY, *THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW* 28 (1965).

20. David Kennedy, *The Sources of International Law*, 2 *AM. U. J. INT'L L. & POL'Y* 1, 16 n.25 (1987).

21. Koskenniemi, *supra* note 7, at 566.

22. *E.g.*, CRAWFORD, *supra* note 6, at 30 (“Treaties are the most important source of obligation in international law.”); WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 123-24 (1974) (“It is obvious that, in the fast moving articulate and complex international society of today, the international treaty increasingly replaces custom as the principal source of international law.”); Duncan B. Hollis, *Introduction to THE OXFORD GUIDE TO TREATIES* 1, 8 (Duncan B. Hollis ed., 2012) (“[T]reaties are an essential vehicle for organizing international cooperation and coordination. In both quantitative and qualitative terms, they are the primary source for international legal commitments and, indeed, international law generally.”); KLABBERS, *supra* note 14, at 25 (“[T]he treaty has become the dominant source of international law.”); CHARLES ROUSSEAU, *DROIT INTERNATIONAL PUBLIC* 59 (1970) (“[L]’article 38 qu’il n’établit pas de

of treaties is such that international law-making can be usefully divided into “treaty law” and “non-treaty law”: treaties on one hand, everything else on the other.²³ In fact, it is not rare for legal scholars to regard treaties and international law as one and the same.

The “treaty primacy” thesis comes in various degrees and forms that can be categorized in two principal streams of arguments. The first stream posits that treaties and custom are normatively equivalent but that, *as a matter of procedural order*, treaties take priority over other sources of international law. According to this argument, when courts and tribunals decide a case, they routinely—and should, as a matter of principle—look at treaties first, before considering non-treaty sources.²⁴ This view is based on two principal justifications. The first is a pragmatic consideration: treaties are generally thought to be superior instruments for resolving disputes because of their written character, which confers a greater degree of precision and textual determinacy to treaty norms.²⁵ Treaty norms are easier to locate, ascertain, and apply than other norms, particularly customary norms, the precise content of which can be difficult and onerous to establish. As noted by Beckett, “[s]tate practice is widely dispersed, often awkward to identify, hard to weigh, and generally not uniform [I]t is easier to consult a written source.”²⁶ Treaty law is also, by and large, devoid of the ontological and methodological uncertainties characteristic of

hiérarchie entre les différences sources qu’il énumère . . . on constate qu’il y a accord sur les idées suivantes . . . [l]a première source, incontestablement la plus importante, est formée par les traités.”) (emphasis removed).

23. For example, PATRICK DAILLIER ET AL., *DROIT INTERNATIONAL PUBLIC* (8th ed. 2009), subcategorize their chapter on international law-making into “*formation conventionnelle*” and “*formation non conventionnelle*.”

24. *E.g.*, Fragmentation Report, *supra* note 16, ¶ 85 (“This informal hierarchy . . . emerges as a ‘forensic’ or a ‘natural’ aspect of legal reasoning. Any court or lawyer will first look at treaties, then custom and then the general principles of law for an answer to a normative problem.”).

25. PAUWELYN, *supra* note 9, at 133-34; *see also* John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 *HARV. INT’L L.J.* 139, 215 (1996) (highlighting that treaty provisions often include specific mechanisms for dispute resolution).

26. Jason Beckett, *Customary International Law*, in *INTERNATIONAL LAW FOR INTERNATIONAL RELATIONS* 122, 134 (Başak Çali ed., 2010) (emphasis omitted).

customary law. Proving a treaty norm is generally unproblematic. There are rarely any disputes about the existence of a treaty: a treaty is either in force between the parties, or it isn't.²⁷ By contrast, proving custom is a far more uncertain enterprise that nearly always gives rise to serious controversies and often leave adjudicators (or codifiers) exposed to criticism.²⁸ In these circumstances, it is not surprising that courts and tribunals should, as a matter of practice, demonstrate a preference for the formality and definition of treaty law. Noting this point, Charlesworth writes of a "hierarchy of sources in terms of ease of identification."²⁹

The procedural or operational priority of treaties is also justified by a principled consideration, which stems from the notion that states, by concluding treaties, are purposely "opting out" of general (often understood as customary) international law to establish a special, derogatory regime (i.e., a *lex specialis*) in a given area of cooperation. This argument is found in its purest expression in the writings of Hersch Lauterpacht. Using a domestic law analogy, Lauterpacht considers that the rights and duties of states:

are determined, in the first instance, by their agreement as expressed in treaties—just as in the case of individuals their rights are specifically determined by any contract which is binding upon them. When a controversy arises between two or more States with regard to a matter regulated by a treaty, it is natural that the parties should invoke and that the adjudicating agency should apply, in the first instance, the provisions of the treaty in question In the above sense, treaties must be considered as ranking first in the hierarchical

27. Disputes occasionally arise regarding the validity of a treaty or its termination, though this is a rather rare occurrence. For a characteristic example, see *Gabčíkovo–Nagymaros Project (Hung. v. Slov.)*, 1997 I.C.J. Rep. 7, ¶ 142 (Sept. 25).

28. The ICJ was notoriously criticized for its method of ascertaining customary law in the *Nicaragua* case, with some legal scholars blaming the Court for its "revisionist" approach, blurring the lines between practice and *opinio juris*, and "trashing" customary international law. Similar criticisms were levelled against the ICRC when it published its 2009 restatement of customary international humanitarian law. See MARIO PROST, *THE CONCEPT OF UNITY IN PUBLIC INTERNATIONAL LAW* 100-02 (2012).

29. Hilary Charlesworth, *Law-making and Sources*, in *THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW* 187, 189-90 (James Crawford & Martti Koskenniemi eds., 2012).

order of the sources of international law.³⁰

The notion that treaties should take precedence as *lex specialis inter partes* has been recognized on various occasions in positive law. For instance, the 1907 Hague Convention (XII) relative to the Creation of an International Prize Court explicitly provided that “if a question of law to be decided is covered by a treaty in force between [the parties], the Court is governed by the provisions in the said treaty. In the absence of such provisions, the Court shall apply the rules of international law.”³¹ Although this procedural sequencing was not repeated in Article 38, the ICJ has stated on several occasions that “rules of [general] international law can, by agreement, be derogated from in particular cases or as between particular parties”³² and that “[i]n general, treaty rules being *lex specialis*, it would not be appropriate that a State should bring a claim based on a customary-law rule if it has by treaty already provided means for settlement of such a claim.”³³ The International Law Commission, in its study on the fragmentation of international law, noted this jurisprudence, holding that international tribunals “give precedence to treaty law in matters where there is customary law as well—a practice that highlights the dispositive nature of custom and the tribunals’ deference to agreements as the ‘hardest’ and presumably most legitimate basis on which their decisions can be based.”³⁴

The procedural priority of treaty law constitutes the first version of the “treaty primacy” thesis. The second version of the thesis is rather different. It posits that treaty law is both operationally and normatively superior to (i.e., *better* than) other law-making processes. The argument here is that the treaty is,

30. HERSCH LAUTERPACHT, INTERNATIONAL LAW: VOLUME 1, THE GENERAL WORKS 87 (1970).

31. Convention (XII) Relative to the Creation of an International Prize Court art. 7, Oct. 18, 1907, 205 Consol. T.S. 381.

32. North Sea Continental Shelf Cases (Ger. v. Den.; Ger. v. Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 72 (Feb. 20).

33. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 274 (June 27); *see also* Amoco Int’l Fin. Corp. v. Iran, 15 Iran-U.S. C.T.R. 189, ¶ 112 (1987) (“As a *lex specialis* in the relations between the two countries, the Treaty supersedes the *lex generalis*, namely customary international law.”).

34. Fragmentation Report, *supra* note 16, ¶ 81.

comparatively, a “first-class” source of international law that possesses unique qualities and attributes. Though legal scholars have expressed a wide range of views in this regard, treaty law is generally thought to possess three essential qualities that set it apart from other sources: ontological determinacy, practical versatility, and process legitimacy. Ontological determinacy refers to the already alluded to fact that the nature of treaties as a source of international law is “unambiguous and uncontroversial.”³⁵ Compared to customary law—whose nature, constitutive elements, and methods of ascertainment are intensely debated—the law of treaties appears remarkably reliable and well-settled to the point that it has become practically unthinkable to challenge its content.³⁶ Though some areas of the law of treaties are open-ended or subject to continued discussion (e.g., treaty interpretation, reservations), it is argued that the Vienna Convention on the Law of Treaties offers “consummate clarity”³⁷ to treaty law as a source of rights and obligations and effectively functions as a form of “meta law,” a stable legal code that regulates the whole life-cycle of treaties from their making, identification, and validation to their application, interpretation, modification, and termination.³⁸ Treaties thus enjoy a degree of “source determinacy” unknown to other law-making processes, promoting legal certainty, and security in international relations.³⁹

Treaties are also generally favored for their practical versatility. Treaties can be used for a variety of purposes and in a variety of contexts, from the dramatic (war) to the mundane

35. G.J.H. VAN HOOFF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* 117 (1983).

36. On the methodological problems posed by the identification of customary law, see OLIVIER CORTEN, *MÉTHODOLOGIE DU DROIT INTERNATIONAL PUBLIC* 149-78 (2009).

37. THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 59-60 (1990).

38. MARTIN DIXON, *TEXTBOOK ON INTERNATIONAL LAW* 55 (7th ed. 2013).

39. For a discussion of “source determinacy” as a signifier of progress in international law, see Thomas Skouteris, *The Force of a Doctrine: Art. 38 of the PCIJ Statute and the Sources of International Law*, in *EVENTS: THE FORCE OF INTERNATIONAL LAW* 69 (Fleur Johns et al. eds., 2011). The notion that the primary function of the law of treaties should be to provide certainty and security in legal relations was central to proceedings at the 1969 Vienna Conference. Vienna Convention on the Law of Treaties pmb., May 23, 1969, 1155 U.N.T.S. 332.

(duty-free shopping).⁴⁰ They can be used to codify or restate pre-existing customary law, or to make a fresh start and create new rules almost instantly.⁴¹ They can be used to regulate bilateral relations or for larger legislative ambitions, laying down whole regimes to govern holistic areas such as humanitarian law or climate change.⁴² They can serve to articulate general principles of law (sovereign equality, non-intervention, self-determination), but also to adopt highly specific technical standards on commodity prices or water pollution.⁴³ A number of things, to finish, can only be done by way of treaties, most notably the setting up of international institutions like the UN or the EU.⁴⁴

Lastly, and critically, the treaty is generally viewed as superior to other sources by reason of its perceived legitimacy as a law-making process. To begin, treaty-making is premised on the principle of freedom of contract (though the exercise of this freedom is rarely unconstrained⁴⁵). States are free to sign up to a treaty or choose not to become a party.⁴⁶ They enjoy full freedom with regards to the modalities and form of agreement.⁴⁷ They are free to enter reservations and to limit or modify the effect of the

40. Christian J. Tams et al., *Introduction* to RESEARCH HANDBOOK ON THE LAW OF TREATIES x (Christian J. Tams et al. eds., 2014).

41. On the treaty as an instrument of legal innovation/renovation in a fast-moving world, see CHARLES DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 162 (1968); FRIEDMANN, *supra* note 22, at 123-24.

42. See FRIEDMANN, *supra* note 22, at 123-24 (discussing how treaties can be used to regulate bilateral relations but also to achieve broader welfare and co-operative objectives, for instance in matters of trade, nature conservation or international labor standards).

43. See, e.g., International Coffee Agreement 2007, Sept. 28, 2007, In'tl Coffee Council Doc. ICC 98-6, <http://www.ico.org/documents/ica2007e.pdf> [<http://perma.cc/DUZ3-JPZV>] (maintaining coffee exporting countries' quotas and stabilizing coffee prices in the international market).

44. On the versatility of treaties and their importance in contemporary international relations, see Michel Virally, *The Sources of International Law*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 116, 123-24 (Max Sørensen ed., 1968).

45. Omar M. Dajani, *Contractualism in the Law of Treaties*, 34 *MICH. J. INT'L L.* 2, 2-3 (2012); see *infra* Section II.

46. BOYLE & CHINKIN, *supra* note 4, at 31.

47. Vienna Convention on the Law of Treaties, *supra* note 39, art. 11 (governing the means of expressing consent to be bound by a treaty).

treaty in its application to them.⁴⁸ And States are free, of course, to withdraw from treaties, as recently illustrated by the withdrawal of Latin American States from the ICSID Convention, African withdrawals from the International Criminal Court, and President Trump's stated intent to withdraw from the Paris Climate Agreement.⁴⁹ Treaty-making is thus, in principle, a conscious, deliberative process respectful of State consent and contractual autonomy. It is also, to an extent, subjected to democratic scrutiny. Treaty negotiations, in important areas such as climate change or trade/investment, are largely covered by the media and the subject of public debate.⁵⁰ Civil society is increasingly involved in treaty-making, with the participation of NGOs in intergovernmental conferences and proceedings.⁵¹ And in many instances, treaty ratification involves a domestic "chain of legitimacy" where treaties must be approved by the Parliament or some representative institution, and sometimes even by popular referendum.⁵² For the above reasons, treaty-making is often regarded as comparatively more transparent and democratic than other law-making processes (especially the nebulous process of customary law formation), a fact that is said to increase the effectiveness of international law, as norms generated through legitimate processes are thought to exert

48. *Id.* art. 19.

49. See Lars Markert & Catharine Titi, *States Strike Back—Old and New Ways for Host States to Defend Against Investment Arbitrations*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2013-2014, at 401 (Andrea K. Bjorklund ed., 2015); *African Union Backs Mass Withdrawal from ICC*, BBC NEWS (Feb. 1, 2017), <http://www.bbc.co.uk/news/world-africa-38826073> [<http://perma.cc/C9G8-RACQ>]; Tom Batchelor, *Trump 'Will Definitely Pull out of Paris Climate Change Deal'*, INDEPENDENT (Jan. 30, 2017, 4:00 PM), <http://www.independent.co.uk/news/world/americas/donald-trump-paris-climate-change-deal-myron-ebell-us-president-america-pull-out-agreement-a7553676.html> [<http://perma.cc/7KB6-75KQ>].

50. See PAUWELYN, *supra* note 9, at 135 (discussing the "open" and "public" nature of treaty conferences).

51. Whether greater NGO participation necessarily leads to enhanced legitimacy is, of course, questionable. See Kenneth Anderson & David Rieff, *'Global Civil Society': A Sceptical View*, in GLOBAL CIVIL SOCIETY 2004-2005, at 26, 26, 29 (Helmut K. Anheier et al. eds., 2004); BOYLE & CHINKIN, *supra* note 4, at 59-61.

52. KLABBERS, *supra* note 14, at 37; Rüdiger Wolfrum, *Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations*, in LEGITIMACY IN INTERNATIONAL LAW 1, 4, 7 (Rüdiger Wolfrum & Volker Röben eds., 2008).

greater “compliance pull” and thus harder to disobey.⁵³

B. *The Custom Primacy Thesis*

The “treaty primacy” thesis has become dominant in the contemporary doctrine of sources. Few would deny that treaties have assumed a central role in international law-making, both quantitatively and qualitatively. That thesis, however, has always coexisted with others that posit that custom ranks higher, normatively, than treaty law. As with the “treaty primacy” thesis, there are several versions of the “custom primacy” thesis, three of which are discussed here.

The first version of the thesis posits that custom is superior to other sources—in particular treaty law—inasmuch as it precedes and pre-determines them: in other words, there can be no treaty law without a pre-existing framework of customary law governing its formation. This argument has a long history. Writing at the turn of the 20th century, Oppenheim notoriously stated that custom “is the original source of International Law.”⁵⁴ What he meant was not that, chronologically, custom came first and treaties second, but rather that custom was not dependent on any other source to exist, whereas treaties could only exist against the background of custom: “treaties are a source the power of which derives from custom. For the fact that treaties can stipulate rules of international conduct at all is based on the customary rule of the Law of Nations, that treaties are binding upon the contracting parties.”⁵⁵

The limits of this theory are well known. As Lauterpacht famously noted, if one subscribes to the view that treaties are binding only because there is a customary rule to that effect, “[t]here still remains the question why custom is binding.”⁵⁶ It has, however, proved remarkably resilient. Kelsen, in his *General Theory of Law and State*, observed that

If, again, we ask why this treaty is valid, we are led back

53. FRANCK, *supra* note 37, at 59-60; Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT’L L. 705 (1988).

54. L. OPPENHEIM, INTERNATIONAL LAW: VOL. 1, PEACE 24 (1905).

55. *Id.*

56. LAUTERPACHT, *supra* note 30, at 58.

to the general norm which obligates the States to behave in conformity with the treaties they have concluded, a norm commonly expressed by the phrase *pacta sunt servanda*. This is a norm of general international law, and general international law is created by custom . . . Customary international law . . . is the first stage within the international legal order.⁵⁷

Reuter, a leading scholar of the law of treaties and a firm believer in the “central position” of treaty law in international life, conceded that

treaties are binding by virtue not of a treaty but of customary rules. In that sense, international custom is even more central than the law of treaties since it is the very pillar on which treaties rest. If one were to speak of a ‘Constitution’ of the international community, it would have to be a customary one.⁵⁸

In his recent Hague Lectures, Crawford took the same view, arguing that “international law is a customary law system, despite all the treaties; even the principle of *pacta sunt servanda*, the obligation to comply with treaties, is a customary law obligation.”⁵⁹ Common to all these views about the primacy of custom is the notion that customary law has a privileged, elemental status at the heart of the international legal order and represents the source of all sources, the background that determines the condition of validity of all other legal norms and processes.⁶⁰

It should be noted that this first version of the “custom primacy” thesis is not so much concerned with custom as a law-making process as it is with certain basic, foundational principles (e.g., *pacta sunt servanda*) that happen to be of a customary nature.⁶¹ The second and third versions of the thesis,

57. HANS KELSEN, GENERAL THEORY OF LAW AND STATE 369 (1945).

58. PAUL REUTER, INTRODUCTION TO THE LAW OF TREATIES 29 (José Mico & Peter Hagggenmacher trans., 2012).

59. JAMES CRAWFORD, CHANCE, ORDER, CHANGE: THE COURSE OF INTERNATIONAL LAW 57 (2014).

60. Brigitte Stern, *Custom at the Heart of International Law*, 11 DUKE J. COMP. & INT'L L. 89, 89 (2001).

61. The notion that the rule *pacta sunt servanda* is a customary rule is open to question. Kelsen himself eventually abandoned this view, arguing instead that the rule

by contrast, have more to do with custom as a process and its comparative merits. The second version of the thesis, to begin with, posits that custom is the only process capable of producing law *in the proper sense of the term*—i.e., rules of general validity—applicable to the legal order as a whole and to all legal subjects. This view was notoriously put forward by Fitzmaurice, who argued that treaties ought to be viewed as mere contracts which can do little more than create specific rules applicable to specific parties in specific contexts.⁶² Since treaties are unable to produce genuine rules of law, he concluded, they cannot be considered as sources of international law but merely as sources of rights and obligations.⁶³ While they may lead to the emergence of law proper if their provisions pass into the general corpus of customary international law, because of their contractual nature Fitzmaurice viewed treaties as “no more a source of law than an ordinary private law contract.”⁶⁴

This view of treaties as a mere source of obligations has had a certain influence and was espoused by many scholars after Fitzmaurice. Parry, for instance, while recognizing that treaties are of paramount importance when determining the rights and duties of States *inter se*, argued that the contribution of treaties to “the whole content and stuff of the international legal system . . . is relatively small.”⁶⁵ To Parry, the treaty is essentially peripheral as a source of international law—it is custom that defines the basic constitutional structure and general principles of international law as a system.⁶⁶ The treaty is simply “the contract of the international legal system” and in the same way that one can learn about English law without reading a single

pacta sunt servanda is an axiom incapable of juridical demonstration and not itself a part of the system of positive law. HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 190 (2nd prtg. 2003); François Rigaux, *Hans Kelsen on International Law*, 9 EUR. J. INT’L L. 325, 328 (1998).

62. Gerald Fitzmaurice, *Some Problems Regarding the Formal Sources of International Law*, SYMBOLAE VERZIJL 153 (1958), reprinted in MARTIN DIXON ET AL., CASES & MATERIALS ON INTERNATIONAL LAW 23, 23 (6th ed. 2016).

63. *Id.*

64. *Id.* For a rebuttal, see M.H. Mendelson, *Are Treaties Merely a Source of Obligation?*, in PERESTROIKA AND INTERNATIONAL LAW (William E. Butler ed., 1990).

65. PARRY, *supra* note 19, at 34.

66. *Id.*

contract or statute, “one can have a very fair idea of international law without having read a single treaty: and one cannot gain any very coherent idea of the essence of international law by reading treaties alone.”⁶⁷ Brownlie, to provide another example, listed treaties alongside General Assembly resolutions and drafts adopted by the International Law Commission as “material sources” exercising direct influence on the content of the law, rather than “formal sources” of law proper—a distinction that endured until Crawford’s re-edition of Brownlie’s classical textbook.⁶⁸ The point in these arguments about sources is that a hierarchy of sorts is introduced between custom as legislation and treaties as contracts.

The third version of the “custom primacy” thesis is more directly concerned with the specific attributes which custom is said to possess as a law-making process. Customary law, as a formal source, may be seen as normatively superior (*better*) to other sources due to its ability to generate universally applicable norms, i.e., norms which are binding on any and all States at once.⁶⁹ Whilst treaties may theoretically achieve universal participation, this remains an extremely rare occurrence and the universality of treaties is, in any event, likely to be undermined by reservations and other flexibility mechanisms.⁷⁰ In comparison, norms generated through the customary process do not necessitate all states to opt in to become universal. Customary norms are *born* universal and states are not permitted to opt out of customary law unless they have persistently and unambiguously objected to its formation, a possibility that has played such a limited role in practice that it has become essentially theoretical.⁷¹ As stated unambiguously by the ICJ,

67. *Id.* at 35.

68. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 12-13 (6th ed. 2003); CRAWFORD, *supra* note 6, at 42.

69. BROWNLIE, *supra* note 68.

70. On the tension between the universality and integrity of treaties, see Catherine Redgwell, *Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties*, 1993 BRIT. Y.B. INT’L L. 245.

71. Ted Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT’L L.J. 457, 457, 467 (1985) (describing the principle of the “persistent objector” and the limited role that it has played in international relations).

“customary law rules and obligations . . . by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion.”⁷²

Customary law, in this sense, offers the promise of majority rule and universal legality. Majoritarian universality is thus the great strength; the “unique selling point” of customary international law.⁷³ Whether this prospect is attractive and legitimate is, of course, very much a matter of perspective and circumstances. Creating legal norms without the consent of all concerned states would certainly appear illegitimate to most 19th century legal positivists, and the classical position of the International Court of Justice has consistently been that international rules only exist if and where they have been developed with the consent of those concerned.⁷⁴ However, the notion of non-consensual law-making has always appealed to scholars committed to the idea of universal law and frustrated with the strict contractual nature of treaties and the limits inherent in voluntary law-making.⁷⁵ In recent years, this frustration has seen somewhat of a renewal, most notably in debates concerning global public goods. Many scholars have highlighted what they see as the inherent inadequacy of treaty law and its emphasis on state consent in dealing with global public good challenges such as climate change mitigation, fisheries depletion, the management of pandemics, or global security threats.⁷⁶ To resolve such problems, the argument goes,

72. North Sea Continental Shelf Cases (Ger. v. Den.; Ger. v. Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 63 (Feb. 20).

73. Beckett, *supra* note 26, at 124.

74. See, e.g., Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 269 (June 27) (“[I]n international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise.”); Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. Rep. 3, ¶ 89 (Feb. 5) (“Here as elsewhere, a body of rules could only have developed with the consent of those concerned.”).

75. See, e.g., JOHANN CASPAR BLUNTSCHLI, LE DROIT INTERNATIONAL CODIFIÉ 58 n.1 (1895) (“Si le droit international était exclusivement le produit de la libre volonté des états, aucun d’eux ne serait obligé vis-à-vis des autres d’en respecter les principes, quand ces principes n’auraient pas été sanctionnés par un traité.”).

76. E.g., Nico Krisch, *The Decay of Consent: International Law in an Age of Global Public Goods*, 108 AM. J. INT’L L. 1, 1-2 (2014).

global rules must be developed which are binding on all states. Because we cannot expect rules, especially in such controversial areas, to receive the specific individual consent of each and every one of the nearly 200 states composing the international community today, these rules must be developed “regardless of the attitude of any particular state,”⁷⁷ i.e., without or perhaps even against the will of individual states.⁷⁸ In this context, treaty-making becomes problematic as it gives any state the right to object to the formation of any proposed rule of international law. An excessive commitment to consent is thus perceived as crippling efforts to develop the international norms the world so desperately needs.⁷⁹

The limits of treaty-making in addressing global public good problems has prompted a (re)turn to non-consensual law-making processes. Some scholars have argued for the use of international institutions with majoritarian voting rules.⁸⁰ Others have simply advocated a wider use of custom as a way to achieve universal norms without the specific support of every member of the global community. For instance, Justice Weeramantry has claimed that custom is vastly superior to the treaty as an instrument for dealing with global public good challenges.⁸¹ Pointing to the near impossibility of obtaining universal treaty ratification, he argues that “[w]e need to have resort to a set of principles that do not owe their existence to an act of specific state consent but reach beyond state consent to the primordial verities and principles on which the international order is founded.”⁸² In his view, “customary international law provides such a source which will need to be increasingly relied upon in a future where unexpected and urgent problems of an unprecedented nature will keep arising, for which treaty law cannot provide the solutions.”⁸³

77. Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 529 (1993).

78. Christian Tomuschat, *Obligations Arising for States Without or Against their Will*, 241 RECUEIL DES COURS 195 (1993).

79. Andrew T. Guzman, *Against Consent*, 52 VA. J. INT'L L. 747, 788 (2012); Laurence R. Helfer, *Nonconsensual International Lawmaking*, 2008 U. ILL. L. REV. 71, 125.

80. E.g., JOEL P. TRACHTMAN, *THE FUTURE OF INTERNATIONAL LAW* 283 (2013).

81. C.G. WEERAMANTRY, *UNIVERSALISING INTERNATIONAL LAW* 222-25 (2004).

82. *Id.* at 223.

83. *Id.* at 223-24.

The superiority of custom as a source capable of producing legal universals is, of course, rooted in a particular vision of the world and the role of law in it. The universal as a project is always particularly located. The primacy of custom here is justified on utilitarian (solving global public good problems) and semi-naturalist grounds (the “primordial verities and principles” of the international order). And output legitimacy (generating norms despite opposition by a reluctant minority) matters more than normative legitimacy (the “justness” of norms and institutional arrangements) or process legitimacy (who decides and according to what procedures). Unsurprisingly, these justifications for the primacy of custom do not resonate with everyone, and some states and scholars have historically resisted custom as a legitimate method for making universally applicable international laws. In particular, in the immediate post-colonial era, the approach of Third World States and scholars to international law was characterized by a clear rejection of custom.⁸⁴ Importantly, this was not simply a rejection of specific customary norms, thought to express relationships of domination, inequality, or privilege. The rejection was much deeper and concerned custom as a law-making process more generally. Custom as a process was deemed both illegitimate and ineffective. It was deemed anti-democratic, as it was created in accordance with the needs of powerful (Western) nations and then imposed onto the silent (non-Western) majority.⁸⁵ It was also deemed ineffective because it made the prospect of radical transformation of the legal system remote. Newly independent states were in need of institutions and structures allowing rapid modification and adaptation of the law, a need that custom, with its slow and undecided tempo, was ill-adapted for.⁸⁶ Custom was thus

84. *E.g.*, R.P. Anand, *Attitude of the Asian-African States Toward Certain Problems of International Law*, 15 INT'L. & COMP. L.Q. 55 (1966); Prakash Sinha, *Perspective of the Newly Independent States on the Binding Quality of International Law*, 14 INT'L & COMP. L.Q. 121 (1965).

85. This critique mirrored that which was levelled earlier by the Soviet doctrine against custom, seen as entrenching the hegemony of capitalist states. *E.g.*, Grigorii Ivanovich Tunkin, *Co-existence and International Law*, 3 RECUEIL DES COURS 3, 46-48 (1958).

86. MOHAMMED BEDJAOU, TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER 133-34 (1979).

perceived as a largely deficient source of international law: “[b]ackward looking, conservative because static, iniquitous in its content, ponderous in its formation, custom as traditionally conceived cannot be of real use in the development of new rules, and could actually be an obstacle to any attempt at change.”⁸⁷ Most Afro-Asian states, as a result, expressed a clear preference for reforming the law through deliberative mechanisms such as conferences, treaties, and resolutions.⁸⁸

C. Conclusion on Informal Hierarchies

Doctrines about the sources of international law generally begin with an abstract definition of the sources listed in Article 38 and nearly always posit, as a general rule, that there exists no formal hierarchy among them. Beyond this, however, the discourse on sources is replete with hierarchical discussions elaborating the procedural, practical, or normative superiority of some sources over others. In this sense, international law about sources is first and foremost a set of doctrinal boundaries and hierarchies. Critically, though, these hierarchies are not rigid, pre-determined, or definitive, but rather fluid and transient. First, the hierarchical arguments discussed above are not always mutually exclusive. For instance, it may be possible to argue that treaties take precedence over custom as a matter of procedural or operational priority, and at the same time that treaty law still remains subordinate to customary law, as the latter determines its conditions of validity and interpretation. Lauterpacht is a case on point here, having argued on different occasions that, operationally, treaty law “rank[s] first in the hierarchical order of the sources of international law”⁸⁹ and, at the same time, that “[i]n the international sphere, where legislation in the true sense of the world is non-existent, custom is still the primary source; it supplies the framework, the background, and the principal instrument of the interpretation of treaties.”⁹⁰

87. *Id.* at 137.

88. R.P. ANAND, CONFRONTATION OR COOPERATION? INTERNATIONAL LAW AND THE DEVELOPING COUNTRIES 39-41 (2011); ABDULQAWI A. YUSUF, PAN-AFRICANISM AND INTERNATIONAL LAW ch. 3 (2014).

89. LAUTERPACHT, *supra* note 30, at 87.

90. HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE

More importantly though, these arguments about source hierarchies are rarely, if ever, fixed or set in stone. They are more often than not context-dependent and determined by the project or strategy pursued by the lawyers making them. These informal hierarchies reflect and continue the problematics and desires that motivate them. Arguments about the primacy of treaty law are generally driven by a desire for determinacy and consent-based legitimacy, while arguments about the primacy of custom are generally driven by a desire for autonomy (from consent) and universality. As contexts and desires shift, so do source hierarchies. In the classical doctrine of international law, the main hierarchy was not between treaties and custom, but one between natural (divine) law and man-made rules.⁹¹ To a 19th century scholar, normative hierarchies had to reflect a positivist concern with state consent, thus giving priority to treaties as the ideal type of sources. To a 20th century Third World scholar, the hierarchy of sources is typically characterized by a rejection of traditional sources and a preference for mechanisms giving force to the numerical strength of the non-Western world (e.g., GA resolutions). Source hierarchies are thus historically contingent.⁹² They are also functionally determined. Each source possesses specific design features (e.g., determinacy, flexibility, universality) that make it suitable to deal with particular classes of cooperation problems. States may prefer the design features of treaties when tackling problems with high distributional costs (e.g., climate change) but express preference for custom in dealing with problems that require generally articulated norms or in domains where rules benefit all states equally (e.g., state immunities).⁹³ Likewise, the same lawyer might argue the superiority of the treaty in one context (e.g., as a legal scholar) and argue the primacy of customary law in another context (e.g., as a legal adviser, counsel, or judge). Even within one and the

INTERNATIONAL COURT 387 (1982).

91. On the historically contingent nature of sources hierarchies, see Harlan Grant Cohen, *Finding International Law: Rethinking the Doctrine of Sources*, 93 IOWA L. REV. 65 (2007).

92. *Id.*

93. Laurence R. Helfer & Ingrid B. Wuerth, *Customary International Law: An Instrument Choice Perspective*, 37 MICH. J. INT'L L. 563, 568 (2016).

same context, arguments about source hierarchies typically fluctuate between the “treaty primacy” and “custom primacy” theses, mediating the tension between determinacy and generality, consensualism and non-consensualism, sovereignty and community.⁹⁴

II. MATERIAL HIERARCHIES AND THE PRAGMATICS OF SOURCES

The previous section was concerned with the first facet of the “no-hierarchy” thesis—i.e., the notion that there exists no *a priori* hierarchy of validity or importance among formal sources of international law. I now turn to the second, and perhaps more problematic, aspect of the no-hierarchy thesis: the view that law-making processes, in the way that they operate, are, in essence, non-hierarchical. This section offers a short introduction to the founding principle of legislative equality in international law before examining some of the hierarchies of status, worth, and influence that characterize law-making in the international system. As noted above, these hierarchies do not concern the relationship between various sources in the formal sense of the term. They are, instead, material hierarchies that manifest themselves in the concrete workings of sources as law-making processes, i.e., in their pragmatics. These are hierarchies of sources nonetheless and, as explained below, to the extent that these hierarchies are accommodated and sanctioned by the international legal system, they cannot simply be discarded as belonging to the domain of politics, i.e. as something that does not concern international law strictly speaking. These material hierarchies are integral to the fabric and structure of international law, a fact that is rarely acknowledged in the context of debates on (the hierarchy of) sources.

A. *The Principle of Legislative Equality*

It is commonplace to say that international law, as a system,

94. As Kennedy has demonstrated, the discourse on sources can be interpreted as an attempt to mediate between consensualism and non-consensualism, in order to demonstrate simultaneously international law’s respect for sovereign autonomy and its systemic authority. Kennedy, *supra* note 20, at 22-23.

is premised on the sovereign equality of states. Since at least the middle of the 18th century, publicists of all schools and dispositions—naturalists and positivists alike—have highlighted the equality of states as one of the primary postulates of the law of nations.⁹⁵ As famously noted by Chief Justice Marshall in the *Antelope* case: “[n]o principle of general law is more universally acknowledged, than the perfect equality of nations.”⁹⁶ At times criticized but never abandoned, the principle has, through the centuries, “clung with tenacity to the trunk of legal science.”⁹⁷ Reaffirmed in major textbooks and in leading international documents—including the Montevideo Convention, the UN Charter, and the UN Declaration on Friendly Relations among States⁹⁸—sovereign equality, to this day, continues to be regarded as a canonical principle and is routinely reiterated by courts and tribunals as one of the basic constitutional doctrines of international law.⁹⁹ While the orthodoxy of sovereign equality readily acknowledges the pervasive inequalities and power differentials among states in the “real world” of international relations (“obviously some states are more equal than others”),¹⁰⁰ these are usually relegated to the realm of the political—outside

95. On the early history of the doctrine of sovereign equality and the influence of the philosophical ideas of Grotius, Hobbes, Locke, and others on its formation, see Arnold McNair, *Equality in International Law*, 26 MICH. L. REV. 131 (1927).

96. *The Antelope*, 23 U.S. (10 Wheat.) 66, 122 (1825).

97. Ann Van Wynen Thomas & A.J. Thomas, Jr., *Equality of States in International Law—Fact or Fiction?*, 37 VA. L. REV. 791, 791 (1951).

98. Montevideo Convention on the Rights and Duties of States art. 4, Dec. 26, 1933, 165 L.N.T.S. 19 (“States are juridically equal, enjoy the same rights, and have equal capacity in their exercise.”); U.N. Charter art. 2(1) (“The Organization is based on the principle of the sovereign equality of all its Members.”); G.A. Res. 2625 (XXV), at 124 (Oct. 24, 1970) (“All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.”).

99. *E.g.*, *Jurisdictional Immunities of the State (Ger. v. It.)*, Judgment, 2012 I.C.J. Rep. 99, ¶ 57 (Feb. 3) (“[T]he principle of sovereign equality of States . . . [i]s one of the fundamental principles of the international legal order.”); CASSESE, *supra* note 3, at 48 (“It is safe to conclude that sovereign equality constitutes the linchpin of the whole body of international legal standards, the fundamental premise on which all international relations rest.”).

100. *E.g.*, CRAWFORD, *supra* note 6, at 449 (“Obviously, the allocation of power and the capacity to project it in reality are different things, which suggests that while all states are equal, some are more equal than others.”).

the law—in a way that only serves to reinforce the alleged autonomy of the legal domain and international law’s egalitarian promise.

The principle of sovereign equality—perhaps because of its canonical status—is rarely examined in much depth and has no fixed or stable meaning. At minimum, however, it is generally thought to possess formal, existential, and substantive implications. Formally, states are said to be “equal before the law,” i.e., to have equal capacity to vindicate and exercise their rights, most notably in courts and tribunals where their claims are treated as having equal value and dignity.¹⁰¹ Existentially, all states are said to possess self-definitional agency—the freedom to choose their political, social, economic, and cultural system.¹⁰² Substantively, to finish, all states—big or small—are said to possess a bundle of fundamental rights and privileges, including the right to territorial integrity, the right to freely dispose of their natural resources, sovereign immunities, the right to self-help, and the right to make treaties, join international organizations like the UN, and litigate in international courts such as the International Court of Justice.¹⁰³

Additionally, sovereign equality is also understood to have important implications for international law-making (i.e., for

101. On formal or “forensic” equality, see McNair, *supra* note 95, at 136, 151 (“An international tribunal, or a municipal tribunal when giving effect to the international obligations of the State to which it belongs, pays the same attention to the rights of France as it does to the rights of Costa Rica . . . [and sovereign equality] is used to denote [e]quality before the law, equality in the assertion and vindication by law of such rights as a state may have.”) (emphasis removed); see also *Composition of the Court*, 1950-51 INT’L CT. JUSTICE Y.B. 17 (statement of President J. Basdevant) (“Before this Court, there are no great or small states.”).

102. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶ 258 (June 27) (“Every State possesses a fundamental right to choose and implement its own political, economic and social systems.”). On the notion of “existential equality,” see GERRY SIMPSON, *GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER* 53-56 (2004).

103. Most of the “equality rights” are restated in the UN Friendly Relations Declaration, G.A. Res. 2625 (XXV), *supra* note 98. For an early conceptualization of sovereign equality in terms of substantive rights, see ROBERT PHILLIMORE, *COMMENTARIES UPON INTERNATIONAL LAW*, VOL. 1, at 216-17 (3d. ed. 1879), who extracted four specific “rights of equality” from the principle of sovereign equality: the right of protecting subjects abroad, the right to recognition, the right to external marks of honor, and the right to make treaties.

sources). This is what McNair calls “equality for law-making purposes” or what Simpson more recently has dubbed “legislative equality.”¹⁰⁴ The notion of legislative equality boils down to two broad principles. At a fundamental level, states are equal in that they are presumed to be obligated only to the extent of their actual or constructive consent, i.e., they cannot be subjected to obligations to which they have not consented. This is the famous *Lotus* principle according to which “[t]he rules of law binding upon States . . . emanate from their own free will [and are] established . . . between co-existing independent communities.”¹⁰⁵ At a more practical or procedural level, sovereign equality requires states to be given an equal say in the creation of international norms. Traditionally, this has been taken to mean that in international proceedings, states are entitled to equality of representation, equality of vote, and an equal role in the formation of customary and treaty law.¹⁰⁶ States are said to have the same capacity for rights and equal competence to make and enforce laws. Under this view, international law-making is thus predicated on a (liberal) vision of states as independent, autonomous agents that engage in international juridical transactions on an equal footing and produce norms through conscious, regular, and deliberate processes.¹⁰⁷

Legislative equality has never existed in a pure, unadulterated form in international law. It has always been the site of intense negotiations and, to an extent, the history of international law can be read as a history of struggles for

104. See McNair, *supra* note 95, at 142-47; SIMPSON, *supra* note 102, at 48-53.

105. Case of the S.S. *Lotus* (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

106. This is how Oppenheim, in particular, envisaged sovereign equality at the turn of the 20th century. See OPPENHEIM, *supra* note 54, at 162 (“The consequence of . . . legal equality is that, whenever a question arises which has to be settled by the consent of the members of the Family of Nations, every State has a right to a vote, but to one vote only. And legally the vote of the weakest and smallest State has quite as much weight as the vote of the largest and most powerful.”).

107. On sovereign equality as autonomy, see Hans Kelsen, *The Principle of Sovereign Equality of States as a Basis for International Organization*, 53 YALE L.J. 207, 209 (1944) (“[N]o State has jurisdiction over another State . . . without the latter’s consent . . . [and] the courts of one State are not competent to question the validity of the acts of another State Understood this way, the principle of equality is the principle of autonomy of the States as subjects of international law.”).

sovereign equality, with great powers attempting to weaken or deflect the principle and smaller states investing it in the hope that one day it may deliver substantive benefits.¹⁰⁸ What is certain is that accounts of international law-making that remain exclusively predicated upon the presumption of legislative equality are at best deceptive and at worst dangerous, both politically and epistemologically. Despite a broad commitment to sovereign equality, the international legal system is indeed profoundly structured by a variety of hierarchies that affect not simply the substance of legal norms but the very processes of law-making. At times, these hierarchies simply operate as factual hierarchies of influence. However, as the rest of this section will demonstrate, they are more often than not sanctioned or institutionalized by the legal system itself. When this happens, they become legalized hierarchies that shape the making of international law from within, and not simply from without, as a mere matter of international political economy.

B. Hierarchies of Influence: Great Powers, Great (White) Men, and the Making of International Law

Law is the outcome of power struggles. It is both an expansion of and a constraint on power structures; a legitimizer and a civilizer. In any legal system, powerful agents are subject to the law but are able to mobilize their resources (material, cultural, economic and otherwise) to influence the legislative process and produce favorable outcomes.¹⁰⁹ This is a basic fact of juridical life to which international law is evidently not immune. In the international system, as in all legal systems in the world, dominant actors—great powers in particular—influence the law-making process and its distributive consequences.¹¹⁰

The influence of great powers is felt at different levels of the international legislative process. In treaty-making, great powers have historically enjoyed quasi-hegemonic privileges. For three

108. For a historical account of these struggles, see R.P. ANAND, *SOVEREIGN EQUALITY OF STATES IN INTERNATIONAL LAW* ch. 3 (2008).

109. See B.S. Chimni, *Legitimizing the International Rule of Law*, in *THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW*, *supra* note 29, at 290, 294 (stating that international law generally codifies the interests of powerful states).

110. See *id.* at 290.

centuries following the Treaties of Westphalia, as European nations expanded their influence across the globe, they organized and formalized their relationship with polities on the periphery through treaties.¹¹¹ Those treaties—used to acquire territories, secure trade benefits, and protect the property rights of European citizens—were not negotiated by nations treating each other as equals but were more often than not imposed on non-European states under duress, with flawless legal validity.¹¹² Within Europe, treaty-making was also deeply shaped by power differentials, despite Westphalia’s egalitarian promise. Nowhere was this more obvious than in the 19th century Concert system. The Congress of Vienna in 1815 heralded an era of great power management in Europe in which the four (then five) great powers of the day made decisions for the rest of Europe with little or no participation by other states.¹¹³ In the Concert system, the great powers decided the fate of small countries; rearranged the map of Europe; and laid down rules of international law on the status of international rivers, the status of diplomatic representatives, or the suppression of the slave trade.¹¹⁴ The great five acted as self-appointed law-makers and other states accepted the rules laid down by them. Agreements were signed, but they merely endorsed the pre-determinations of the leading states. The great powers made the law, and smaller powers ratified the treaties.¹¹⁵

The Concert system provided an international “learning experience” that foreshadowed many of the legislative and

111. The ability to sign treaties with European powers was of course a privilege reserved to a few recognized non-European sovereigns such as China, Japan, Korea, and the Ottoman Empire. Most non-European territories were denied the privilege of sovereignty and were thus managed (“civilized”) through conquest and colonial rule. The leading text on the role of international law in regulating the encounters between Europe and the non-European world remains ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2004).

112. On the history of unequal treaties, see Lucius Caflisch, *Unequal Treaties*, 1992 GERMAN Y.B. INT’L L. 52, 52; Matthew Craven, *What Happened to Unequal Treaties? The Continuities of Informal Empire*, 74 NORDIC J. INT’L L. 335 (2005); MICHAEL AUSLIN, *NEGOTIATING WITH IMPERIALISM: THE UNEQUAL TREATIES AND THE CULTURE OF JAPANESE DIPLOMACY* (2004).

113. Gerry Simpson, *International Law in Diplomatic History*, in *THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW*, *supra* note 29, at 25, 35-36.

114. *Id.*

115. *Id.*

institution-making procedures of the 20th century.¹¹⁶ All conferences held on matters of war, peace, and security since the end of the Concert system have borne the mark of great power preponderance. The Hague Peace Conferences of 1899 and 1907—though based on a complete equality of representation (one State, one vote) and the rule of unanimity on all material decisions—exhibited an overwhelming inequality of influence among the participants.¹¹⁷ The Conferences were convened at the initiative of Russia. The proceedings—including the agenda and procedure—were determined by a few dominant military powers. Treaty provisions were largely based on the U.S. Lieber Code or framed by delegates of the great powers. And on several occasions proposals supported by large majorities were abandoned simply because of the opposition of a few of the great powers.¹¹⁸ While the principle of equality was formally preserved at The Hague, the great powers were able to either force their views upon the Conference or prevent the adoption of unacceptable proposals through their concerted opposition. Claims of strict equality put forward by some smaller states—most famously by Barbosa of Brazil—were derided as “theoretical”, “foolish” or “exuberant” by great power delegates, who insisted that the “useful role” of smaller nations should remain “spontaneous and disinterested” and be limited to raising awareness to “just causes” or “bringing harmony into the conflicting views of the Great Powers.”¹¹⁹

There was also little equality at the Paris Peace Conference. Negotiations concerning the peace treaty with Germany and the League of Nations Covenant were confined to the “Council of Five” (sometimes expanded to a “Council of Ten”) and were

116. MARK JARRETT, *THE CONGRESS OF VIENNA AND ITS LEGACY: WAR AND GREAT POWER DIPLOMACY AFTER NAPOLEON* 369 (2013).

117. For an overview of the varying influences imposed by different countries, see Betsy Baker, *Hague Peace Conferences (1899 and 1907)*, OXFORD PUB. INT’L LAW ¶¶ 9-11 (Nov. 2009), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e305> [<http://perma.cc/B2PL-6E3U>].

118. *Id.*; see also EDWIN D. DICKINSON, *THE EQUALITY OF STATES IN INTERNATIONAL LAW* 290-91 (1920).

119. See JAMES BROWN SCOTT, *THE HAGUE PEACE CONFERENCES OF 1899 AND 1907*, at 165-73 (1909) (quoting and endorsing the views of, among others, Louis Renault, the French delegate and chairman of the drafting committee, during his time as a U.S. delegate to the Second Peace Conference).

conducted in utmost secrecy, despite President Wilson's Fourteen Points and his declared commitment to "open diplomacy."¹²⁰ Decisions were made by the Allied powers behind closed doors, in gatherings where no secretaries were admitted and no official minutes were recorded.¹²¹ It was then left to smaller countries to ratify them. "Confidential tsarism" was pervasive during the negotiations. As one observer reported, when a Canadian delegate spoke of the "proposals" of the great powers, he was immediately corrected by Clemenceau, who intimated that these were not proposals but definitive and final decisions.¹²² The same logic presided over the drafting of the UN Charter. The great powers were not prepared for the Charter to be drafted by a conference of large and small states. It was feared that a full-scale conference would lead to innumerable difficulties and inefficiencies, and significantly delaying the setup great delay in the setting up of the new postwar security organization.¹²³ It was therefore decided that the most effective way to prepare the Charter was for the great powers to reach an agreement first among themselves, and then to subject it to smaller countries for (marginal) amendments and adoption at a plenary meeting.¹²⁴ Although equality of representation and voting was maintained in San Francisco, the process was openly elitist and the main purpose of the Conference was none other than to get the smaller nations to approve a plan already worked out by the great powers (United States, Great Britain, Soviet Union, and later China) at the Dumbarton Oaks conference.¹²⁵

Since Paris and San Francisco, treaty-making has become more accepting of genuine participation by smaller nations and

120. President Woodrow Wilson, The Fourteen Points Speech (Jan. 8, 1918), in *THE WILSON READER*, VOL. 4, at 172, 177 (Francis Farmer ed., 1956) ("The program of the world's peace . . . as we see it, is this: I. Open covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind but diplomacy shall proceed always frankly and in the public view.")

121. SETH P. TILLMAN, *ANGLO-AMERICAN RELATIONS AT THE PARIS PEACE CONFERENCE OF 1919*, at 84-85 (1961).

122. E.J. DILLON, *THE INSIDE STORY OF THE PEACE CONFERENCE* 201-02 (1920).

123. ANAND, *supra* note 108, at 87-88.

124. *Id.* at 88.

125. *Id.*; Gerry Simpson, *The Great Powers, Sovereign Equality and the Making of the United Nations Charter*, 2000 AUSTL. Y.B. INT'L L. 133, 136.

more intolerant of brute assertions of power. However, the dominant status of great powers remains a pervasive feature of the legislative process. Great powers retain overwhelming influence in setting the terms of reference for international negotiations. In the field of investment law, to give a salient example, it has become habitual for leading capital exporting countries (mostly Western countries) to draft “model investment treaties” which provide the blueprint for agreements with capital exporting countries (mostly developing countries), in conditions that are often less like negotiations among equals than an imposition of asymmetrical “contracts of adhesion,” reminiscent of the capitulation agreements once imposed by colonial rulers against the periphery.¹²⁶ In multilateral negotiations, confessional tsarism remains an enduring, if controversial, feature of treaty-making. For instance, recent climate talks have demonstrated a return, in the name of efficiency, to 19th century legislative practices. During the 2009 Copenhagen climate summit, a small group of great and emerging powers—citing political expedience and time constraints—brokered a deal in secret in the dying hours of the conference (the so-called “leaders’ agreement”) and presented it as a *fait accompli* to the rest of the delegates, with President Obama publicly announcing the outlines of the accord at a press conference before the end of the proceedings, leaving other nations with little choice but to sign the take-it-or-leave-it agreement.¹²⁷

Finally, great powers are able to marshal “soft power” to influence treaty-making.¹²⁸ Great powers have the ability to apply

126. See José E. Alvarez, *A BIT on Custom*, 42 N.Y.U. J. INT’L L. & POL. 17, 26, 38-39 (2009) (acknowledging the unequal nature of many BIT negotiations but nevertheless stressing the validity of these agreements under the existing law of treaties). For a resolutely apologetic defense of model BITs as facilitating negotiations and reducing the drafting and negotiation costs of investment treaties, see STEPHAN W. SCHILL, *THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW* 91 (2009).

127. The adoption *en force* of the Copenhagen agreement was famously criticized by the Venezuelan delegate who during the Conference’s closing session deliberately cut her hand and drew blood, denouncing a “coup d’état against the United Nations.” Andrew Gilligan, *Copenhagen Summit Ends in Blood, Sweat and Recrimination*, TELEGRAPH (Dec. 20, 2009, 7:30 AM), <http://www.telegraph.co.uk/news/earth/copenhagen-climate-change-confe/6845892/Copenhagen-summit-ends-in-blood-sweat-and-recrimination.html> [<http://perma.cc/9Q3E-HBSZ>].

128. Soft power is defined by Joseph Nye as “intangible power resources such as

economic and political pressures on other states, and also possess ideational, cultural, and human resources which they can mobilize to secure favorable outcomes in ways that are often not available to smaller nations. Leading states can draw upon large pools of experts, skilled negotiators, and communicators to disseminate their ideas and make their claims seem legitimate in the eyes of others. Their bureaucracies possess the breadth and depth of regulatory knowledge necessary to effectively control and influence law-making in the functionally specialized institutions that determine policies in areas such as market regulation, development, environment, transportation, public health, and education. By contrast, smaller states often experience difficulties in staffing their missions to the organizations and international gatherings where treaties and agreements are negotiated. They lack the soft co-optive and institutional power needed to persuade other actors to define their interests in ways consistent with their own. For these reasons, diplomacy is therefore skewed in favor of the more affluent and powerful countries.¹²⁹

To be sure, the power of individual states can sometimes be balanced by the “power of numbers.” On some occasions, smaller nations have been successful in negotiating favorable provisions by mobilizing the power of the majority, a power which the UN has, to an extent, entrenched in institutions such as the General Assembly. For instance, developing countries have secured recognition for principles such as the right to self-determination, permanent sovereignty over natural resources, or the principle of common but differentiated responsibilities. However, these are rare, moderate, and often precarious successes.¹³⁰ More often

culture, ideology, and institutions” which a state can use to set the political agenda and determine the framework of debate in a way that shapes others’ preferences. Joseph S. Nye, Jr., *Soft Power*, 80 FOREIGN POL. 153, 166-67 (1990).

129. BOYLE & CHINKIN, *supra* note 4, at 30-31.

130. For example, the principle of common but differentiated responsibilities has recently been the object of sustained criticism from Western governments and scholars, claiming that efficiency requires setting aside ethical principles in favor of swift, practical, and politically acceptable action. *E.g.*, ERIC A. POSNER & DAVID WEISBACH, CLIMATE CHANGE JUSTICE 169-70 (2012). For a critical analysis, see Mario Prost & Alejandra Torres Camprubí, *Against Fairness? International Environmental Law, Disciplinary Bias, and Pareto Justice*, 25 LEIDEN J. INT’L L. 379 (2012); Benoit Mayer, *Climate Change and International Law in the Grim Days*, 24 EUR. J. INT’L L. 947 (2013).

than not, great powers are able to block proposals supported by overwhelming majorities. This is especially true given the fragmentation of the legislative process in increasingly narrow functionalist regimes, a phenomenon that limits the opportunities for weaker actors to build cross-issue coalitions and increase their bargaining power.¹³¹ In the WTO context, to provide a recent example, a cycle of negotiations known as the “Doha Round” was initiated in 2001 to tackle some of the fundamental inequities of the world trading system, in light of the needs and interests of developing countries.¹³² However, small and emerging powers have been unable to gain enough leverage to overcome the unwillingness of a few leading economies (in particular, the EU, the United States, and Japan) to make concessions on issues such as farm subsidies and tariffs, despite a united front on at least some of the policy proposals. The Doha Agenda was eventually abandoned in December 2015, having failed to achieve any meaningful reform of the trading system.¹³³

If treaty-making is the work of power, so too is the formation of customary international law (CIL).¹³⁴ With regards to state practice—the primary element of CIL—powerful states possess the ability to engage in practice across a much wider range of issues than smaller nations, and their actions traditionally carry a greater weight in the formation of custom. As observed by De Visscher, if the formation of CIL is akin to the gradual formation of a road across vacant land, then “[a]mong the users are always some who mark the soil more deeply with their footprints than others, either because of their weight, which is to say their power in the world, or because their interests bring them more frequently this way.”¹³⁵ Historically, the conduct of powerful

131. On the proliferation of regulatory institutions as a deliberate effort on the part of powerful states to “divide and conquer,” see Eyal Benvenisti & George W. Downs, *The Empire’s New Clothes: Political Economy and the Fragmentation of International Law*, 60 *STAN. L. REV.* 595 (2007).

132. *Global Trade After the Failure of the Doha Round*, *N.Y. TIMES* (Jan. 1, 2016), http://www.nytimes.com/2016/01/01/opinion/global-trade-after-the-failure-of-the-doha-round.html?_r=0 [<http://perma.cc/82T4-F8Q7>].

133. *Id.*

134. See generally MICHAEL BYERS, *CUSTOM, POWER AND THE POWER OF RULES* (1999).

135. CHARLES DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW*

states has been treated as more decisive—i.e., as more authoritative as a source of law—than that of less powerful ones.¹³⁶ In many areas (e.g., maritime law, space law, law of immunities), CIL has, in fact, developed under the influence of remarkably few states.¹³⁷ Though it is generally said that state practice must nowadays be “widespread” and “representative,”¹³⁸ the practice of the most dominant states still possesses a particular force in the formation of CIL and, conversely, a practice not supported by the world’s major powers will not normally give rise to general customary rules.¹³⁹ Finally, great powers exert special influence on the formation of CIL in more indirect ways, whether it be by influencing or controlling how other states behave (i.e., their practice), or through the historical role Western lawyers have played in formulating CIL and their influence within bodies such as the ICJ or the ILC, which play a leading part in the identification and codification of customary law.¹⁴⁰

149 (1957).

136. BYERS, *supra* note 134, at 8.

137. Lauterpacht, for instance, points to the overwhelming influence of the United States and the UK, as the leading maritime powers of the day, on the emergence of customary rules concerning the status of marine and submarine areas, noting that their practice was treated as “authoritative almost as a matter of course from the outset.” See HERSCH LAUTERPACHT, *INTERNATIONAL LAW: VOLUME 3, PART 2-6: THE LAW OF PEACE, PARTS II-VI*, at 163 (1977).

138. For a recent restatement, see Michael Wood (Special Rapporteur), *Second Report on Identification of Customary International Law*, ¶¶ 52-54, UN. Doc. A/CN.4/673 (May 22, 2014) (“[F]or a rule of general customary international law to emerge or be identified, the practice need not be unanimous (universal); but, it must be ‘extensive’ or, in other words, sufficiently widespread . . . [T]he participation in the practice must also be broadly representative.”).

139. As a recent example, the ICJ’s *Nuclear Weapons* advisory opinion states that the *opinio juris* of the few states possessing nuclear weapons outweighs that of the large majority of states that support their prohibition. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶¶ 64-73 (July 8). Judge Shi criticized the Court’s approach and methodology, expressing reservations about the nuclear deterrence policy. *Legality of the Threat or Use of Nuclear Weapons*, Declaration of Judge Shi, 1996 I.C.J. Rep. 277, 277-78.

140. On the pre-eminence of Western lawyers in the formulation of CIL (based on the practice of a limited number of Western powers), see ONUMA YASUAKI, *A TRANSCIVILIZATIONAL PERSPECTIVE ON INTERNATIONAL LAW* 135, 258-60 (2010). On the dominance of the ICJ bar by international lawyers from developed states, see Shashank P. Kumar & Cecily Rose, *A Study of Lawyers Appearing Before the International Court of Justice, 1999-2012*, 25 EUR. J. INT’L L. 893 (2014).

Power hierarchies among sovereign states have always been superimposed with other, but no less significant, hierarchies. Chief among those are gender hierarchies. International diplomacy and law-making take place in traditionally and predominantly male spaces. International law is designed by and for states, the overwhelming majority of which are governed by men. At the time of writing, there were a mere 19 female heads of state and/or government (excluding figurehead monarchs) and only 17 percent of government ministers worldwide were women.¹⁴¹ Gendered states, unsurprisingly, set up gendered institutions. Major international organizations such as the UN are highly patriarchal organizations, with limited or marginalized women presence.¹⁴² Since 1945, UN Secretaries-General have all been men.¹⁴³ As of January 1, 2016, all but one members of the Security Council were men and only 23 percent of all Senior UN Officials were women, with a majority working in “soft” corners, i.e., on subjects traditionally associated with “feminine” concerns (e.g., sexual violence, children’s rights, refugees, education) or in positions of relatively low prestige (e.g., conference management, budget and accounts), compared with the “hard” portfolios (e.g., political affairs, economic development, peacekeeping), all traditionally entrusted to men.¹⁴⁴

The invisibility of women becomes even more acute when looking at UN bodies with special functions regarding the progressive development and implementation of international law. Only 4 women have ever served on the International Law Commission and of the 58 Special Rapporteurs appointed since

141. *Press Release: Sluggish Progress on Women in Politics Will Hamper Development*, UN WOMEN (Mar. 10, 2015), <http://www.unwomen.org/en/news/stories/2015/3/press-release-sluggish-progress-on-women-in-politics-will-hamper-development> [<http://perma.cc/43EM-HPDJ>].

142. See Hilary Charlesworth, *Transforming the United Men’s Club: Feminist Futures for the United Nations*, 4 *TRANSNAT’L L. & CONTEMP. PROBS.* 421 (1994).

143. *Secretary-general, UN*, *ENCYC. BRITANNICA*, <https://www.britannica.com/topic/secretary-general-UN> [<http://perma.cc/N8CY-RPSM>] (last visited Dec. 15, 2016).

144. Out of 225 Senior Officials, just 57 of them are female. Senior Officials of the United Nations and Officers of Equivalent Rank, *PROTOCOL & LIAISON SERV.* (July 8, 2016), <https://www.un.int/protocol/sites/www.un.int/files/Protocol%20and%20Liaison%20Service/listofunseniorofficials.pdf> [<http://perma.cc/G36L-6TCU>].

1949, all but 2 were men.¹⁴⁵ As for the International Court of Justice, only 4 women have ever sat on the bench out of the 106 judges elected since 1946, the first (Rosalyn Higgins) being appointed in 1995, 50 years after the Court's establishment.¹⁴⁶

The exclusion of women from law-making processes has important normative consequences. First, it undermines international law's democratic legitimacy, as women are prevented from participating in decisions that affect their lives.¹⁴⁷ But it also bears on normative outputs. Women's issues or interests tend to be marginalized or consigned to separate spheres that are easily ignored, are typically articulated in soft language, and have weak compliance mechanisms.¹⁴⁸ Gendered institutions produce decisions, norms, and regimes that are largely constructed and defined by male experiences. The human rights regime, for instance, does not deal in categories that fit the experiences of women. It has historically prioritized civil and political rights over social, economic and cultural rights, with adverse consequences for women who suffer disproportionately from structural socio-economic inequalities.¹⁴⁹ Likewise, individual rights have typically been conceptualized and applied in a gendered manner. For instance, whilst women's rights are most often violated within the family, the right to family life has traditionally been interpreted as a duty of "non-interference" in

145. The four female members of the ILC are Concepción Escobar Hernández, Marie G. Jacobsson, Xue Hanqin, and Paula Escarameia. *Present and Former Members of the International Law Commission (1949-present)*, INT'L LAW COMM'N (July 15, 2015), <http://legal.un.org/ilc/guide/annex2.shtml> [<http://perma.cc/Z4CV-4V28>]. The only female Special Rapporteurs to be appointed by the UN are Marie G. Jacobsson and Concepción Escobar Hernández. *Special Rapporteurs of the International Law Commission (1949-2014)*, INT'L LAW COMM'N (July 15, 2015), <http://legal.un.org/ilc/guide/annex3.shtml> [<http://perma.cc/54TP-7DB2>].

146. The four female justices are Xue Hanqin, Julia Sebutinde, Dame Rosalyn Higgins, and Joan E. Donoghue. *All Members*, INT'L COURT OF JUSTICE, <http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=2> [<http://perma.cc/82F8-3NR5>] (last visited Dec. 15, 2016).

147. See generally Nienke Grossman, *Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?*, 12 CHI. J. INT'L L. 647 (2012) (outlining a feminist critique of international courts and tribunals from a democratic theory perspective).

148. Charlesworth, *supra* note 142, at 447-48.

149. Rosa Ehrenreich Brooks, *Feminism and International Law: An Opportunity for Transformation*, 14 YALE J.L. & FEMINISM 345, 347 (2002).

the private family sphere, preventing the application and development of human rights standards in relationships between men and women.¹⁵⁰ Finally, the gendered nature of law-making means that when engagement with women's issues does occur (e.g., Security Council resolutions on sexual violence during armed conflicts), international law tends to reinforce masculinist assumptions and institutional preferences which are harmful to women (e.g., the stereotypical representation of women as "victims," the UN's commitment to globalization and militarism, and the hegemonic position of the Security Council).¹⁵¹

C. *Legalized Hierarchies*

The structure of international law-making, as the above makes clear, is one dominated by oligarchy and patriarchy. There is, it turns out, a significant discrepancy between the pragmatics of sources and the foundational principle of legislative equality. When confronted with this problem, international lawyers have traditionally deployed a variety of strategies to reconcile material hierarchies of influence and international law's formal commitment to sovereign equality. A classical posture of international lawyers in this regard is one that politely acknowledges the existence of legislative hierarchies but confines them to the political domain, outside the law, as a mere fact of international life. This narrative is deceiving, as it creates a false dichotomy between *de facto* and *de jure* hierarchies which neglects the manner in which hierarchies of influence are actually internalized by the international legal order, including by its system of sources.

International law (by which I mean *actual*, positive law; not just diplomatic practice), to start with, has historically been very

150. See, e.g., Hilary Charlesworth, *Worlds Apart: Public/Private Distinctions in International Law*, in PUBLIC AND PRIVATE: FEMINIST LEGAL DEBATES 254 (Margaret Thornton ed., 1995); Donna Sullivan, *The Public/Private Distinction in International Human Rights Law*, in WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 126 (Julie Peters & Andrea Wolper eds., 1995); Christine Chinkin, *A Critique of the Public/Private Dimension*, 10 EUR. J. INT'L L. 387 (1999).

151. See, e.g., Dianne Otto, *The Exile of Inclusion: Reflections on Gender Issues in International Law over the Last Decade*, 10 MELB. J. INT'L L. 11, 15-16 (2009); Anne Orford, *Feminism, Imperialism and the Mission of International Law*, 71 NORDIC J. INT'L L. 275, 282 (2002).

accepting of deviations from the principle of legislative equality. This may be most visible in the law of treaties and its liberal attitude towards coercion. As noted above, international law has traditionally regarded treaties procured by the threat or use of force as fully valid, save for situations involving coercion of the individual representatives of the state. From Grotius to Oppenheim, the dominant view has classically been that treaties concluded as a result of force, whilst morally questionable, are just as binding as those made willingly, if only because states ought to be able to end wars by way of treaties knowing that these treaties will not subsequently be invalidated on grounds of duress.¹⁵² As international law's position towards armed force as a legitimate means of international relations began to change, so did its position towards imposed treaties. In the inter-war period, demands began to emerge challenging the traditional view and claiming that treaties imposed by states using illegal force ought not to be recognized as legally binding.¹⁵³ With the gradual development of the principle prohibiting the threat or use of force and the adoption of the UN Charter, the foundations of the traditional doctrine began to erode and a new rule of customary law against imposed treaties progressively crystallized after 1945. That rule was eventually codified in the 1969 Vienna Convention on the Law of Treaties, which provides that "a treaty is void if its conclusion has been procured by the threat or use of

152. See, e.g., HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE INCLUDING THE LAW OF NATURE AND OF NATIONS* 392-93 (A.C. Campbell trans., 1901) (asserting that injustices of war do not challenge a treaty's validity but rather its interpretation); SAMUEL PUFENDORF, *OF THE LAW OF NATURE AND NATIONS* 849 (Basil Kennett trans., 4th ed. 1729) (arguing that compacts made with an enemy are required to be observed, save for treaties that continue a state of war); DANIEL GARDNER, *INSTITUTES OF INTERNATIONAL LAW* 573 (1860) ("Treaties made under forcible coercion are valid by the law of nations, though in all codes of municipal law the rule is otherwise as to contracts of individuals. This is a rule of necessity, as all wars would be endless if a valid treaty could not be made, and terms of pacification ratified in a binding form."); OPPENHEIM, *supra* note 54, at 525 ("[C]ircumstances of urgent distress, such as either defeat in war or the menace of a strong State to a weak State, are . . . not regarded as excluding the freedom of action of a party consenting to the terms of a treaty . . . a State which was forced by circumstances to conclude a treaty . . . has no right afterwards to shake off the obligations of such treaty on the ground that its freedom of action was interfered with at the time.")

153. For a historical account of the emerging norm prohibiting coercion in treaty-making, see Stuart S. Malawer, *Imposed Treaties and International Law*, 7 CAL. W. INT'L L.J. 5, 7-8 (1977).

force.”¹⁵⁴

Critically though, the new rule of international law providing for the invalidity of imposed treaties is only concerned with the most egregious forms of coercion involving the use or threat of military violence. During the negotiations of the Vienna Convention, an amendment was submitted by Afro-Asian, Latin American, and Communist states proposing that economic and political pressures be mentioned explicitly as falling within the concept of coercion, noting that the strangulation of a country's economy had become a weapon of choice of Western powers and could be equally as coercive as the threat or use of armed force.¹⁵⁵ However, the amendment was vigorously opposed and ultimately defeated by the vast majority of Western states, who argued that the standard of economic pressure lacked objective content and that accepting economic duress as a ground of invalidity would prejudice the stability of treaty relations.¹⁵⁶ That view was also supported by the ILC Rapporteurs, most notably by Waldock, who firmly resisted the demands of postcolonial states on the ground that extending the meaning of coercion to other forms of pressure would leave the door to the evasion of treaty obligations wide open.¹⁵⁷ As a compromise between the two groups of states, a Declaration was attached to the Vienna Convention solemnly condemning the threat or use of pressure “in any form, whether military, political, or economic” in the conclusion of treaties.¹⁵⁸ However, the Declaration is drafted in broad political-declaratory language and does not actually form part of the Vienna Convention. It lacks legal force and, as a result, the position today remains that coercion of states by way of economic or political constraint, though undesirable and prejudicial to good relations

154. Vienna Convention on the Law of Treaties, *supra* note 39, art. 52.

155. U.N. Conference on the Law of Treaties, First and Second Sessions, Official Records: Documents of the Conference, ¶¶ 449, 454, U.N. Doc. A/CONF.39/11/Add.2 (1971) (denoting the positions of Afghanistan, India, Bolivia, Iraq, Ecuador, Syria, Cuba, Algeria, Zambia, Ghana, Guinea, Russia, and Kenya).

156. *Id.* ¶ 455 (denoting the positions of the Netherlands, Australia, Portugal, Sweden, Canada, United Kingdom, United States, and Japan).

157. Humphrey Waldock (Special Rapporteur), *Second Report on the Law of Treaties*, U.N. Doc. A/CN.4/156/1963/Add.1-3 (Mar. 20, 1963).

158. Vienna Convention on the Law of Treaties, *supra* note 39, annex, Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties.

among states, is not considered as vitiating consent under international law.¹⁵⁹

As the above makes clear, international law as a legal system takes a relaxed, *laissez-faire* approach to freedom of consent and is largely accommodating of the various “methods of persuasion” used by dominant powers in treaty-making.¹⁶⁰ However, international law does not simply tolerate legislative hierarchies. In many respects, it serves to consolidate and entrench these hierarchies by giving them a legal form. For instance, the great power prerogatives of the Concert System were not a mere matter of political domination. As noted by Simpson, the Concert order was a highly legalized structure of governance: the Congress was established through a series of treaties; the Protocols by which the great powers proposed to dominate the Congress were legal instruments; and the decisions of the Congress were set out in treaty form and subsequently ratified by European states.¹⁶¹ The great powers did not, then, just impose their will on other states through raw power. Instead, they established a new, highly hierarchical regime in which their dominant position was legally organized and sanctioned, and their hegemony endowed with institutional respectability (i.e., legitimacy). A hierarchy of might was thus converted into a hierarchy of right.¹⁶²

In this, the Concert system was a forerunner of the

159. See Frédéric Mégret, *Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties*, in THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY, VOL. 1, 1861 (Olivier Corten & Pierre Klein eds., 2011); Antonios Tzanakopoulos, *The Right to be Free from Economic Coercion*, 4 CAMBRIDGE J. INT'L & COMP. L. 616, 630 (2015) (discussing the *laissez-faire* attitude of international law towards economic coercion more generally); Thomas A. Zaccaro, Note, *Duress in Treaty Organizations*, 7 B.C. INT'L & COMP. L. REV. 135, 149 (1984) (discussing how the vague language used in the Declaration drastically limits the scope of its applicability). *But see also* Olivier Corten, *Article 52*, in THE VIENNA CONVENTIONS ON THE LAW OF TREATIES, VOL. 1, *supra*, at 1210-11 (arguing that the broader interpretation of coercion—which is not limited to military, but also includes economic and political coercion—has nowadays prevailed).

160. See WADE MANSELL & KAREN OPENSHAW, INTERNATIONAL LAW: A CRITICAL INTRODUCTION 82-83 (2013) (ebook) (using the United States' threat to withdraw military aid as an example of a “method of persuasion” used in obtaining consent to a treaty).

161. SIMPSON, *supra* note 102, at 102-08.

162. *Id.* (noting that the constitutional privileges of the great powers in the Concert system were combined with a strong commitment to sovereign equality among themselves).

international organizations of the 20th century, in particular the United Nations. In San Francisco, like in Vienna, dominant powers were successful in carving special constitutional privileges for themselves, most notably through permanent representation in the Security Council and the veto power, giving them complete immunity from the enforcement jurisdiction of the Council and overall control over its decision-making.¹⁶³ To be sure, the legalized hierarchy of the UN never reached the same scale as that of the Concert system. When drafting the Charter, the great powers had to account for some of the demands emanating from small and medium powers to secure their participation. As a result, the privileged position of the permanent members (P5) within the Council was mediated by elements of sovereign equality, most notably the establishment of the General Assembly as an egalitarian chamber with perfect equality of representation and vote for all states.¹⁶⁴ However, due to their status on the Council, the P5 enjoy unparalleled bargaining power in the UN and possess overwhelming influence over the organization, its membership, and its legislative agenda, as well as controlling appointment of key personnel, including on law-making and law-ascertaining bodies such as the International Court of Justice.¹⁶⁵ International organizations like the UN (or the Bretton Woods institutions in which voting rights are commensurate to economic power) therefore operate to institutionalize political dominance by giving it a formal, juridical status. This in large part explains why great powers have historically been supportive—if strategically and selectively—of institution-building.¹⁶⁶

To finish, legislative hierarchies are legalized through a variety of legal doctrines such as the doctrine of “specially affected states.” According to this doctrine, which has a long history in

163. See U.N. Charter, arts. 23, 27.

164. SIMPSON, *supra* note 102, at 180-92.

165. Under the ICJ Statute, members of the Court “shall be elected by the General Assembly and by the Security Council.” The Court has always included judges of the nationality of the permanent members. Statute of the International Court of Justice, *supra* note 12, art. 4(1).

166. See Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369, 382-83 (2005).

international law, the practice of some states—because they are “most concerned” with a subject or have a greater “depth of experience”—weighs more heavily in the formation of customary law than that of others.¹⁶⁷ This principle has been interpreted in practice as having two possible implications. Firstly, if all major interests are represented, there is no need for a majority of states to have participated in order for custom to emerge. Participation from a narrow but politically powerful circle of states may suffice.¹⁶⁸ Secondly, and conversely, if specially affected states do not accept a particular practice, the said practice cannot mature into a rule of customary international law, even when it is otherwise broadly supported.¹⁶⁹ The question of who constitutes a “specially affected state” may vary according to circumstances. In some instances, that determination may rest on objective factors, like geography or location. For instance, coastal states have been considered more “specially affected” by the legal status of the continental shelf than landlocked states.¹⁷⁰ Likewise, small island States may be considered “specially affected” by climate change.¹⁷¹ In practice, however, the doctrine has generally been used as a disguise for important or powerful states, which are somehow assumed to always be “specially affected” by legal developments, given the scope of their interests, the extent of their resources, and the reach of their practice.¹⁷²

167. *North Sea Continental Shelf Cases* (Ger. v. Den.; Ger. v. Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 72 (Feb. 20) (“[E]ven without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected.”).

168. See INT’L LAW ASSOC., FINAL REPORT OF THE COMMITTEE: STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW 26, princ. 14 & cmt. (e) (2000) [hereinafter ILA REPORT].

169. *Id.*

170. *North Sea Continental Shelf Cases*, Dissenting Opinion of Judge Tanaka, 1969 I.C.J. Rep. 172, 176 (“We cannot evaluate the ratification of the Convention by a large maritime country or the State practice represented by its concluding an agreement . . . as having exactly the same importance as similar acts by a land-locked country which possesses no particular interest in the delimitation of the continental shelf.”).

171. See Yukari Takamura, *Climate Change and Small Island Claims in the Pacific*, in CLIMATE CHANGE: INTERNATIONAL LAW AND GLOBAL GOVERNANCE, VOL. 1 657, 669-70 (Oliver C. Ruppel et al. eds., 2013).

172. ILA REPORT, *supra* note 168 (noting that, although seemingly undemocratic, the importance accorded to major powers is “in the nature of things” and “in touch with political reality,” given the “scope of their interests”); see also Benedict Kingsbury,

The doctrine of specially affected states therefore gives great powers considerable influence over the formation of customary international law, most notably the ability to block the emergence of customary norms, even when these are otherwise supported by large majorities. For instance, the United States was successful in arguing before the ICJ that, as a specially affected state, its opposition (along with a few other nuclear powers) effectively blocked the development of a customary norm prohibiting the threat or use of nuclear weapons.¹⁷³ Likewise, the tribunal in the *Texaco* arbitration found that Resolution 3281 of the UN General Assembly (“Charter of Economic Rights and Duties of States”) could not be said to give rise to new principles of customary international law, despite the adoption of the Charter by an overwhelming majority of states (118 votes to 6, with 10 abstentions), because of the opposition of “developed countries with market economies which carry on the largest part of international trade.”¹⁷⁴ As these examples demonstrate, the

Sovereignty and Inequality, 9 EUR. J. INT’L L. 599, 609 (arguing that the doctrine “operates mainly (but prudently, not exclusively) for the benefit of powerful states”).

173. Legality of the Threat or Use of Nuclear Weapons, Written Statement of the Government of the United States of America 9 (June 20, 1995), <http://www.icj-cij.org/docket/files/95/8700.pdf> [<http://perma.cc/Z22U-473D>] (“With respect to the use of nuclear weapons, customary law could not be created over the objection of the nuclear-weapon States, which are the States whose interests are most specially affected”); *see also* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 73 (July 8) (“[T]he desire of a very large section of the international community to [prohibit] the use of nuclear weapons [and the] emergence . . . of a customary rule specifically prohibiting the use of nuclear weapons . . . is hampered by . . . the still strong adherence to the doctrine of deterrence.”); Legality of the Threat or Use of Nuclear Weapons, Dissenting Opinion of Vice-President Schwebel, 1996 I.C.J. Rep. 311, 312 (“This nuclear practice is not a practice of a lone and secondary persistent objector. This is not a practice of a pariah Government crying out in the wilderness of otherwise adverse international opinion. This is the practice of five of the world’s major Powers, of the permanent members of the Security Council . . . that together represent the bulk of the world’s military and economic and financial and technological power.”).

174. *Texaco Overseas Petrol. Co. v. Libya*, 17 I.L.M. 1, ¶¶ 86-87 (1978) (“[T]he legal value of the resolutions which are relevant to the present case can be determined on the basis of circumstances under which they were adopted . . . the Tribunal notes that only Resolution 1803 (XVII) of 14 December 1962 was supported by a majority of Member States representing all of the various groups. By contrast, the other Resolutions mentioned above, and in particular those referred to in the Libyan Memorandum, were supported by a majority of States but not by any of the developed countries with market economies which carry on the largest part of international trade.”).

doctrine of “specially affected states” regularizes and legalizes great power dominance. It converts political power into rightful authority by formally recognizing that the practice and opinion of dominant states carries greater legal significance in law-making than that of small and medium powers.

CONCLUSION: OF NOBLE LIES AND OPPORTUNE FALSEHOODS

The “no-hierarchy” thesis is both descriptively and normatively problematic. Descriptively, it does not accurately reflect the highly differentiated nature of the doctrine of sources and the pervasive inequalities that characterize law-making in the international community. From this point of view, the thesis is analytically inconsistent with the “real world” of sources—a world that is replete with (more or less formalized) hierarchies of worth, status, and influence. As such, the thesis amounts to what French philosopher Gaston Bachelard used to call an “epistemological obstacle,” i.e., a commonly accepted conception or idea that does not add value to our existing knowledge and, worse, obstructs and impedes scientific progress.¹⁷⁵ Normatively, the thesis is also problematic in that it serves to conceal or marginalize these hierarchies, rendering them immune to critical scrutiny and challenge. As noted by Charlesworth, narrow discussions of (the lack of) formal hierarchies among international law sources allow “international lawyers to sidestep complex debates about the function of international law and the relative legitimacies of state consent and claims of justice.”¹⁷⁶ Engaging in debates about sources and source hierarchies along restricted, formalistic lines serves to “postpon[e] (possibly indefinitely) discussion of the politics of the designated sources” and “obscures the fact that international law is generated by a multi-layered process of interactions, instruments, pressures and principles.”¹⁷⁷

Relegating what Charlesworth calls the “politics of sources”

175. GASTON BACHELARD, *THE FORMATION OF THE SCIENTIFIC MIND: A CONTRIBUTION TO A PSYCHOANALYSIS OF OBJECTIVE KNOWLEDGE* 27 (Mary McCallester Jones trans., 2002).

176. Charlesworth, *supra* note 29, at 189.

177. *Id.*

to the periphery of the legal domain is not satisfactory. As argued above, law-making hierarchies do not operate outside the law, as a mere matter of geopolitical economy, lying within the exclusive jurisdiction of political scientists. These hierarchies are to a great extent sanctioned, organized, and formalized through international legal institutions and law-making processes. Though they are often counterpoised by elements of equality and equivalence, legislative hierarchies are thus an integral part of the international legal order and of its system of sources. In these circumstances, as Anand suggests, the mere recitation of the pious and holy principle of sovereign equality hardly makes a difference: “Even after you give the squirrel a certificate which says he is quite as big as any elephant, he is still going to be smaller, and all the squirrels will know it and all the elephants will know it.”¹⁷⁸ Mechanical recanting of the no-hierarchy thesis among and in the sources of international law merely serves to legitimize and reproduce real-world legislative inequalities by neutralizing them. When this happens, the “noble lie” of equality and horizontality turns into an “opportune falsehood,” an ideational device that justifies gross inequalities of political power and juridical authority.¹⁷⁹ While this may not be a problem for system apologists or proponents of the status quo, it is for anyone committed to systemic change and redistribution. Therefore, the no-hierarchy thesis must be rejected as an accepted axiom of international law, for the first step in redressing inequalities is to recognize when and where they occur and challenge vocabularies that defuse and naturalize them.

178. ANAND, *supra* note 108, at 95 (quoting Samuel Grafton).

179. PHILIP ALLOTT, *THE HEALTH OF NATIONS: SOCIETY AND LAW BEYOND THE STATE* 390 (2002).