

ARTICLES

THE SOURCES OF INTERNATIONAL LAW

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I. DOCTRINES ABOUT THE SOURCES OF INTERNATIONAL LAW

International law devotes a great deal of attention to its sources. Scholars have produced a large body of work about both the conditions under which treaties, custom, or general principles of law bind actors and the hierarchy among the various doctrinal forms which might apply in a given instance.¹ Indeed, doctrine and commentary about what

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1. Most standard treatises and casebooks devote a section to the sources of international law. See, e.g., J. BRIERLY, *THE LAW OF NATIONS* (5th ed. 1955); I. BROWNLE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (3d ed. 1979); L. OPPENHEIM, *INTERNATIONAL LAW* (8th ed. H. Lauterpacht 1955); I. M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* (1963).

For information devoted to sources in general, see Waldock, *General Course on Public International Law*, 106 RECUEIL DES COURS, 1, 39-103 (1962) (classic British approach focusing on practice and the I.C.J. jurisprudence); McDougal & Reisman, *The Prescribing Function in World Constitutive Process: How International Law is Made*, 6 YALE STUD. IN WORLD PUB. ORDER 249 (1980) (a sociological approach); A. VERDROSS, *DIE QUELLEN DES UNIVERSELLEN VÖLKERRECHTS* (1973) (a natural law approach); G. Tunkin, *Soviet Theory of Sources of International Law*, in *VÖLKERRECHT UND RECHTSPHILOSOPHIE: INTERNATIONALE Festschrift für Stefan Verosta* 67 (1980) (summarizing the extremely positivist Soviet approach); Virally, *The Sources of International Law*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 116 (M. Sprenson ed. 1968) (a classic treatise summary); Baxter, *Treaties and Custom*, 129 RECUEIL DES COURS 44 (1970) (discussing mutual reciprocal influence of treaty and custom upon each other's formation); de Visscher, *Cours général du droit international public*, 136 RECUEIL DES COURS 9 (1972). For information concerning treaties, see T. ELIAS, *THE MODERN LAW OF TREATIES* (1974) (based on the Vienna Convention on The Law of Treaties); A. MCNAIR, *THE LAW OF TREATIES* (1961) (a practice-oriented handbook drawing upon British practice; concerned primarily with clarifying rules about specific doctrines such as treaty conclusion rather than with general considerations of validity); P. REUTER, *INTRODUCTION AU DROIT DES TRAITÉS* (1972); B. SIMMA, *DAS REZIPROZITÄTSELEMENT IM ZUSTANDEKOMMEN VÖLKERRECHTLICHER VERTRÄGE* (1972); I. SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* (1973).

are and what are not the sources of international law are so well developed that further commentary seems unnecessary. The discussion usually revolves around the four classic sources contained in Article 38 of the Statute of the International Court of Justice.² Article 38 is addressed to I.C.J. justices and enumerates the various sources they are to examine in finding the law necessary to resolve a case.³ It has been taken as a convenient catalog of international legal sources generally, and as such, has been the starting point for most discussion in this area. Article 38 reads:

1. 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 contesting 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

For information on customary law, see Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1 (1974-1975) (a good survey of contemporary doctrine); A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* (1971) (a balanced and comprehensive treatment); Guggenheim, *Les deux éléments de la coutume en droit international*, in 1 LA TECHNIQUE ET LES PRINCIPES DU DROIT PUBLIC, ÉTUDES EN L'HONNEUR DE GEORGES SCHELLE 275 (1950); H. GÜNTHER, *ZUR ENTSTEHUNG VON VÖLKERGEWOHNRECHT* (1970) (emphasizes estoppel, or "Vertrauensgrundsatz" as a basis for customary law).

For information on general principles, see Tunkin, "General Principles of Law" in *International Law*, in INTERNATIONALE Festschrift für ALFRED VERDROSS 523 (1971); Verdross, *Les principes généraux de droit dans le système du droit international public*, in RECUEIL D'ÉTUDES DE DROIT INTERNATIONAL EN HOMMAGE À PAUL GUGGENHEIM 521 (1968).

For additional sources, see C. DE VISSCHER, *DE L'ÉQUITÉ DANS LE RÉGLEMENT ARBITRAL OU JUDICIAIRE DES LITIGES DE DROIT INTERNATIONAL PUBLIC* (1972); Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 AM. J. INT'L L. 782 (1966); R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* (1963); Skubiszewski, *A New Source of the Law of Nations: Resolutions of International Organizations*, in RECUEIL D'ÉTUDES DE DROIT INTERNATIONAL EN HOMMAGE À PAUL GUGGENHEIM 508 (1968); E. SUIY, *LES ACTES JURIDIQUES UNILATÉRAUX EN DROIT INTERNATIONAL PUBLIC* (1962).

2. Most textbooks make this reliance explicit. See I. BROWNIE, *supra* note 1, at 3 *passim*; NGUYEN QUOC-DINH, P. DAILLER & A. PELLET, *DROIT INTERNATIONAL PUBLIC* 105, 108 (2d ed. 1980); E. MENZEL & K. IPSEN, *VÖLKERRECHT* 75 (2d ed. 1979); A. VERDROSS, *supra* note 1, at 38 *passim*. For a critical analysis of this reliance, see McDougal & Reisman, *supra* note 1, at 259-60 ("It has become almost a ritual presentation among commentators to make Article 38 . . . the central focus of exposition.").

3. I.C.J. CHARTER art. 38. Article 38 replicates a similar provision in the statute of its predecessor, the Permanent Court of International Justice. The I.C.J. provision suggests a stronger intention that the enumerated sources are *general* sources of international law by adding after "the Court" the words "whose function it is to decide." See NGUYEN QUOC-DINH, P. DAILLER & A. PELLET, *supra* note 2, at 108-09; A. VERDROSS, *supra* note 1, at 98.

teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

Contemporary analyses of source doctrine generally begin with an abstract definition of each of the sources enumerated in Article 38, developing the boundaries of these categories.⁴

Treaty law, for example, considers the theoretical prerequisites for in-

4. Treatments of treaty law differ only in the level of abstraction at which treaties are defined. The most abstract definition is perhaps Kelsen's: "A treaty is an agreement normally entered into by two or more states under general international law." H. KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 454 (2d rev. ed. R. Tucker 1966); see J. STARKE, *AN INTRODUCTION TO INTERNATIONAL LAW* 457 (8th ed. 1977).

A treaty may be defined, in accordance with the definition adopted in Article 2 of the [Vienna] Convention, as an agreement whereby two or more States establish or seek to establish a relationship between themselves governed by international law. So long as an agreement between States is attested, any kind of instrument or document or any oral exchange between States involving undertakings may constitute a treaty, irrespective of the form or circumstances of its conclusion.

Id. at 454 (coupled with a system for categorizing treaties by the form of their creation, *id.* at 458); see also NGUYEN QUOC-DINH, P. DAILLER & A. PELLET, *supra* note 2, at 111.

Le traité désigne tout accord conclu entre deux ou plusieurs sujets du droit international, destiné à produire des effets de droit et régi par le droit international.

A still more concrete definition is:

Unter einem [völkerrechtlichen] Vertrag verstehen wir eine ausdrückliche oder durch konkludente Handlungen zustandegekommene, vom VR [Völkerrecht] bestimmte Willenseinigung zwischen zwei oder mehreren Staaten oder anderen Völkerrechtssubjekten, in denen sich diese zu bestimmten einseitigen oder korrespondierenden, gleichen oder verschiedenen, einmaligen oder wiederholten Leistungen, Unterlassungen oder Duldungen verpflichten.

A. VERDROSS & B. SIMMA, *UNIVERSELLES VÖLKERRECHT* 270 (1976). For an interesting "programization" of this abstract approach, see I. V. MÜNCH, *VÖLKERRECHT IN PROGRAMMIERTER FORM* 53-82 (1982). These abstract definitions are usually coupled with abstract limitations in the form of categorizations of permissible treaties defined by the form of their conclusion. See, e.g., J. STARKE, *supra*, at 400-05. Treaties are limited, for example, by contrast to private agreements or declarations of political intention. Münch, *Non-Binding Agreements*, 29 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* [ZAÖRV] 1 (1969); see Dehaussy, *Le problème de la classification des traités et le projet de convention établi par la Commission du Droit international des Nations Unies*, in *RECUEIL D'ÉTUDES DE DROIT INTERNATIONAL EN HOMMAGE À PAUL GUGGENHEIM* 305 (1968) (describing the classification of treaties). Custom is similarly defined and limited at an abstract level. See, e.g., Hudson, *Article 24 of the Statute of the International Law Commission*, U.N. Doc. A/CN.4/16, reprinted in [1950] 2 *Y.B. INT'L L. COMM'N* 24, 26, U.N. Doc. A/CN.4/SER.A/1950/Add.1.

Seeking with Brierly [The Law of Nations (4th ed. 1949)] (p. 62) "a general recognition among States of a certain practice as obligatory," the emergence of a principle or rule of customary international law would seem to require presence of the following elements:

cluding some form of words under the heading "treaty." Thus, people who discuss treaties feel that such issues as "capacity,"⁶ executive

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- (a) concordant practice by a number of States with reference to a type of situation falling within the domain of international relations;
 - (b) continuation or repetition of the practice over a considerable period of time;
 - (c) conception that the practice is required by, or consistent with, prevailing international law; and
 - (d) general acquiescence in the practice by other States. Of course the presence of each of these elements is to be established (*droit être constaté*) as a fact by a competent international authority.

Id.

"International jurists speak of a *custom* when a clear and continuous habit of doing certain actions has grown up under the aegis of the conviction that these actions are, according to International Law, obligatory or right." L. OPPENHEIM, *supra* note 1, at 26. Most modern treatises refer to Article 38 of the Statute of the International Court of Justice in lieu of developing their own definition: "international custom, as evidence of a general practice accepted as law." Custom is then limited by abstract consideration of issues such as the degree of "evidence" required. See, e.g., I. BROWNLIE, *supra* note 1, at 4-6. For discussions of related topics such as the meaning of "practice" as acts or verbal statements, see *infra* note 72; the duration of the practice required, see *infra*, note 12; the number of states who must participate, see *infra* note 12; the requirement of "*opinio juris*," see *infra* note 41. For a discussion of the *opinio juris* requirement, compare A. VERDROSS, *supra* note 1, at 104-09 (favoring) with Virally, *supra* note 1, at 134-35 (against) and H. GÜNTHER, *supra* note 1, at 149 (against).

5. Although capacity seems unproblematic for sovereign states (Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, U.N. Doc. A/CONF.39/27, art. 6, reprinted in 8 I.L.M. 679 (1969), 63 AM. J. INT'L L. 875 (1969) [hereinafter Vienna Convention]; J. STARKE, *supra* note 4, at 466; A. VERDROSS & B. SIMMA, *supra* note 4, at 348), the discussion of the capacity of international organizations and federal states reveals the abstract structure of assumptions underlying capacity doctrine. There is a basic tension between the aim of registering pre-existing capacity and creating reliable or reasonable limits to capacity. The notions of "pre-existing" or "reasonable" capacity which are in turn relied upon reflect either the intention of some pre-existing sovereign capacity or reasonable external values or definitions of sovereignty. Thus, the treaty-making capacity of institutions is deduced either "by implication from their constituent instruments" (Virally, *supra* note 1, at 183) in the so-called "implied powers" approach (A. VERDROSS & B. SIMMA, *supra* note 4, at 350) or "is to be deduced, if at all . . . , from the evidence pointing to its having that sort of personality which involves capacity to make treaties" (Parry, *The Treaty Making Power of the United Nations*, 26 BRIT. Y.B. INT'L L. 110 (1949)). For the view that treaty-making power must be expressly conferred by constituents, see H. Kelsen, *supra* note 4, at 330; J. SCHNEIDER, *TREATY MAKING POWER OF INTERNATIONAL ORGANIZATIONS* (1959); see also L. WILDHABER, *TREATY-MAKING POWER AND CONSTITUTION* (1971) (describing the capacity of federal states). International law capacity of federal states depends upon the constitution of the federation. See, e.g., Grundgesetz für die Bundesrepublik Deutschland (Basic Law of the Federal Republic of Germany), art. 32 III; Bundesverfassung der Schweizerischen Eidgenossenschaft, art. 8, 9 (Federal Constitution of Switzerland) (establishing a limited treaty-making capacity, although such provisions cannot be relied upon to deceive other sovereigns). For a comprehensive survey of the treaty-making capacity of and performance of treaties by constituent member states in Federal systems, see L. WILDHABER, *supra*, at 278-343. In particular, compare the situation where member states have no power to conclude international agreements: Australia, *id.* at 297-302; USSR, *id.* at 283-84, with the situation where member states may have a limited treaty-making power; Canada, *id.* at 286-89, and the situation where member states have a constitutional power to make treaties: West

"competence,"⁶ the "full powers" of plenipotentiaries,⁷ the require-

Germany, *id.* at 306-7; Switzerland, *id.* at 315-19.

6. This doctrine considers which organs of the state may legitimately conclude treaties. Although the domestic legal order is normally considered controlling, 1 C. ROUSSEAU, *DROIT INTERNATIONAL PUBLIC* (1970); A. VERDROSS & B. SIMMA, *supra* note 4, at 352, the discourse attempts abstractly and vainly to resolve the international law consequences of derogation from these domestic provisions. The effect of an internal limitation of authority upon other states is seen to depend either upon a vision of the true, pre-existing power of the state concluding the treaty or upon the systematic necessity of establishing reasonable limits of state authority. Each of these views depends in some way upon the other. For example, if the doctrine is to register the true power of the concluding state, it must be based upon either an external vision of state power or recognition of acceptable international rules. Most commentators alternatively distinguish and then blend these approaches. See, e.g., Geck, *The Conclusion of Treaties in Violation of the Internal Law of a Party, Comments on Arts. 6 and 43 of the ILC's 1966 Draft Articles on the Law of Treaties*, 27 *ZÄÖRV* 429 (1967). Geck maintains that the dependence of treaties on internal law is particularly dangerous from the viewpoint of the security of international treaty relations. He concludes that:

On the basis of almost universally uniform constitutional law, and indeed perhaps even on the basis of a rule of international law, a Head of State is empowered to express binding consent to a treaty . . .

It is, however, at present both necessary and sensible to refer to constitutional law for the answer as to whether other representatives of State are authorised to express consent independently of any authorization by the Head of State.

Id. at 442. For the view that derogation from municipal provisions of authority is not relevant at international law, see H. BLIX, *TREATY MAKING POWER* 392 (1960). "[T]he evidence of a practice treating constitutional provisions as not directly relevant in international law is both quantitatively and qualitatively more significant than that pointing to the direct relevance of municipal provisions." *Id.* Blix suggests that what practice does support is a "criterion of apparent ability." *Id.* For the view that derogation from municipal authority is internationally relevant, because the pre-existing power had simply not been exercised, see TRIEPEL, *VÖLKERRECHT UND LANDESRECHT* 236 (1899). For the mixed view that such derogation is sometimes relevant, see Vienna Convention on the Law of Treaties, *supra* note 5, at art. 46 (holding a violation of internal law relevant if the violation is manifest, the provision is of fundamental importance and concerns competence to conclude treaties). The International Law Commission, which drafted the Convention, was "extremely cautious" in formulating Article 46. Nahlik, *The Ground of Invalidity and Termination of Treaties*, 65 *AM. J. INT'L L.* 736, 740 (1971); see also Cahier, *La violation du droit interne relatif à la compétence pour conclure des traités comme cause de nullité des traités*, 54 *RIVISTA DI DIRITTO INTERNAZIONALE* 226 (1974); Kearney, *Internal Limitations on External Commitments: Article 46 of the Treaties Convention*, 4 *INT'L LAW.* 1 (1969). Kearney analyzes Article 46 (originally I.L.C. draft Article 43) as a:

middle ground between opposing schools of thought classically grouped under the convenient umbrellas of monism and dualism. The monists, holding the view that internal law and international commitments are one, deduced from this concept of unity that international commitments which did not meet internal limitations on making treaties are unlawful because of a failure of consent. The dualists, holding the distinctness of internal and international law, concluded that while a treaty obligation may be invalid internally because of failure to comply with constitutional requirements, the international obligation is unimpaired if it measures up to international law requirements, because these requirements do not comprehend any reference to the internal law. There is an essential bootstraps element in each position because the conclusion depends upon acceptance of a semantic assumption.

ments and effects of signature or ratification,⁸ or the requirements of

Id. at 3. Nevertheless, Kearney appears to rely on a dualist interpretation of Article 46 in his attempt to elaborate its coherent meaning.

Is the solution that has been finally worked out the best available solution? It is certainly not the rule that would have the greatest appeal to either the fervid nationalist or the perfervid internationalist. But the all-or-nothing approach of true believers rarely supplies a workable formula for a work-a-day world. When the desirable aim of upholding the stability of the international treaty structure collides with the laudable end of placing some domestic checks and balances upon the making of international commitments, the reasonable solution should be a compromise that protects both sets of interests to the maximum extent.

The essential decision in reaching such a compromise is allocation of the burden of proceeding. . . .

The decision underlying [article 46] . . . is to accord *prima facie* validity to the appearance of authority subject to the limitation of an objectively evident violation of a fundamentally important internal law. The review of the problem has demonstrated above that this solution is amply supported, not only by legal theory, but by consideration of practical consequences.

Id. at 21.

7. "Full powers" is defined:

a document emanating from the competent authority of a state designating a person or persons to represent the state for negotiating, adopting or authenticating the text of a treaty, for expressing consent of the state to be bound by a treaty, or for accomplishing any other act with respect to a treaty. . . .

The Vienna Convention on the Law of Treaties, *supra* note 5, at art. 2(1)(c):

The extremely formal nature of this doctrine exists in some tension with its reliance upon a substantive view of "competent" municipal authority and of the impact of international law of failure to negotiate on the basis of full powers. Article 7(1) provides that:

A person is considered as representing a State for the purpose of . . . expressing the consent of the State . . . if:

(a) he produces full powers; or

(b) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State

Moreover, under Article 47,

if the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent.

See J. STARKE, *supra* note 4, at 401; J. JONES, FULL POWERS AND RATIFICATION (1946). For examples of the doctrine's invocation, see I. C. ROUSSEAU, *supra* note 6, at 80.

8. Signature and ratification doctrine defines in a formal way the abstract end steps in treaty creation. These formal acts separate binding and non-binding instruments. See Bolintineanu, *Expression of Consent to be Bound by a Treaty in the Light of the 1969 Vienna Convention*, 68 AM. J. INT'L L. 672 (1974); I. BROWNIE, *supra* note 1, at 603-04 (a good doctrinal summary); SMETS, LA CONCLUSION DES ACCORDS EN FORME SIMPLIFIÉE (1969). Ratification, like full powers, is discussed as a municipal and international law event. Article 2(1)(b) of the Vienna Convention, *supra* note 5 defines ratification as "the international act . . . whereby a state establishes on the international plane its consent to be bound by a treaty." Cf. "capacity" doctrine, *supra* note 5; see also *infra* notes 59 & 65 and accompanying text. On the hierarchical relation between signature and ratification, see I. BROWNIE, *supra* note 1, at 603-04; J. STARKE,

registry and deposit⁹ need abstract explanation. Mitigating circumstances such as duress, or *force majeure*¹⁰ complete the affirmative pre-

supra note 4, at 479-81.

9. Designed to prevent secret agreements or make a determinative text available, these doctrines provide for the registry and deposit of reservations, ratifications, and treaty texts with one or more states or international organizations. I. BROWNIE, *supra* note 1, at 590-91. The discourse about these doctrines contrasts a view of registry as a nonsubstantive recognition of the underlying instrument and as in some way the act which gives the instrument international force. These strands structure discussion of the role of the repository and of the requirement that "[e]very treaty . . . entered into by any member of the United Nations . . . shall . . . be registered with the Secretariat." U.N. CHARTER art. 102. In one view, for example, the repository is an impartial communicator of reservations, in another, the decisive acceptor of reservations. See Rosenne, *More on the Depository of International Treaties*, 64 AM. J. INT'L L. 838 (1970) (updating Rosenne, *The Depository of International Treaties*, 61 AM. J. INT'L L. 923 (1967)). After a general discussion of the function of deposit, the author concludes "that a depository notified of reservations incompatible with the object and purpose of a treaty must communicate the text of the reservation to the other states concerned and leave it to them to decide the question of compatibility." *Id.* at 852. Similarly, under one view of U.N. Charter article 102, the provision that "[n]o party to any such treaty or international engagement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or engagement before any organ of the United Nations" imposes a condition on the validity of the underlying instrument. In another, this merely adds an international law sanction to failure to register. See I. BROWNIE, *supra* note 1, at 609-10; Geck, *Die Registrierung und Veröffentlichung völkerrechtlicher Verträge*, 22 ZAÖRV 173 (1962).

10. Instances of invalidity on the grounds of error, fraud, or the threat or use of force against the person of a representative are little known in international practice. See Nahlik, *supra* note 6, at 741; Waldock, *Second Report on the Law of Treaties*, [1963] 2 INT'L L. COMM'N Y.B. 36 (1963). Nevertheless there is hardly a treatise which does not deal abstractly and often at length with these mitigating factors. See, e.g., E. MENZEL & K. IPSEN, *supra* note 2, at 327; I. C. ROUSSEAU, *supra* note 6, at 143; Virally, *supra* note 1, at 201-04. Coercion of a state by use of force is uniformly viewed to mitigate consent. See Vienna Convention on the Law of Treaties, art. 52, *supra* note 5, at 891, providing: "a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations." *Id.* The discourse concerns the extent to which all treaties can be understood to be coerced by the underlying positions of power. This arises in abstract discussions of the binding force of peace treaties and the mitigation of economic coercion. See Parry, *The Law of Treaties*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 175, 202 (M. Sprenson ed. 1968) (on peace treaties); Stone, *De Victoribus Victis: The International Law Commission and Imposed Treaties of Peace*, 8 VA. J. INT'L L. 356 (1967). Some claim to have resolved this by requiring that duress be legitimized by international law.

Durch Art. 2 Abs. 4 SVN wurde (jedoch) jede zwischenstaatliche gewaltsame Selbsthilfe mit Ausnahme von Notwehr und Nothilfe gemäss Art. 51 SVN . . . verboten. Somit ist seither jeder Vertrag nichtig, der durch einen unter Verletzung der Grundsätze der USVNO gegen einen Staat ausgeübten Zwang herbeigeführt wurde.

A. VERDROSS, *supra* note 1, at 62-63. For a discussion on economic duress, see *id.* at 62 (economic and political duress not mitigating factors); cf. INSTITUT FÜR INTERNATIONALE BEZIEHUNGEN DER AKADEMIE FÜR STAATS UND RECHTSWISSENSCHAFT DER D.D.R., 1 VÖLKERRECHT 251 (H. Krüger ed. 1973) [hereinafter *DDR LEHRBUCH*]. "Unter 'Gewalt' [muss] auch jede Art politischer und insbesondere ökonomischer

conditions for treaty making.¹¹ Those who consider custom elaborate the psychological and physical prerequisites to treating mere habit as "custom." They talk about how frequently a norm must be respected, and by whom, before it becomes a customary norm.¹²

Those who consider both major sources likewise elaborate the condi-

Zwangsanzwendung . . . [verstanden werden]." *Id.*

11. One of the most important doctrines abstractly limiting the ambit of treaty law concerns the possibility of reservations. As enshrined by the Vienna Convention, *supra* note 5, (Articles 19-23), reservation doctrine blends a "contractual conception of the absolute integrity of the treaty as adopted" (I. BROWNLIE, *supra* note 1, at 605-06) with a deference to the "purpose and *raison d'être* of the convention" (Reservations to the Convention on Genocide, 1951 I.C.J. 21 (Advisory Opinion of May 28)). For an analysis of three modes of discourse about reservations to multilateral treaties, see Koh, *Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision*, 23 HARV. INT'L L.J. 71 (1982); see also Mendelson, *Reservations to the Constitution of International Organizations*, 45 BRIT. Y.B. INT'L L. 137 (1971); Sinclair, *Vienna Conference on the Law of Treaties*, 19 INT'L & COMP. L.Q. 47, 53-60 (1970); Reports of the Commission to the General Assembly, U.N. Doc. A/6309/Rev.1, reprinted in [1966] 2 Y.B. INT'L LAW COMM'N 169, 205, U.N. Doc. A/CN.4/SER.A/1966/Add.1 [hereinafter Reports of the Commission].

12. Formerly, for example, it was maintained that only an "immemorial" practice could give rise to a customary rule. Virally, *supra* note 1, at 131. This was slowly eroded. A classic statement of the prerequisite practice required only "practice over a considerable period of time." Hudson, *supra* note 4, at 26. Modern discourse prefers other factors, as indicated in the now famous statement of the I.C.J. in the *North Sea Continental Shelf Cases*; "[a]n indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform." *North Sea Continental Shelf Cases* (Ger. v. Den., Ger. v. Neth.) 1969 I.C.J. 2, 43 (Judgment of Feb. 20). Some authors suggest that the time element has become fully irrelevant. See, e.g., Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law?*, 5 INDIAN J. INT'L L. 23, 35 (1965) (coining term "instant customary law"); see also Baxter, *Treaties and Custom*, 129 RECUEIL DES COURS 25, 44 (1970). "If all States were today to declare that the State of law is that foreign States are not entitled to immunity in national courts, that would be the law, even though it had theretofore been acknowledged that the law is just the opposite." *Id.* The progressive abandonment of the time element has led to a focus on how many states, or, more accurately, which states must participate to create custom. See *infra* note 72; E. MENZEL & K. IPSEN, *supra* note 2, at 81 ("derjenigen Staaten . . . die ein besonderes Interesse . . . [an der betreffenden Norm] haben.") Each of these attempts at abstract delimitation contained an element of deference to the consent of underlying sovereigns or registry of already binding norms and one of norm creation. This is most clearly seen in the discourse about the states which must participate. It relies upon a vision either of the relative importance of various states or of the nature of the norm being created. That each strand depended upon the other has been recognized by those who suggest that this discourse has failed in its attempt to delimit custom independently of the content of the norms themselves on the basis either of practice or sovereign intention. See, e.g., A. D'AMATO, *supra* note 1, at 92.

A more difficult question, insisted upon by many writers, relates to the number of acts (or restraints) necessary to satisfy the material element of custom formation. However, such an inquiry is misleading. There is no metaphysically precise (such as "seventeen repetitions") or vague (such as "in the Court's discretion") answer possible. States simply do not organize their behavior along absolute

tions under which treaties and customs cease to be sources of international law, due to abrogation,¹³ denunciation,¹⁴ changed circumstances (*rebus sic stantibus*),¹⁵ or subsequent custom.¹⁶ When discussing

lines. There is no international "constitution" specifying when acts become law. Rather, states resort to international law in claim-conflict situations. In such instances, counsel for either side will attempt to cite *as many acts as possible*.

Id. (emphasis in original).

13. The abstract discourse about the replacement of the old custom with new perennially oscillates between an approach which would imagine practice and sovereign authority to create and merely to recognize norms. A. D'AMATO, *supra* note 1, at 97.

Unquestionably customary law has changed over the years, and thus any theory must incorporate the possibility of change into its concept of custom. In particular, an "illegal" act by a state contains the seeds of a new legality. When a state violates an existing rule of customary international law, it undoubtedly is "guilty" of an illegal act, but the illegal act itself becomes a disconfirmatory instance of the underlying rule. The next state will find it somewhat easier to disobey the rule, until eventually a new line of conduct will replace the original rule by a new rule.

Id. Although one writer has suggested that "[t]he Vienna Convention prescribes a certain presumption as to the validity and continuance in force of a treaty," I. BROWNIE, *supra* note 1, at 496, abrogation (termination by all parties) is possible if the treaty so provides (Vienna Convention, art. 54, *supra* note 5) in an abstract provision about validity of its own, by consent of all parties (article 54) or by the conclusion of a later treaty (article 59). Discourse about these doctrines, while independent of the substance of the treaty itself, blends a consensual theory, which relies upon a vision of underlying sovereign authority, with a justice-based "nature of the obligation" theory, which relies upon a vision of the limits of consent. See I. C. ROUSSEAU, *supra* note 6, at 206-07; Simma, *Reflections on Article 62 of the Vienna Convention on the Law of Treaties and its Background in General International Law*, 2 ÖSTERREICHISCHE ZEITSCHRIFT FÜR OFFENTLICHES RECHT [ÖZÖR] 5 (1970).

14. The denunciation doctrine limits and justifies unilateral abrogation. See *supra* note 13. Denunciation is permitted if the treaty expressly or impliedly so provides (Vienna Convention, *supra* note 5, at arts. 54, 56) or if another party materially breaches. The discourse again blends a consensual strand, relying upon a vision of sovereignty, with a "material" breach of a provision "essential to the accomplishment of the object or purpose of the treaty" (article 60), relying upon a vision of implied consent. See A. DAVID, *THE STRATEGY OF TREATY TERMINATION* (1975); B. SINHU, *UNILATERAL DENUNCIATION OF TREATY BECAUSE OF PRIOR VIOLATIONS BY OTHER PARTY* (1966); Briggs, *Unilateral Denunciation of Treaties*, 68 AM. J. INT'L L. 51 (1974); see also Nahlik, *supra* note 6, at 736-56 (examining the development of the relevant provisions of the Vienna Convention).

15. The doctrine of "fundamental change of circumstances" has become embodied in Article 62 of the Vienna Convention. Few issues were as strongly debated as the inclusion of this cause in the Convention. Fervent supporters of the doctrine suggested that it constituted an implied restriction to the binding force of any treaty which could contribute to the stability of agreements. Lyssitzyn, *Stability and Change: Unilateral Denunciation or Suspension of Treaties by Reason of Changed Circumstances*, 61 AM. SOC'Y INT'L L. PROC. 186 (1967). Opponents of the doctrine argued that it would undermine the stability of consensual agreements. Nahlik, *supra* note 6, at 748; see also Poch de Caviedes, *De la clause "rebus sic stantibus" à la clause de revision dans les conventions internationales*, 118 RECUEIL DES COURS 109, 138-39 (1966) (in the absence of an automatic decision by an impartial organ on all the issues involved, the *clausula* is open to abuse as a handy means of avoiding compliance with burdensome treaty obligations).

sources of law not included in the Article 38 list, such as the acts of international institutions, what seems to need explaining is whether they fit within the classic forms.¹⁷

16. See *supra* note 12. Commentators agree that custom can overrule itself. The question is when. Discourse considers the relative thresholds which abstract components of custom creation (duration, frequency, etc.) must overcome to change previous custom. See E. MENZEL & K. IPSEN, *supra* note 2, at 83 (statement of the classic position); see also Akehurst, *supra* note 1, at 19 (developing "a very strong presumption against change in the law" and a weaker presumption against formulation of new custom). "In particular, a great quantity of practice is needed to overturn existing rules of customary law. The better established a rule is, the greater the quantity of practice to overturn it." *Id.* [footnotes omitted].

17. Some commentators suggest that the acts of certain international institutions, particularly resolutions of the U.N. General Assembly, are binding. Their justifications generally assimilate these acts to more traditional sources either by suggesting that similar thresholds of consent or intention are met or by indicating that while such resolutions may not themselves be authoritative, they are constitutive of more traditional sources; particularly of custom. For support of the first sort, see J. CASTAÑEDA, *LEGAL EFFECTS OF UN RESOLUTIONS 2-21* (1964) (categorizing diverse resolutions to systematize the "extraordinarily complex" law-creating function of the UN; concluding that "internal" resolutions, "determinations" concerning facts, and resolutions relying upon "external" legal foundations such as treaties or "declarations" are binding because sufficient intention is present); see also G. TUNKIN, *THEORY OF INTERNATIONAL LAW* 162-76 (W. Butler trans. 1974). In general, the Soviet international law literature views resolutions of international organizations as a source of international law. Tunkin adds, however:

[t]o say . . . that the resolutions of international organizations are sources of international law if they have been recognized by a state in no way defines the place of these resolutions in the process of forming norms of international law. . . . [A] norm of international law results . . . only when there is a concordance of the wills of states relating to recognition of a particular rule as a norm of international law.

Id. at 163-64; see also Falk, *supra* note 1, at 784 (suggesting that there is a "rather indefinite line that separates binding from non-binding norms governing international behavior"). "Thus the formal limitations of status, often stressed by international lawyers, may not prevent resolutions of the General Assembly, or certain of them, from acquiring a normative status in international life." *Id.* Falk, *supra*, justifies this binding force by asserting:

The degree of authoritativeness that a particular resolution will acquire depends upon a number of contextual factors, including the expectations governing the extent of permissible behavior, the extent and quality of the consensus, and the degree to which effective power is mobilized to implement the claims posited in a resolution."

Id. at 786 (emphasis added). For support of the second sort, maintaining that UN resolutions function as contributors to the formation of conventional sources, see Virally, *supra* note 1, at 162; A. VERDROSS & B. SIMMA, *supra* note 4, at 329-32; R. HIGGINS, *supra* note 1, at 5 ("Resolutions of the Assembly are not *per se* binding; though those rules of general international law which they may embody are binding on member states, with or without the help of the resolution. But the body of resolutions as a whole, taken as indications of a general customary law, undoubtedly provide a rich source of evidence." (footnote omitted)); Panel Discussion, *The Effect of U.N. Resolutions on Emerging Legal Norms*, 1979 AM. SOC. INT'L L. PROC. 300 (an informative discussion concluding that the legal power of UN resolutions is not due to their being binding *per se*, but rather to their substantial influence upon the development of inter-

Such an inquiry might consider the sense in which U.N. resolutions are constitutive of custom or interpretively derivative of the Charter treaty.¹⁸ There seems to be some hesitation about simply adding another source to the list.

The important thing about these inquiries into the scope and meaning of the sources considered is the pervasive attempt to delimit boundary conditions for the category in an abstract way, independent of the particular content of the norms whose source is being considered. The sense that it is important to elaborate a theoretical boundary which has an on-off quality reflects the shared understanding among those doing this work that the abstract categories will control the content of the norms, rather than merely register them. Some of the most modern treatises acknowledge this explicitly by pairing their abstract discus-

national law via more traditional and acknowledged sources such as customary law). Those who oppose the treatment of resolutions as *sui generis* sources of law do so on similar grounds. See, e.g., Virally, *supra* note 1, at 160-62; A. VERDROSS & B. SIMMA, *supra* note 4, at 329-33; see also J. MÜLLER, VERTRAUENSCHUTZ IM VÖLKERRECHT 250 (1971); Sloan, *The Binding Force of a "Recommendation" of the General Assembly of the United Nations*, 25 BRIT. Y.B. INT'L L. 1 (1948):

There are circumstances under which a resolution of the General Assembly produces important juridical consequences and possesses binding legal force. As a general rule, however, resolutions, for lack of intention or of mandatory power in the Assembly, do not create binding obligations in positive law

Although a large majority supports the view that mere recommendations have no legal force, the opinion also prevails that [they] possess moral force and should, as such, assert great influence. . . .

The exact nature of this moral force is not easy to define [However], the view that the expression "moral force" has no positive content and is merely a diplomatic way of indicating that there is no legal, i.e., binding, force cannot be accepted.

Id. at 31-32; see also Gross, *The International Court of Justice and the United Nations*, 120 RECUEIL DES COURS 313 (1967).

In regard to some resolutions members may record their view that they recognize the principles contained in them as constituting or reflecting international law Some resolutions like General Assembly resolution 1514(XV) may be stepping stones towards a principle of international law. . . .

A resolution or declaration of the General Assembly, putting it at its highest, could be regarded as *opinio juris*, but . . . unless it results in uniform conduct could not be regarded as a rule of law.

Id. at 375-76. There is widespread consensus that such resolutions as these admitting states to membership, promulgating rules of procedure, or establishing subsidiary bodies are legally binding on all members because of the degree of consent which they represent. See, e.g., W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 139 (1964); Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-1954: Questions of Jurisdiction, Competence and Procedure*, 34 BRIT. Y.B. INT'L L. 1, 3-7 (1958); Johnson, *The Effect of Resolutions of the General Assembly of the United Nations*, 32 BRIT. Y.B. INT'L L. 97, 121-22 (1955-56); Tammes, *Decisions of International Organs as a Source of Law*, 94 RECUEIL DES COURS 265, 316 (1958).

18. See *supra* note 17 and accompanying text.

sions of sources with a distinct discussion of the "reality" or "force and effect" of the sources which they have abstractly elaborated.¹⁹

In addition to defining abstractly the boundaries of the sources under consideration, the scholarly literature considers limits of various sorts to the force of each source. For example, scholars consider the municipal effects of international norms,²⁰ the force of treaties upon non-signatories²¹

19. See, e.g., B. WESTON, R. FALK & A. D'AMATO, *INTERNATIONAL LAW AND WORLD ORDER* 80-101, 116, *passim* (1980) (the discussion devoted to "sources" is followed by a subchapter entitled "The Reality of International Law" which considers how and why states obey each type of international legal norm). The term "reality of international law" was popularized by Jessup, *The Reality of International Law*, 18 *FOREIGN AFF.* 244 (1940); see also Friedmann, *General Course in Public International Law*, 127 *RECUEIL DES COURS* 39, 76 (1969).

20. One of the most abstract of sources discourse concerns the general relationship between international and municipal law. This is done both generally, as an inquiry into their relative authority and separation, and specifically, as an inquiry into the process by which an international norm can be imported into municipal law by, for example, transformation, adoption, or execution. Both types of inquiry proceed independently of the norms themselves. Both blend reliance upon a vision of pre-existing national sovereignties which must be internationally registered or recognized with reliance upon a region of pre-existing international sovereignties which must be municipally registered or constituted. See B. WESTON, R. FALK & A. D'AMATO, *supra* note 19, at 163-89 (1980) (providing examples of this discourse). On the approach of the Vienna Convention, see Hostert, *Droit International et Droit Interne dans la Convention de Vienne sur le Droit des Traités du 23 Mai 1969*, 1 *ANNUAIRE FRANÇAIS DU DROIT INTERNATIONAL* 92 (1969). For a discussion on monism and dualism, see I. C. ROUSSEAU, *supra* note 6, at 37-48 (criticizing each doctrine by relying upon the other); see also E. MENZEL & K. IPSEN, *supra* note 2 (concluding that a modified endorsement of both theories is possible); Virally, *supra* note 1, at 165-71 (surveying both positions). For a discussion on municipal incorporation of international law, see I. BROWNIE, *supra* note 1, at 45-50.

21. Conventional doctrine provided that "[a] treaty does not create either obligations or rights for a third state without its consent." (Vienna Convention on the Law of Treaties, *supra* note 5, at art. 34). While assent to benefits may be implied if "the contrary is not indicated," burdens must be expressly accepted in writing. *Id.* at art. 35. The strands of reliance upon a consensual vision of pre-existing sovereign authority and upon a justice based vision of the authority of the community are displayed in discourse about the treatment of multilateral treaties as constituting or expressing customary international law. Argument approving and disapproving the entry into custom of such treaties relies alternatively upon notions of internationalized consent and decentralized justice. All these discussions proceed independently of the content of either the treaty or customary regime. See A. D'AMATO, *supra* note 1, at Ch. 5 (unqualifiedly supporting the possibility that such treaties are binding as custom either because they create custom or because they reflect it). Baxter, *infra* note 70, illustrates several trends, including both treaties as evidence of custom: "My thesis is that . . . 'general practice' or international custom may be found in treaties and that treaties may therefore exercise their effects, *qua* evidence of customary international law, upon non-parties." *Id.* at 51. Or later: "If certain treaties both bind the parties and form evidence of customary international law, they will be the instruments of harmonization of the law on a widespread basis. . . . The simplicity of the use of a treaty rule and its widespread acceptance by others makes it a convenient short-cut for non-parties," *id.* at 102, and treaties as constitutive of custom: "The rule of a treaty becomes general inter-

and successor states²² or of custom upon new states²³ or those beyond

national law in the same way that a practice accompanied by the necessary *opinio juris* may come to dominate customary international law." *Id.* at 103. Baxter concludes that there is an interplay between codification and progressive development. *Id.* at 41; cf. Akehurst, *supra* note 51, at 42-49, 53 (requiring intent to transform treaty into custom). "The better view would appear to be that treaties, like other forms of State practice must be accompanied by *opinio juris* in order to create customary law." *Id.* at 44. Or later: "Sometimes a treaty which is not accompanied by *opinio juris* may nevertheless be imitated in subsequent practice; but in such cases it is the subsequent practice (accompanied by *opinio juris*), and not the treaty, which creates customary law." *Id.* at 53. Denmark and the Netherlands sought to combine these elements in a progressive approach requiring all of them in the *North Sea Continental Shelf Cases*:

"[T]he process of the definition and consolidation of the emerging customary law took place through the work of the International Law Commission, the reaction of governments to that work and the proceedings of the Geneva Conference;" and this emerging customary law became "crystallized in the adoption of the Continental Shelf Convention by the Conference."

North Sea Continental Shelf Cases (W. Ger. v. Den.; W. Ger. v. Neth.) 1969 I.C.J. 3, 38 (Judgment of Feb. 20). For the Soviet viewpoint emphasizing consent, see *North Sea Continental Shelf Cases*, *supra*, at 154 (diss. op. Koretsky, J.). In Soviet views of international law, treaties take paramount precedence over customary international law as they rest upon the express agreement of states. The dissenting opinion of Judge Koretsky is particularly important for the weight he attaches to the development of "the general principles of the law of the continental shelf," which he found to have taken shape even before the Geneva Conference of 1958. *Id.* at 158 (diss. op. Koretsky, J.). However, this position stands in contrast to Tunkin's view that conventional and customary rules of international law are created on a basis of agreement and that "to become a norm of international law of universal application [a customary norm of limited application] should be recognized by all the states." See Tunkin, *Coexistence and International Law*, 95 RECUEIL DES COURS 1, 18 (1958); cf. Rozakis, *Treaties and Third States: A Study in the Reinforcement of the Consensual Standards in International Law*, 35 ZAÖRV 1, 1-80 (1975).

[D]ue to the increasing emphasis upon individual consent, custom is becoming more and more identified with treaties. In fact it is almost becoming as voluntarist a process as a treaty is; and thus, easy inferences of customary law-creation are replaced by rigid requirements of proof. It is therefore evident that custom and treaties are approaching each other and that the former is losing its relative advantage over the latter which lay in its being a less voluntarist process of law-creation.

At the same time, however, consensualism may rejuvenate custom and make it viable in the long run. In an international system where treaties will unquestionably play the role of the most usual tool of international legislation, custom may prove very valuable by playing the equally important role of assisting, as a universally recognized process, changes of law in all cases where the inelasticity of written law does not allow rapid modifications to cope with new needs.

Id. at 39-40; see also Cahier, *Le Problème des effets des traités à l'égard des états tiers*, 143 RECUEIL DES COURS 589, 589, 604 (1974) (discussing that, in principle, treaties affect only the contracting parties and doubting that in the absence of conventional mechanisms, silence of a state could be considered as consent).

22. The Vienna Convention on the Law of Treaties leaves the question of the effect of state succession on treaty obligations expressly open. Vienna Convention, *supra* note 5, at art. 73. There are two opinions. Some believe that successor states are not bound. See, e.g., Castren, *Obligations of States Arising from the Dismemberment of Another State*, 73 ZAÖRV 753, 754 (1951) ("To the succeeding states the treaties concluded by the former state are *res inter alios acta*"); McNair, *supra* note 1, at 601 ("Newly

established states which cannot fairly be said to involve political continuity with any predecessor, start with a clean slate in the matter of treaty obligations"); E. MENZEL & K. IPSEN, *supra* note 2, at 189. These writers generally emphasize the consensual nature of treaty obligations but make an exception for treaties which must remain reliable as a matter of international stability, such as those establishing boundaries, or riparian rights. See 2 D. O'CONNELL, *STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW* 12-23, 273-291 (1967); O. UDOKANG, *SUCCESSION OF NEW STATES TO INTERNATIONAL TREATIES* (1972); Virally, *supra* note 1, at 277. Others hold that while a new state may have a qualified right to repudiate "unequal" provisions, the treaty remains binding to take into account the legitimate interests of the other state. These authors, while emphasizing the systemic importance of the reliability of treaties, indicate the importance of an exception for provisions to which the new state could not consent consistent with its identity or its purpose in the succession struggle. These two aspects of the discourse blend reliance upon consent and external notions of international justice differently. See, e.g., L. CHEN, *STATE SUCCESSION RELATING TO UNEQUAL TREATIES* (1974). Chen agrees with the general position of the commentators that "there is no single answer to the general questions of state succession to treaties," *id.* at 232, but advocates a substantive investigation of the "unequalness" of each treaty. "In an unequal treaty the disparity of the power bases of the contracting parties is translated into unequal rights or obligations for the contracting parties." *Id.* After this determination, "[a]ccording to contemporary international law an unequal treaty is voidable, and thus it should be a legitimate reason for nonsuccession." *Id.* at 235. This approach, in Chen's view, ensures that "[p]roper treaty relations can thus be established among the predecessor, successor, and other concerned states to redress past grievances and achieve international equity and justice." *Id.* at 241. For a contrasting emphasis on the consent element in the unequal treaty exception, see O. UDOKANG, *supra* at 487-508. "While a new state may be reluctant to assume those treaty obligations which are not in conformity with its basic interests, or with the essential object of its independence, subrogation to certain other rights and obligations under treaties concluded on its behalf by the predecessor may well prove indispensable not only to the progressive development of its domestic economy, but to its very participation in international life." *Id.* at 492-93. Udokang thus supports Chen's position regarding unequal treaties, on the ground that they are regarded by new states as "void *ab initio*, on the ground that they are calculated to enshrine and protect the 'predatory interests' of the colonial powers." *Id.* at 220-21. The extreme form of the neo-universalist position holds that all treaties would devolve *ipso jure* upon a new state, to protect systemic stability while any new state might denounce the treaty if it was contrary to its basic interests, to protect its consensual authority. See C. JENKS, *THE COMMON LAW OF MANKIND* 94 (1958); 2 D. O'CONNELL, *supra* at 23-25. The Soviet position, as expressed by Korovin, advocates devolution of all treaties to protect the consensual nature of the obligations with an exception for unequal treaties on grounds of equity:

Every international agreement is the expression of an established social order, with a certain balance of collective interests. So long as this social order endures, such treaties as remain in force, following the principle of *pacta sunt servanda*, must be scrupulously observed. But if in the storm of a social cataclysm, one class replaces the other at the helm of the state, for the purpose of reorganization not only of the economic ties, but the governing principles of internal and of external politics, the old agreements in so far as they reflect the preexisting order of things, destroyed by the revolution became null and void. To demand of a people at last freed of the yoke of centuries the payment of debts contracted by their oppressors for the purpose of holding them in slavery would be contrary to those elementary principles of equity which are due to all nations in their relations with each other.

U.S. Dept. of State, in 2 M. WHITEMAN, *supra* note 1, at 777. Many modern authors have abandoned the discourse of abstract solution to this controversy in favor of a

the region who may not have participated in its formulation.²⁴ Along

description of the varied state practice. See, e.g., Meron, *International Practice as to Succession of New States to Treaties of Their Predecessors*, 10 INDIAN J. INT'L L. 459 (1970):

International practice as to succession to treaties is not sufficiently abundant and uniform to permit an attempt at generalization . . . The practice is more dictated by public policy of the respective states than by any legally accepted principle . . . That does not mean that a state may be safely and freely allowed to avail itself of the advantages of the treaty when it suits it to do so and repudiate it when its performance is onerous.

Id. at 476. Meron proposes that "we have to follow a pragmatic, problem-oriented, step-by-step approach. Each case has to be scrutinized carefully taking into account a number of factors." *Id.* at 477. Although Meron suggests reference to the "nature of the treaty" among other factors, he retains the distanced and abstract discourse which would determine a hierarchy of "natures" before it would allow the treaty to determine its own scope. The apparent distance from substance of this aspect of sources doctrine has almost been overcome as its reliance either upon a vision of interests or of justice has been exposed. For further development of this tendency, see Keith, *Succession to Bilateral Treaties by Seceding States*, 61 AM. J. INT'L L. 521, 546 (1967) (holding that the solution depends upon "(a) the nature and function of the treaty in question; (b) the method of secession; and (c) the circumstances of the conclusion of the treaty . . . The first factor is obviously of great importance. . ."); see also U.S. State Dept., in 2 M. WHITEMAN, *supra* note 1, at 993.

23. See *infra* notes 85-88 and accompanying text. The unanimous opinion of Western commentators is that new states are bound by custom upon their coming into being as states. A. D'AMATO, *supra* note 1, at 191-93; E. MENZEL & K. IPSEN, *supra* note 2, at 82. This position is usually based on a vision of the communal nature of statehood. It is usually paired with an exception should new states not consent. See, e.g., Akhurst, *supra* note 1, at 28 ("[T]he opposition of new states to old customs is bound to cast doubt on the customs"). The Soviet bloc theorists, by contrast, argue that because custom is consensual, new states are not bound without their consent. See, e.g., G. TUNKIN, *THEORY OF INTERNATIONAL LAW* 127-33 (W. Butler trans. 1974). This consent-based theory is usually combined with a willingness to imply consent when the new state begins to act like a state on the grounds of reciprocal fairness. See H. BOKORNÉ-SZEGŐ, *NEW STATES AND INTERNATIONAL LAW* (1970).

24. The idea of regional or bilateral custom is generally justified on the basis of consent, or at least is seen as more directly connected to state consent than general custom. See D'Amato, *The Concept of Special Custom in International Law*, 63 AM. J. INT'L L. 211 (1969). D'Amato argues that:

the requirement of a showing of consent is a mistaken view . . . because of a widespread failure to draw a basic distinction between special (or "local" or "particular") customary international law and general customary international law. . . . The stringent requirements of proof of consent in [the three cases decided by the World Court] thus do not apply to the large body of general norms of international law binding upon all states, but rather apply only in similar cases of "special" custom.

Id. at 211-12. Consequently, unlike general customary norms, special custom seems binding only upon those who have participated in its creation. This seems to be the practice of the I.C.J.

The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The . . . Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the states in question. . . .

Asylum Case (Colom. v. Peru) 1950 I.C.J. 266, 276 (Judgment of Nov. 20). See Falk, *supra* note 1, at 782 (discussing the idea that "some tangible evidence of consent on

this vein, the literature has considered the hierarchical relationship among the various Article 38 sources.²⁵

the part of the state that is bound" is required). Other commentators, however, emphasizing the non-consensual nature of custom as opposed to treaty, argue that a custom which has grown up among some of the states belonging to a well-defined group is binding upon all members of that group. Just as the consensual position was willing to imply consent in some cases, so commentators of this persuasion are willing to except members of the group who opposed the custom. See H. THIRLWAY, *INTERNATIONAL CUSTOMARY LAW AND CODIFICATION* 136-37 (1972) (admitting that it is difficult for the non-consensual approach "to ascertain exactly what are the boundaries of the 'community' to which the custom in question is to be treated as applying," but charging that "[t]he view that local custom is binding only on states which have expressly agreed to it is fundamentally an assertion of the view that custom is based upon acceptance."); see also Akehurst, *supra* note 1, at 29-30 (discussing this view).

25. The relative authority of various sources is most often discussed in contrasting treaties and custom. Advocates of all logically available positions exist. For the proposition that there is no hierarchy, see NGUYEN QUOC DINH, P. DAILLER & A. PELLET, *supra* note 2, at 104 (source equality reflects social equality): "En effet, à l'absence de hiérarchie organique dans la société internationale correspond l'absence de toute hiérarchie entre les sources"; E. MENZEL & K. IPSSEN, *supra* note 2, at 43 (source equality flows from textual equality); see also Barile, *La structure de l'ordre juridique international*, 161 *RECUEIL DES COURS* 9 (1978). "[L]e rapport entre droit international spontané (ou de la conscience) et droit international écrit (nous nous référons justement aux accords dont nous discutons dans ce chapitre) ne devait pas être celui d'une subordination du second au premier mais celui d'une interdépendance réciproque." *Id.* at 92. For the proposition that treaty is superior to custom, see *Right of Passage over Indian Territory* (Port. v. India) 1960 I.C.J. 6, 90 (Judgment of Apr. 12) (Quintana, J. dissenting); Akehurst, *The Hierarchy of the Sources of International Law*, 47 *BRIT. Y.B. INT'L L.* 273 (1974-1975) (summarizing the positions of other authorities and the differing results which occur when a treaty is more or less specific than a rule of custom, earlier or later in time, intended to overrule, or be overruled, and other similar conflicts). For the proposition that treaty is inferior to custom, see C. PARRY, *THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW* 53 (1968). "Treaties, then, are binding because there is a rule of customary international law to that effect." *Id.*; see also Fitzmaurice, *Some Problems Regarding the Formal Sources of International Law*, in *SYMBOLAE VERZIJL: PRÉSENTÉES AU PROFESSEUR J.H.W. VERZIJL* 153, 157 (1958) (treaties are not a source of law, but rather a source of obligation under the law); see also L. OPPENHEIM, *supra* note 1, at 28:

But it must be emphasized that, whereas custom is the original source of International Law, 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.

Id.; see also 1 P. GUGGENHEIM, *TRAITÉ DE DROIT INTERNATIONAL PUBLIC* 57 (1953); G. SCHELLE, *MANUEL ÉLÉMENTAIRE DE DROIT INTERNATIONAL PUBLIC* 577 (1948). Because Article 38 lists "treaty" before "custom" in enumerating the sources of law, some commentators have suggested that if this does not create a hierarchy it suggests at least a procedural order in which sources are to be examined to see whether they can dispose of a case at hand. In a given case, the judge should begin by seeking applicable rules of treaty law, turning to custom or ultimately to general principles when treaty does not "dispose" of the case. This approach is said to combine the rules of *lex specialis* (since treaties are usually more specific) and *lex posterior* (since treaties are often more recent). There are also commentators who conclude exactly the opposite. See E. MENZEL & K. IPSSEN, *supra* note 2, at 94:

Die Rechte und Pflichten der Staaten sind in erster Linie durch vertragliche Ver-

In addition to considering the abstract hierarchy of treaty and custom at great length,²⁶ the sources literature devotes a great deal of energy to the idea that the power of states to make treaties runs out when it confronts a supercustomary norm of *jus cogens*.²⁷ Likewise, and far

einbarungen festgelegt. . . . Es steht den Staaten frei, untereinander Regeln zu vereinbaren, die von Normen des Gewohnheitsrechts abweichen. Verträge schränken insoweit den Geltungsbereich des Völkergewohnheitsrechts und der allgemeinen Rechtsgrundsätze ein. Man kann folglich in dem dargestellten Sinne von einem Vorrang der Verträge vor anderen Quellen des Völkerrechts sprechen. Dadurch ist allerdings nicht ausgeschlossen, dass umgekehrt vertragliche Regelungen durch Gewohnheitsrecht beseitigt werden.

Id.; see also I H. LAUTERPACHT, INTERNATIONAL LAW 87 (1970). "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." *Id.*; cf. Jenks, *The Conflict of Law Making Treaties*, BRIT. Y.B. INT'L L. 401, 451-53 (1953) (even in the situation of a conflict between law-making treaties, the first approach to resolution should be based on an analysis of the provisions of the treaties, aided by the presumptions and rules of construction that have developed about treaty interpretation). Jenks considers that these presumptions are similar to those that "exist in respect of statutes and contracts, and the applicability of the same principles to treaties was recognized at an early stage in the development of international law." *Id.* at 451. In the final analysis, Jenks adopts a legalistic stance, seeing the avoidance of controversy lying in the domain of "considerable improvement in the technical legal equipment. . . ." *Id.* at 452. The perspective which is taken to the hierarchy of treaty and custom depends in part upon the understanding which a writer has of the power of consent and of the extent to which each source enshrines consent. McDougal and Reisman describe this phenomenon:

The initial itemization of "international conventions" prompts some commentators to champion agreements as an important "direct, conscious, and purposive" modality for law creation, offering the closest approach to the deliberate and explicit formulations of legislative processes in national societies. From this perspective, agreements may be both "formal" for the parties and others, and "material" or "evidentiary" sources of the expectations about authority and control which comprise customary law. Other commentators, however, find it difficult to understand how agreements, which in some versions of inherited international myth are supposed to "bind" only the immediate parties, can create "obligation" for third parties. Posing the problem as a quest for "consent" rather than for empirical expectations about the probable course of future decision, such commentators distinguish between the creation of "law" and the creation of "obligations," and insist that even agreements can derive their "binding" quality only from "a rule of customary law to that effect." This would appear greatly to subordinate agreements to custom as an exclusive law creating modality.

McDougal & Reisman, *supra* note 1, at 261 [footnotes omitted]. For a general treatment of the relative authority of other sources, see Akchurst, *supra* note 1, *passim*.

26. See *supra* notes 6-8.

27. The doctrine of *jus cogens* or *peremptory norm* is defined by the Vienna Convention on the Law of Treaties quite concretely as "a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention, *supra* note 5, at art. 53. A more general definition is provided by A. VERDROSS & B. SIMMA, *supra* note 4, at 264; "Normen, die im gemeinsamen Interesse aller Staaten gelten und tief im allgemeinen Rechtsbewusstsein verankert sind." *Id.*; see also Verdross, *Ius Dispositivum und Jus*

more often, custom or treaty norms run out when they contravene certain other, superior norms of *jus dispositivum*.²⁸ These doctrines are disconnected from the content of the particular norms of custom which overrule treaty and *vice versa*. Although commentators often remark that no one has ever "found" a norm of *jus cogens*,²⁹ some hierarchy seems to need to be established in order to develop an internally coher-

Cogens in International Law, 60 AM. J. INT'L L. 55 (1966); Lachs, *The Law of Treaties. Some General Reflections on the Report of the I.L.C.*, in RECUEIL D'ÉTUDES DE DROIT INTERNATIONAL EN HOMMAGE À PAUL GUGGENHEIM 391, 398 (1968).

28. See *supra* note 25 for general discourse about the hierarchical relations among sources. *Jus dispositivum* is discussed far less often than *jus cogens* in contemporary scholarship. Because it is thought to include all norms which are not *jus cogens*, and can therefore be changed by subsequent, more authoritative norms, its abstract dimensions are negatively implied by the myriad discussions of *jus cogens*. Most norms of treaty law are considered replaceable by subsequent agreement. Most customary norms can be replaced by subsequent custom. These possibilities are justified by more basic norms, such as "freedom to conclude treaties," which cannot be so changed. Paradoxically, the concentration of the literature upon *jus cogens* would be replaced by a concentration upon *jus dispositivum*, if the number of norms recognized as *jus cogens* increased. Then one would need to ask, in considering changing a treaty, if the specific norms were, in fact, *jus dispositivum*. The theoretical concentration upon the exceptional category thus reflects the concern of scholarship to delimit the sources of law abstractly. See, e.g., Verdross, *supra* note 27, at 55 (discussing *jus dispositivum* and *jus cogens* in international law).

29. Some writers have tried to catalog norms of *jus cogens*. See, e.g., Ago, *Droit des traités à la lumière de la Convention de Vienne*, 132 RECUEIL DES COURS 297, 324 (1971) (a somewhat less comprehensive survey than Whiteman); A. VERDROSS & B. SIMMA, *supra* note 4, at 265-66; Whiteman, *Jus Cogens in International Law with a Projected List*, 7 GA. J. INT'L & COMP. L. 609 (1977) (the most ambitious list to date). Most authors are far more sceptical that an example of *jus cogens* might be found. See, e.g., Mann, *The Doctrine of Jus Cogens*, FESTSCHRIFT ULRICH SCHEUNER 399 (1973); Schwarzenberger, *The Problem of International Public Policy*, 18 CURRENT LEGAL PROBS. 191 (1965); I. C. ROUSSEAU, *supra* note 6, at 150; J. SZTUCKI, *JUS COGENS AND THE VIENNA CONVENTION ON THE LAW OF TREATIES* 93 (1974) (concluding that his survey of modern practice "seems to justify the conclusion that there is not a single application of the concept of peremptory norms"). Sztucki dramatically separates the doctrinal discussion from practice, noting:

the references to *jus cogens*, or to other similiar constructions, in . . . opinions . . . belong to the doctrine of international law rather than to practice, since the inter-state obligations remain unaffected by such opinions.

All the known cases of recognition of certain norms as binding independent of the respective conventional obligations, as well as all the known cases of avoidance or nullification of treaties, touch, in fact, upon other matters than the category of *jus cogens*, and can be explained without any need of resorting to the concept of peremptory norms, unless one departs from a preconceived idea that peremptory norms should be looked for and arrived at at any price.

Therefore, in the light of international practice, the question whether the concept of *jus cogens* has been "codified" or "progressively developed" in the [Vienna] Convention, may be answered only in the sense that there has been nothing to codify.

Id. at 94.

ent and sufficiently independent scheme of authority.³⁰ Otherwise, the scheme might produce equally authoritative norms among which one would then be obliged to choose on the basis of their content. These hierarchical discussions elaborate the relative authority of treaties or custom which are general or specific,³¹ multilateral or bilateral,³² universal or regional,³³ and earlier or later.³⁴

The sense that hierarchy needs explaining, like the sense that the abstract boundaries of enumerated sources need elaboration, reveals

30. See generally *supra* note 25. In general, regardless of their content, conflicts among the three major sources (treaty, custom, and general principles) are discussed in terms of such abstractions as *lex posterior derogat legi priori*, *lex specialis derogat legi generali*, *lex superior derogat legi inferiori*, etc. *Jus cogens* comes top of the heap as the ultimate *lex superior*. See *supra* notes 44-45. Other sources (judicial decisions or the writings of publicists) are regarded as "subsidiary" to the big three. See Akehurst, *supra* note 25, at 280-81.

31. A specific norm is generally regarded as superior to a general rule, of either custom or treaty. It is unclear whether "specific" refers to the content of the norm, or to the size of the group whose consensus gave it force. Some basic principles overrule specific rules. Sometimes world custom could overrule regional custom, and multilateral obligations override bilateral. But sometimes the reverse is true. These issues are discussed in terms of the relative strength of the intention of those responsible and in terms of general systemic notions of justice. See Akehurst, *supra* note 1, at 31 (regional custom beats universal custom); Barile, *Structure de l'ordre juridique international*, 161 RECUEIL DES COURS 9 (1978); E. MENZEL & K. IPSSEN, *supra* note 2, at 95 (discussing cases in which the *lex specialis* rule creates no clear hierarchy). But cf. I. A. SERENI, *DIRITTO INTERNAZIONALE* 174 (1956) (arguing that a later general custom overrides a special earlier custom).

But in view of the strong presumption against changes in the law, see A. D'AMATO, *supra* note 1, at 60-61; Akehurst, *supra* note 1, at 19; Lauterpacht, *Sovereignty over Submarine Areas*, 27 BRIT. Y.B. INT'L L. 376, 393 (1950), this result would follow only if there was clear evidence that the parties to the special custom were applying the new general custom *inter se* and no longer applying the old special custom. But cf. G. TUNKIN, *TEORIJA MEZHDUNARODNOGO PRAVA* 504-05 (1970) (applying the principle of *lex specialis derogat generalis* to the relationship between the norms of socialist and general international law).

See also Osakwe, *Socialist International Law Revisited*, 66 AM. J. INT'L L. 596, 599 (1972): "Nothing in [the] general international law . . . precludes the existence of a local international legal order that would regulate relations between states belonging to the same regional (ideological) bloc." *Id.* at 597. Specifically on the conflict of special and general treaty obligations, see A. MCNAIR, *supra* note 1, at 218-24 (regarding this as a rule of interpretation, not authority, he emphasizes the parties' intent which he recognizes is complicated when a hierarchy among treaties with different parties must be constructed).

32. Bilateral treaties are often viewed as more specific than multilateral treaties. The general obligations of multilateral treaties, partly because they relate to third parties, and partly because the intention in ratifying them was to create fundamental obligations, can overrule or aid in the interpretation of bilateral treaties. See *supra* notes 25 & 31.

33. Usually universal custom is considered to be opposable by regional custom. See *supra* notes 25 & 31.

34. Unless the earlier norm was more specific (or more fundamental) the later norm controls. See *supra* notes 25 & 31.

the shared sense that sources discourse is meant to delimit abstractly and authoritatively the norms which bind states in such a way that they might remain free to establish and disagree about the content of those norms as their interests or a natural order might dictate. Discussions of both the extent and hierarchy of sources produce doctrines which do not rely on the content of the norms whose source they identify. Each of these types of discussion suggests that the problem which sources doctrine addresses is the abstract definition of the authoritative set of norms binding states.

II. ARGUMENT ABOUT THE SOURCES OF INTERNATIONAL LAW

International law about sources is more than a set of doctrinal boundaries and hierarchies. Sources doctrine is also a quite well worked out argumentative practice about the authority or "binding nature" of various legal instruments. The arguments which people make about the sources of international law—in treatises, articles, opinions, and so forth—are like the various doctrines which comprise the law of sources in that they define and limit what various sources mean and how they relate to one another in an abstract fashion. This abstract detachment from the content of the norms whose authority they delimit is also characteristic of arguments about the application of particular sources doctrines to particular fact situations.

In sources argument, one characteristically seeks to convince someone that a state which does not currently believe it to be in its interests to follow a given norm should do so anyway. Sources rhetoric provides two rhetorical or persuasive styles which we might call "hard" and "soft." A "hard" argument will seek to ground compliance in the "consent" of the state to be bound. A "soft" argument relies upon some extraconsensual notion of the good or the just. Of course there is no *a priori* reason to divide the "sources" of law, or the persuasive reasons for compliance into these two categories. Indeed, it is difficult to classify the various classic sources as either "hard" or "soft," and it seems intuitively obvious that fulfilling promises is an important dimension of justice and *vice versa*. Nevertheless, it turns out that arguments about sources doctrine often rhetorically contrast these two sets of ideas. It will be easier to analyze exemplary sources argument after considering the ways in which one might argue about sources doctrine in a somewhat stylized fashion. As I have defined them, hard and soft sources are mutually exclusive categories which together account for all possible sources that might be imagined. Hard sources are grounded in con-

sent. Soft sources are grounded not in consent. Moreover, to be coherently grounded, a source may not be both. The point of a consent-based source is that it *binds*: that it is authoritative even when other considerations—including notions of the good—push an actor in another direction. The point of soft sources is that they are *authoritative*: that they bind even the state which does not imagine compliance to be in its interest—which does not consent. In a schematic and preliminary way, we can imagine the arguments which might be made on behalf of hard and soft sources in a world of autonomous states. Suppose that one sovereign (State 1) when invoking a norm against another (State 2) argues that the norm invoked is authoritative and binding because it is "hard." A hard source is binding because the state to be bound has agreed that it is binding, so that compliance will not threaten its autonomy. State 2 might make several responses. It might make a factual argument, claiming, for example, that it had not in fact agreed, or had agreed only subject to a condition which had not been fulfilled. Leaving these arguments aside for the moment (or imagining that they are resolved in favor of State 1), State 2 might attack the hard source directly. It might argue that if its consent is the basis for its being bound, it has changed its mind, or did not intend to consent in the first place.

These classic responses force State 1 to argue that such change is not permissible. The reasons offered may be many: because if everyone did, it would be a mess; because State 1 would not want its treaty partners to do so; because you just have to keep your word, etc. One might invoke a doctrinal expression of these conclusions such as *pacta sunt servanda*.

State 2, against whom the norm is being invoked, might respond that these norms or considerations have nothing to do with its consent. If they do, State 2 might simply reinvolve its initial objection that it does not *now* consent to this application or interpretation. Perhaps State 2 is willing in similar circumstances to let its treaty partners off as well, or finds the state of the system less important than its own release from this particular norm. In responding, State 2 has forced State 1 to shift gears and argue from some non-consensual perspective. To State 2, all hard sources have become soft sources in disguise.

Imagine, however, that State 1 originally argues from a soft perspective; claiming, for example, that the norm is binding on State 2 because it is in some sense just. State 1 might admit that it is arguing from a soft perspective, suggesting that without this norm the international system would not be "equitable" or "workable" or whatever soft code-word seems appropriate. State 2 might make a number of responses. It might argue about the meaning or application of this soft norm in this

case, arguing, for example, that the system would be "just" or whatever, even if it were not bound. Leaving this response aside for the moment, or assuming that it is resolved in favor of the norm invoking state, State 2 might directly attack the soft source. It might assert that it has a different idea of softness, a different image of the system or of justice. Although the visions of softness which might proliferate in the ensuing argument might be patterned in some fashion, if we ignore for the moment the *content* of State 2's response, it seems predicated on the notion that the norm-invoker cannot convincingly invoke its *own* idea of softness. If State 2 is to be bound because of the "justness" of the norm, State 1 must have some way of defending the norm on that plane, without merely asserting power against State 2's sovereignty. Among equal sovereigns, "justice" must be negotiated, or voted to agreement. To State 2, all the soft arguments seem to have been hard arguments in disguise.

These hypothetical arguments reflect the relationship between hard and soft sources as well as their incompatibility and exclusivity. Although one cannot make both sets of arguments together, the proponent of a given norm must continually switch from one rhetoric to the other. When pressed, the hard defender of a norm can be forced to concede that the norm can only be binding if it is soft. Likewise, the defender of a soft norm can be forced to defend his norm in hard terms. Because neither set of arguments can be convincing by itself and neither can trump the other, argument within this structure could go on endlessly without resolution.

This hypothetical set of arguments is similar to the way people actually argue about doctrines concerning the sources of international law. They argue in ways which contrast norms based on sovereign consent but which must be externally validated outside consent (perhaps by implication from "objective" facts) with externally supplied norms which must be subjectively justified and defined by sovereigns. These two strands of argument are present in the discourse about all such traditional sources as treaties, custom, general principles, or the writings of judges and publicists.

Moreover, arguments about sources are related to each other as the hypothetical structure of hard and soft suggests. Arguments about the authority for an international norm appeal either to some form of sovereign consent, or to some ideal outside of consent. In the rhetoric of sources argument, these are exclusive possibilities, and no coherent single appeal can be simultaneously to both. In the world of equal and autonomous sovereigns imagined by those who engage in sources argument, a norm is authoritative either because states say so, or for some

other reason which overrides consent. By definition, to be authoritative, consent must overrule other sources of authority. Likewise, to be authoritative, a nonconsensual source must be able to overrule consent. Yet neither of these sources alone can justify a doctrinal choice. On the one hand, we are unable to explain why consent should be binding against a dissenter (and in every contentious case someone will by definition object) without reference to a higher norm. On the other, we cannot explain the content of extraconsensual norms except by reference back to consensual standards.

This argumentative pattern reflects the image of inter-sovereign life characteristic of sources discourse generally. Sources discourse establishes an abstract basis for authoritatively binding states within a normative order without derogating from their separate and autonomous sovereign authority. The autonomy of sovereigns ensures the attractiveness of hard sources while their separation requires that they be permitted to limit their own consent in a fashion which reveals all hard sources to be soft. The possibility of an external normative order grounding its equality and mutual respect suggests the appeal of soft sources, while the independence of a normative structure from any single content for that order requires that all soft sources rely upon hard sources for their content. The attempt to delimit an abstract system of sources, free of the content of either state interest or of external value, is reflected in the hypothetical rhetorical patterns which I have outlined.

To the extent sources argument pursues these twin rhetorics, moreover, it continues the problematic which motivates it. In order to fulfill the desire for an autonomous system of normative sources, argument about the sources of international law, like sources doctrine itself, includes strands associated both with normative autonomy and normative authority. Sources argument is interesting both because it pursues a rhetorical strategy of inclusion and because it manages the relations between these two rhetorical strands so as to "solve" the problem of sources discourse as a whole. It seems that if the "hard" can lie down with the "soft" in sources argument, sovereigns will be able to remain autonomous within a binding normative order.

The solution furnished by sources doctrine and argument is not so much a matter of logic as it is a practice of continued movement between these two rhetorics which creates an image or a feeling of resolution. Doctrines are not defined by choosing between the hard and the soft. In fact, doctrines can only be produced if the extremes of hard and soft argumentation can be avoided. Neither alone could sustain doctrines of normative authority. Because these arguments may always

be elaborated into conflicting and exclusive global visions, doctrines must include them both by limiting each so as to render them compatible. Without this careful limitation of extreme visions of hard and soft visions, doctrines are in constant danger of dissolution.

Various rhetorical devices for including these two rhetorical strands in sources discourse can be identified both in arguments which define, limit, and order various sources and in concrete arguments about the application of various source doctrines. In this section, I consider arguments of a most general sort about the meaning of various sources, the relations among sources, and the assimilation of new sources to those which are traditionally accepted. In the next sections, I take up argument about the application of various sources doctrines in particular exemplary cases.

The initial embrace of these two rhetorical approaches by sources discourse as well as one technique for managing any tension between them—placing them in a rather simple hierarchical relationship—can be seen in discussion about the boundaries between and within doctrines about the basic sources. It is difficult to categorize the sources of Article 38 as either soft or hard. Treaties seem quintessentially hard: the ultimate expression of sovereign consent. Custom, by contrast, and certainly “general principles,” seem soft: binding because it is just to do things as they have been done, to preserve expectations or reinforce a natural selection of wise norms.³⁵ In general, positivists, who eschewed soft sources, preferred treaties to custom.³⁶ Naturalists, by con-

35. See, e.g., Kunz, *The Nature of Customary International Law*, 47 AM. J. INT'L L. 662, 664 (1953) (criticizing the idea that custom is the discovery of pre-existing natural law).

36. See *supra* notes 6-8 (concerning hierarchy of custom and treaty). Nineteenth century positivists often embraced extreme versions of this position, holding, for example, that no norm could be binding except on the parties who agreed to it, and for as long as they agreed to it. This led to an observational style of scholarship. See, e.g., J. MOSER, *GRUNDSÄTZE DES JETZT ÜBLICHEN EUROPÄISCHEN VÖLKERRECHTS IN FRIEDENSZEITEN* (1750). Usually, conventions are viewed as most persuasive because, in the words of Article 38(1)(a) of the Statute of the International Court of Justice, they “establish rules especially recognized by the contesting states.” The preference for treaties is thus usually associated with a preference for consensual rules. See Bishop, *General Course of Public International Law*, 115 RECUEIL DES COURS 147 (1965).

First among the sources of international law . . . [are] “international conventions” As between the parties to them, treaties . . . lay down clearly expressed, deliberately chosen rules. . . .

[W]hen one compares the position of treaties in international law with various instruments in domestic law, we find treaties having to take the place, internationally, occupied domestically by contracts, legislation, conveyances, constitutional documents, and other instruments. . . . Treaties may, as between the parties, override previously existing rules of customary international law, modifying the law as parties wish.

trast, often emphasized custom and general principles of justice.³⁷ But the discourse of naturalism and positivism corrupted these pure forms.

Positivists, defending the authoritativeness of treaties, raised the soft norm *pacta sunt servanda* to a new status, extending the validity of treaty-based norms to those who had not explicitly consented on the grounds that treaty following was just.³⁸ They also reinterpreted custom and general principles to be binding because they too expressed consent, even if by implication.³⁹ They developed doctrines of custom-

Id.; see also Baxter, *supra* note 1, at 36-74:

In the first place, the treaty is clear evidence of the will of States, free of the ambiguities and inconsistencies characteristic . . . of evidence of State practice.

. . .

Secondly, the convention . . . constitutes one common statement of the law by virtually all States, which does not require the process of harmonization and reconciliation that normally goes into the extraction of a rule of law from the hodge-podge of evidence presented to a tribunal or other form of decision-maker.

Id. at 36-37. When the commentator is less concerned with consent or, more probably, sees the consensual and nonconsensual element of both treaty and custom, the text will tend to treat them equally, resolving conflicts in terms of technical and procedural abstractions. See, e.g., Akehurst, *supra* note 25, at 275:

It is sometimes said that treaties prevail over custom by virtue of the maxim of *lex specialis derogat generali*. It often happens that the subject matter of a treaty is more specific than a customary rule, or that the States bound by a treaty are fewer than the States bound by a customary rule. But it is equally possible that a customary rule may be more specific than a treaty, or that a special custom binding a small number of States may conflict with a multilateral treaty binding a large number of States; in such cases the maxim *lex specialis derogat generali* causes the customary rule to prevail over the treaty.

Where the maxim *lex specialis derogat generali* provides no clear guidance, or where it is shown not to reflect the intentions of the States concerned, it seems that treaties and custom are of equal authority. The later in time prevails.

Id.

37. See *supra* notes 6-8.

38. Successor and third states are usually considered bound by at least those treaties which have become customary law. Opinion differs as to the additional categories of treaties which bind successor states. See *supra* note 22; see also 2 D. O'CONNELL, *supra* note 22, at 352 *passim*; O. UDOKANG, *supra* note 22, at 321-402.

39. See, e.g., Baxter, *supra* note 1, at 31 (customary international law finds its origins in the will of states); DDR LEHRBUCH, *supra* note 10, at 259 ("Der Nachweis der Existenz einer gewohnheitsrechtlichen Norm erfordert . . . den Nachweis des Willens der Staaten, . . . zu der von ihnen praktisch geübten Verhaltensweise rechtlich verpflichtet zu sein.") (emphasis in original). So pervasive has this positivizing tendency been that no contemporary author imagines custom to be binding solely as an expression of justice or of historical wisdom. Only norms of *jus cogens* are now understood in this way. See *supra* note 29. Even modern naturalists concede that custom is a matter of "will." See, e.g., A. VERDROSS & B. SIMMA, *supra* note 4, at 282 n.17.

Wir ersehen daraus [aus der Tatsache, dass ein persistent opposer nicht an eine neuentstandene customary norm gebunden wird], dass auch eine gewohnheitsrechtliche Bindung durch Konsens, wenn gleich nicht durch einen "stillschweigenden Vertrag" entsteht. Zwar beruht jeder Vertrag auf einem Konsens, aber nicht umgekehrt, da ein Vertrag immer eine durch Erklärungen oder konkludente Handlungen erzielte Willenseinigung (consent) voraussetzt,

ary law which reflected this sense of its reliance upon consent: custom was to be binding only upon those who participated in its formulation,⁴⁰ and in general only existed when the repeated practice of states was coupled with a psychological intent to be bound.⁴¹

Naturalists likewise corrupted the softness of custom and the hardness of treaty. They sought to extend custom and general principles by

während ein Konsens auch aus einem passiven Verhalten, aus einer widerspruchsfreien Duldung geschlossen werden kann. Richtig sagt daher Tamme, *The Status of Consent in International Law*, [2 NETHERLANDS Y.B. INT'L L. 11 (1971)] ein "tacit consent" sei eine "contradictio in terminis."

Id.

40. See *supra* notes 21-23 (elaborating on consent to be bound).

41. The "*opinio juris*" requirement was classically formulated by Judge Negulesco to be "the mutual conviction that the recurrence is the result of a compulsory rule." Jurisdiction of the European Commission of the Danube, 1927 P.C.I.J. (ser. B) No. 14, at 105 (Advisory Opinion of Dec. 8) (Negulesco, J., dissenting). The importance of this requirement to the formation of custom has been generally recognized as positivism has come to dominate international legal scholarship. Guggenheim relates that the *opinio juris* requirement had appeared in the positivist writings at the end of the 18th century. Guggenheim, *Contribution à l'histoire des sources du droit des gens*, 94 RECUEIL DES COURS 1, 52-53, 53 n.1 (1958). Some contemporary authors who rejected it early in their careers have since changed their minds. Compare 1 P. GUGGENHEIM, *TRAITÉ DE DROIT INTERNATIONAL PUBLIC* 46-48 (1953) (disapproving of *opinio juris*) with P. GUGGENHEIM, *TRAITÉ DE DROIT INTERNATIONAL PUBLIC* 102-05 (2d ed. 1967) (approving of *opinio juris*); see also Kelsen, *Théorie du droit international coutumier*, 1 REVUE INTERNATIONALE DE LA THÉORIE DU DROIT, 253 *passim* (1939) (strict *opinio juris* not required); H. Kelsen, *supra* note 4, at 307 *passim* (claiming that "the second element is . . . that they must be convinced that they fulfill, by their actions or abstentions, a duty, or that they exercise a right"). For a discussion of this change in the views of Guggenheim and Kelsen, see G. TUNKIN, *supra* note 23, at 120-21. The recent discourse about the *opinio juris* requirement blends a subjective attempt to assess the true motives of compliers and an objective strand, willing to infer intent from certain behavior patterns. See Akehurst, *supra* note 1, at 31-42 (contrasting modern attempts to define *opinio juris*); Virally, *supra* note 1, at 133; I. BROWNIE, *supra* note 1, at 8 (*opinio juris* "in fact a necessary ingredient"); Barberis, *L'Opinio juris comme élément constitutif de la coutume d'après la Cour de la Haye*, 50 R.D.I. 563 (1967). Compare 1 H. LAUTERPACHT, *supra* note 25, at 63 (advocating a "flexible" approach requiring some subjective sense of "obligation" in order "to emphasize the distinction between international custom and international courtesy") with Skubiszewski, *Elements of Custom and the Hague Court*, 31 ZAÖRV 810, 839-45, 853-54 (1971). Skubiszewski interprets the Hague approach to be that "the Court reduces the *opinio juris* to a certain aspect of the practice and implicitly denies the subjective nature of the second element of custom. Further, the Court has never explained the nature of this subjectiveness."

Id. at 854. He concludes that *opinio juris*:

is not psychological in nature, and this is so for the obvious reason that there is no "State Psychology" as only a human being possesses mind and soul. The Court describes the element of *opinio juris* as "subjective," probably to contrast it with the "objective" nature of material facts that compose the practice. But the belief as to the legal nature of the rule of behavior that follows from the practice is not the result of any psychological process. This belief—and it is again an inexact term in the circumstances—follows from the acceptance of the legal nature of the rule by the States.

Id. at 840 (footnotes omitted).

arguing that these most accurately represented the way in which sovereigns wanted to be treated.⁴² They also reinterpreted treaty law to be binding as an expression of community judgment about the justice of the norms included.⁴³ This led them to give a special status to some general treaties like the original Hague protocols, the Kellogg-Briand Pact, or the United Nations Charter and subsequent human rights related treaties.⁴⁴ Consequently, general principles are valid when "recognized" and custom when "accepted" as law.⁴⁵ Moreover, the International Court of Justice may decide a case *ex aequo et bono* "if the parties agree thereto."⁴⁶

42. See, e.g., A. D'AMATO, *supra* note 1, at 75.

The articulation of a rule of international law—whether it be a new rule or a departure from and modification of an existing rule—in advance of or currently with a positive act (or omission) of a state gives a state notice that its action or decision will have legal implications. In other words, given such notice, statesmen will be able freely to decide whether or not to pursue various policies, knowing that their acts may create or modify international law. *This voluntaristic aspect of international law is precisely what makes it acceptable to nation-state decision-makers.*

Id. (emphasis added).

43. See *supra* note 25 (describing the transformation of multilateral treaties into norms of customary law); see also Baxter, *supra* note 1, at 57 (concluding that "[t]reaties that do not purport to be declaratory of customary international law at the time that they enter into force may nevertheless with the passage of time pass into customary international law").

44. Some provisions of these treaties (such as Article 2(4) of the United Nations Charter precluding international interference with matters of domestic jurisdiction) are considered by some to have become *jus cogens*. See Reports of the Commission, *supra* note 11, at 247-49; see also A. McNAIR, *supra* note 1, at 215-16 (considering the General Treaty for the Renunciation of War and the United Nations Charter to be binding upon non-signatories). The Hague Protocols and the Kellogg-Briand Pact, due partly to the sweep of their object, have often been given special status as constitutive of custom. See 1 THE TRIAL OF GERMAN MAJOR WAR CRIMINALS: PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG, GERMANY 41-42, 44 (1946); JUDGEMENT OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST 413-30 (1948).

45. I.C.J. CHARTER art. 38(1)(c)-(1)(d).

46. Article 38(2) of the Statute of the International Court of Justice provides for "the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto." This provision, in the otherwise heavily positivist Statute has never been the basis for the Court's jurisdiction, and is hardly mentioned in most treatments of the Court's jurisdiction. See, e.g., I. BROWNLIE, *supra* note 1, at 27; A. VERDROSS & B. SIMMA, *supra* note 4, at 337-38. *Ex aequo et bono* refers to a decision on the basis of equity, involving elements of compromise, conciliation, and friendly settlement in cases where no norm of international law seems able to provide a solution. Several naturalist authors have noted the role which equity plays in the usual jurisprudence of the Court. See, e.g., A. VERDROSS & B. SIMMA, *supra* note 4, at 337-38 (speaking of "ausserrechtliche Billigkeit"); de Visscher, *supra* note 1, at 13; I. BROWNLIE, *supra* note 1, at 27 (equity in international law may be understood in a different sense, as "an important factor in the process of decision"); Pirotte, *La notion d'équité, dans la jurisprudence récente de la Cour internationale de justice*, 77 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 92 (1973). The I.C.J. has expressed this role:

Sources discourse as a whole embraces the tension between hard and soft by allocating it as the difference between custom and treaty. Discourse about each source avoids the difficulties of singleminded reliance upon either hard or soft by repeating the maneuver. Because each of the classic sources had this double nature, each seemed protected from the inadequacy of either hard and soft tendency. The discourse of sources as a whole is able to appeal both to sovereign authority and sovereign equality. These two aspirations can be embraced by sources discourse precisely because they can be allocated to different doctrinal boxes.

Despite this allocation, commentators have sought to characterize Article 38 as either dominantly hard or soft, and continue to differentiate sources from one another by their relative hardness or softness. These argumentative practices of differentiation and characterization are as important to the overall project of sources discourse as are the embracing practices of inclusion and allocation. Without a sense of *both* the distinctiveness of consent and justice *and* of their inseparability, sources discourse could not reflect both sovereign autonomy and equality. At this preliminary point we might think of argument about the sources of international law as an endless project of differentiation and recombination. The difficulty is to relate these two practices to one another. One technique of accommodation, which is quite apparent even at this preliminary point, is the rhetorical development of hierarchical relations among dimensions of sources doctrines that have been differentiated as relatively hard or soft. This practice characterizes argument both about the relationship among sources and about doctrines defining each source which might be thought of as either hard or soft. Traditional commentators, for example, have seen Article 38 as the expression of a positivist vision of international law.⁴⁷ By this they mean that

Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable. Nevertheless, when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not *outside but within the rules*, and in this field it is *precisely a rule of law that calls for the application of equitable principles*.

North Sea Continental Shelf Cases (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 3, 48 (Judgment of Feb. 20) (emphasis added).

47. See, e.g., 1 H. LAUTERPACHT, *supra* note 25, at 86-87:

The order in which the sources of international law are enumerated in the Statute of the International Court of Justice is, essentially, in accordance both with correct legal principles and with the character of international law as a body of rules *based on consent* to a degree higher than is the law within the State. The rights and duties of States are determined, in the first instance, by their agreement as expressed in treaties.

Id.; see also E. MENZEL & K. IPSSEN, *supra* note 25, at 94; 1 C. ROUSSEAU, *supra* note

Article 38 seems to weight sources based in consent more than those based elsewhere. Of course, if each source were actually equally groundable in both consent and justice, such a characterization would not be possible. Commentators who characterize Article 38 positivistically rely both on the order in which the sources are listed, and upon the way they are described. They treat the order as a hierarchy, from the most to the least consensual source: treaties before custom before general principles before judicial decisions before publicists.⁴⁸ Moreover, judicial decisions and the writings of publicists are included only as "subsidiary" means for the determination of rules of law. They are least convincing because they are least consensual. Both custom and general principles, moreover, are described in such a way as to be grounded in consent rather than in a vision of the justice of tradition.⁴⁹ Those who would loosen the positivism of international legal theory accept this characterization, avoiding the "extreme positivism" of Article 38 in part by concentrating on custom and general principles, which they regard as midway between hard treaties and soft theories of justice.⁵⁰

Creating a hierarchy among sources based on a frozen characterization of each source as more or less "consensual" advances the project of

6, at 395-97. The traditional socialist view is that consent is the primary source of international legal principles which leads Tunkin to conclude that "these principles and norms are created primarily by . . . treaties . . ." G. TUNKIN, *supra* note 17, at 441. The East Germans conclude likewise that, "Sie [die sozialistische Völkerrechtsliteratur] betrachtet den völkerrechtlichen Vertrag einhellig als die *Hauptquelle des gegenwärtigen Völkerrechts*." DDR LEHRBUCH, *supra* note 10, at 215 (footnote omitted).

48. See *supra* note 47.

49. See VIRALLY, *supra* note 1, at 135 (stating that "[the] obligatory character [of customary law] follows from the general consent on the part of states, and this is what Article 38 seeks to convey when it speaks of 'a general practice accepted as law'"); see also DDR LEHRBUCH, *supra* note 10, at 210: "allgemeine Rechtsgrundsätze . . . sind völkerrechtliche Grundsätze, die entweder über völkerrechtliche Verträge oder im Wege des Völkergewohnheitsrechts Bestandteil des Völkerrechts geworden sind und deren allgemeine Anerkennung die Folge allgemein . . . eingegangener (ausdrücklicher oder stillschweigender) Vereinbarungen ist."

This approach is particularly evident in those texts which emphasize the importance of multilateral treaties (traditionally hard sources) as evidence of customary norms. See *supra* note 25; see also Baxter, *supra* note 1, at 38 (maintaining that multilateral treaties are declaratory or even constitutive for new customary law because of "the accuracy with which it reflects the will of States, clarity, near universality, contemporaneity, and sense of legal obligation").

50. See B. SIMMA, *supra* note 1; see also D'Amato, *The Concept of Special Custom in International Law*, 63 AM. J. INT'L L. 211 (1969) (maintaining that consent is the basis for special, but not general custom); D'Amato, *Manifest Intent and the Generation by Treaty of Customary Rules of International Law*, 64 AM. J. INT'L L. 892 (1970) (remarking that custom requires proof of "manifest intent," an objective standard, which can be especially well met by certain multilateral treaties).

domesticating the tension between authority and normative criticism within sources doctrine as a whole. Although both tendencies are present they do not seem to conflict with each other because they have been confined to doctrinal categories which are not equivalent. In one vision, treaty is the master of custom because it is more consensual, in another the reverse. Which of the various permutations one adopts is less important than the overall project of establishing distinctions and hierarchies. It protects the image of a doctrinal resolution to the social problem of conflicting authority centers.

Sometimes, however, the instability of the characterizations upon which this argumentative pattern relies becomes apparent. When this happens, other rhetorical techniques of resolution are available. Of these, the most significant is probably doctrinal proliferation. This instability and the proliferative response can be seen in discourse about new sources of international law and in discussion of the specific doctrines which define and limit each source.

Commentators often discuss new sources of international law in ways which characterize them as either hard or soft.⁵¹ When these two rhetorical strands are used in this way, it is difficult to terminate the discussion in any definitive way—not so much because new sources each entertain both hard and soft rhetorics as because each can be characterized as either hard or soft and neither characterization alone seems a persuasive basis for the new source's authority. Resolutions of the United Nations General Assembly have been treated in precisely this fashion. Since the General Assembly formally has no general legislative function in public international law, Article 38 makes no mention of its various textual outputs. Commentators have nevertheless struggled to think about United Nations resolutions within the rhetoric of sources.

General Assembly resolutions are thought to be binding to the extent that they express state consensus or systemic justice.⁵² Those who ar-

51. See *supra* notes 17-18.

52. See *supra* notes 17-18. Some commentators supporting the binding nature of United Nations Resolutions do so on the basis of the form of their adoption and emphasize their consensual nature. Others rely upon their content and emphasize their justness. Others rely on both. For the first type, see G. TUNKIN, *supra* note 17, at 176: "[T]he binding force of the provisions contained in the resolution is based not on the resolution itself . . . but on the agreement of the States who voted for the resolution . . ."; see also Falk, *supra* note 1, at 782-83 ("[T]he jurisprudential basis for attributing a limited legislative status to those resolutions of the Assembly is that they are supported by a consensus of the membership"); Higgins, *The United Nations and Law-making: The Political Organs*, PROC. AM. SOC'Y INT'L L. 37, 37-38 (1970) (explaining that the political organs of the United Nations engage in the development of customary international law); E. McWHINNEY, INTERNATIONAL LAW AND WORLD REVOLUTIONS 80 (1967); C. JENKS, LAW, FREEDOM AND WELFARE 83-100 (1963).

gue that they express consent are opposed by the argument that General Assembly delegates lack the requisite capacity or intent.⁵³ Those who argue that resolutions embody principles of systemic justice are opposed by argument that resolutions express a mere passing consensus—rule or tyranny of the majority.⁵⁴

Commentators of the second type are harder to find, since few defend the innovative position that Resolutions are binding with the non-positive and hence innovative argument that they express justice. See J. CASTAÑEDA, *supra* note 17, at 5 ("the legal value of these pronouncements is not uniform: it depends not only on the organ that approves them and on their form, but also, and especially on their content"). A strong advocate of this position is M. BEDJAOU, *TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER* (1979). Bedjaoui calls for a law whose principles are derived from its purpose, and "the primary concern of the law today is the establishment of a new international economic order." *Id.* at 132. Focusing on the "normative actions" of organizations, he calls for "ending referral to the traditional sources of international law" because they do not serve this purpose, whereas "the development of resolutions as a means of formulating international law is linked with the very evolution of that law, which has become a law of transformation for a purpose." *Id.* at 140. For advocacy of both positions, see J. BRIERLY, *THE BASIS OF OBLIGATION IN INTERNATIONAL LAW* 1-67 (H. Lauterpacht & C. Waldock eds. 1958) (all obligations in international law can be traced directly or indirectly to the consensus of states or to some universal system of natural rights or duties).

53. Those who rely on the formal consensual nature of resolutions are opposed by arguments cast in the rhetoric of the inadequacy of form or of the absence of underlying substantive authority which would legitimize the form. Thus, commentators argue either that the requisite intent was missing or the requisite power to forge consensus did not rest with the United Nations organ in question. See, e.g., Sloan, *supra* note 17, at 31 ("As a general rule, however, resolutions, for lack of intention or mandating power in the Assembly, do not create binding obligations in positive law."); Virally, *supra* note 1, at 160 ("The Charter contains no general provision regarding the legal effects of General Assembly resolutions. Consequently, as a manifestation of the principle of sovereignty they generally have no binding force on members."); A. VERDROSS & B. SIMMA, *supra* note 4, at 330-31 ("Deklarationen können nur dann für die Mitgliedstaaten verbindliche Völkerrechtsnormen erzeugen, wenn dieses Organ dazu zuständig wäre . . . Eine Erweiterung der Zuständigkeit ist jedoch bisher weder auf förmlichem Weg noch durch eine Verfassungswandlung . . . erfolgt"). Regarding the lack of intent, see Arangio-Ruiz, *The Normative Role of the General Assembly of the United Nations*, 137 RECUEIL DES COURS 419 (1972):

As everybody in the United Nations is convinced that recommendations are *per se* not mandatory, States tend to embellish their image by putting forth draft resolutions. Other states tend naturally to support such drafts. And potential or natural opponents are often reluctant to face the risk of tarnishing or spoiling their own image by opposing the proposal openly or by casting a negative vote.

Id. at 457.

54. Those who justify the binding nature of resolutions by reliance upon their material expression of right values are opposed by a rhetoric which challenges the legitimacy of resolutions as substantive expressions of justice, seeing them instead as expressions of formal voting arrangements or power. Even those supporting the binding force of resolutions in these terms consequently rely simultaneously upon a consensual element, limiting their advocacy to generally or nearly unanimously adopted resolutions. The problem of the dissenter remains. See Sohn, *The Development of the Character of the United Nations*, in *THE PRESENT STATE OF INTERNATIONAL LAW AND OTHER ESSAYS* 39, 50 (M. Bos. ed. 1973) (noting that when an interpretation of the Charter is

It would not be possible to argue both that General Assembly resolutions are binding as reflections of a passing consensus and that the delegates lacked capacity to consent. Likewise, it would not be possible to argue both that the apparent lack of consent did not matter (because the resolutions were just) and that the undesirable redistributive consequences had to be accepted because the resolutions were expressions of consent. The incompatibility of these rhetorical strategies can most clearly be seen in attempts to argue United Nations resolutions into the box of international custom. If custom is a matter of consent, resolutions do not fit because the practice of the very states who voted for them indicates that consent was not given. If custom is valid because it embodies the value and justice of tradition, then the United Nations resolutions are too instant. They cannot, however, be *both* too instant to be traditional and too implied to be consensual.⁶⁶

The difficulty posed by this tension within argument about a single potential source of law might be handled in a number of ways. We might imagine, for example, that although United Nations resolutions "reflect" tradition, their textuality keeps them somewhat displaced from custom and that although United Nations resolutions are "indicative" of international consensus, their institutional form distinguishes them from treaties. Approached in this way, United Nations resolutions occupy a sort of free space between consent and justice—grounded in both, if in a somewhat ambiguous fashion. A mediating rhetorical strategy of this sort has obvious advantages, but it is quite unstable, for those sceptical about the binding authority of United Nations resolutions can attack it from either direction.

A much more common response to the unstable incompatibility of

not generally accepted it is without binding force); Conforti, *Le rôle de l'accord dans le système nations unies*, 142 RECUEIL DES COURS 203, 253 (1974) (objecter not bound despite justice of resolution); D'Amato, *On Consensus*, 8 CAN. Y.B. INT'L L. 104, 121-22 (1970) (remarking that a resolution does not bind a dissenting state merely because there is a declaration of consensus).

55. Most treatise writers feel obliged to take a stand on the binding nature of United Nations resolutions. Efforts at organizing this burgeoning literature have attempted to develop sophisticated methods of differentiating the positions and developing some theory which could unite a fairly wide range of them. No one has focused on the deeper structure of these various argumentative positions. See Gross, *The United Nations and The Role of Law*, 19 INT'L ORG. 537 (1965). After distinguishing two extreme positions, that resolutions are not binding and that the General Assembly has a "legislative or quasi-legislative function," Gross deploys the rhetoric of consent to demonstrate that resolutions are not binding. *Id.* at 555-58; cf. Arangio-Ruiz, *supra* note 53 (surveying the various idiosyncratic positions which have been developed between the two extremes distinguished by Gross and commenting sceptically upon the elaborate distinctions necessary to maintain "one foot in one spot and the other foot or a hand in another").

the two strands of sources rhetoric is to embrace and submerge them by creating further doctrinal distinctions and hierarchies. This technique is easiest to see by returning to doctrines limiting and defining various traditional sources. At first, doctrines governing entry into and departure from treaty and custom follow the rhetorical lines established by argument differentiating one source from another. Thus, for example, treaty and custom having been initially distinguished as respectively hard and soft, doctrines about entry into treaty seem more preoccupied with consent than doctrines about entry into custom.

Doctrines about the creation of custom and treaty reflect a sense that what needs explaining about a treaty is its hard basis in consent, while what needs explaining about custom is its soft basis in the natural order of the system, or, in recent discourse, the conditions under which consent can be implied. Thus, discussion of the creation of treaties is preoccupied with the conditions under which a state which will be bound by a treaty has indeed consented to its terms. A treaty is binding when properly signed and when ratified by the appropriate internal state organs.⁵⁶ From this perspective, executive competence to conclude treaties depends upon the extent to which, under constitutional law, the executive can speak for the state.⁵⁷ Ratification is viewed as a substantive process for registering consent.⁵⁸ In this view reservations are thought to be freely possible until ratification, although they must be accepted by other signatories.⁵⁹ Duress or *force majeure* mitigate the consent of states.⁶⁰

56. See *supra* notes 5-9.

57. See *supra* notes 5 & 7.

58. See *supra* note 8; see also Virally, *supra* note 1, at 192-93 (justifying treating ratification as final act of consent to provide "breathing space" for subjective national reflection after signature). The formal approach to the subjective consent represented by requiring ratification is often replaced by a direct requirement that the subjective intent be present, however it is shown. See Bolintineanu, *supra* note 8, at 673. "The underlying principle of the provisions concerning the expression of consent to be bound by a treaty is the autonomy of the will of the negotiating states." *Id.* Bolintineanu further adds: "[w]e share, therefore the opinion that the Vienna Convention has eliminated the distinction between formal and informal treaties, both being placed on the same level and thus reflecting the 'decline of form' in international law and the procedural autonomy of the negotiating states." *Id.* at 678.

59. See I. BROWNIE, *supra* note 1, at 605-06 (observing that this hard approach to reservations rests on a "contractual conception of the absolute integrity of the treaty as adopted"). Since the Vienna Convention this view has been softened, at least for multilateral treaties. See *infra* note 65 and accompanying text; Koh, *supra* note 11, at 95-105, 115-16.

60. See *supra* note 10. The Western approach to duress is typically hard, focusing only on the elements of formal consent. Socialist and third world authors significantly soften this approach, focusing upon the "unequal" substance of the treaty as a consequence of political or economic pressures. See *infra* note 66.

The initial discussion of the creation of custom, by contrast, concerns doctrines for measuring the pulse of the international system as a whole.⁶¹ Doctrines about the number and importance of states who must follow a practice for it to be binding upon all states suggest limits on the ability of each state to have consented to its being bound.⁶² Gone are doctrines about ratification, or subjective internal agreement by the states to be bound.

Argument about these doctrines of treaty and custom law displays a more complex weave of hard and soft rhetoric. Each doctrine about the creation of a treaty norm balances hard and soft considerations. Often this balance takes the form of an "objective approach" to measuring the consent of the state. Executive competence is discussed in terms of what is reasonable or just for other states to expect the executive to have the power to commit.⁶³ Signature and ratification act as limits on consent; binding the state even when not intended to bind, and limiting the state's ability to change its mind.⁶⁴ The acceptability of reservations is thought to depend upon their compatibility with the "object and purpose" of the treaty rather than upon their acceptance, and the power to reserve is understood to be limited.⁶⁵ Duress either does not

61. See *supra* notes 12-13.

62. See *supra* note 12.

63. This is easiest to see in modern doctrine as enshrined in Article 46 of the Vienna Convention on the Law of Treaties. See Vienna Convention, *supra* note 5, at art. 46. In fact, the expectations of foreign states seem more strongly protected in modern doctrine than municipal constitutional provisions, since a violation of internal competence provisions is only relevant if the provision concerned is one expressly regarding competence to conclude treaties, is of "fundamental importance" and is "manifestly" violated. The effect of this softening has been to make the subjective internal lack of executive capacity irrelevant at international law.

64. Ratification, the last act of consent, is also the act which gives the treaty a presumptive life of its own, independent of consent. See I. BROWNIE, *supra* note 1, at 604; E. MENZEL & K. IPSEN, *supra* note 25, at 304; see also *supra* note 8.

65. See *supra* note 59. This modern softer approach to reservations was first stressed by the International Court of Justice in the Reservations to Convention on Genocide:

[A] State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention, but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention

1951 I.C.J. 15, 21 (Advisory Opinion of May 28). The Vienna Convention incorporates this approach to the extent that the old free reservation-acceptance approach has become an exception. Vienna Convention, *supra* note 5, at art. 20(4), (5). See I. BROWNIE, *supra* note 1, at 605-06 (the best short survey of reservation doctrine describing this switch). The meaning of "compatible" or of the "object and purpose" of the treaty are often given a hard interpretation even in this soft approach, although this is by no means necessary. See *id.* at 590 (maintaining that "compatibility" might be determined "by a majority rule," on the basis of the "fundamental" nature of some provisions, or that "each state decides for itself whether reservations are incompatible"); see

mitigate when the state to be bound could not have known the relevant consent was forced or mitigates consent out of a sense of unfairness in the result rather than through implying a lack of subjective consent in "unequal" treaties.⁶⁶

Sometimes, this rhetorical balancing proceeds by reinterpreting hard doctrines of treaty creation as expressions of justice rather than consent. Thus, for example, doctrines about consent such as signature and ratification are justified as the embodiment of justice, protecting the ability of the consenting state to bind itself in the interests of the community.⁶⁷ Likewise, the softer doctrines of treaty creation, like the ob-

also Waldock, *supra* note 1, at 65-66 (viewing the "compatibility" doctrine as unsuitable for adoption as the "general criterion for determining the status of a reserving state as a party" because it cannot be objectively defined without violating sovereign autonomy and viewing it instead as a "valuable concept for consideration by both the States formulating reservations and other signatories"). Some "pragmatic" authors promote avoiding these contradictions by adopting a "sensible" approach to achieving "the rule calculated to promote the widest possible acceptance of whatever measure of common agreement can be achieved and expressed." Reports of the Commission, *supra* note 11, at 206.

66. See *supra* note 60. In the third world and socialist view, treaties are invalid if unequal, regardless of the subjective consent of the relevant government, which may, after all, have been suffering from false consciousness. This approach has been rejected by the West, in most cases. See, e.g., A. VERDROSS, *supra* note 1, at 62. For socialist advocacy of this view, see DDR LEHRBUCH, *supra* note 10, at 251; Lukashuk, *The Soviet Union and International Treaties*, [1959] SOVIET Y.B. INT'L L. 44, 45-50; Detter, *The Problem of Unequal Treaties*, 15 INT'L & COMP. L.Q. 1069, 1082-83, 1086 (1966) (citing examples such as agreements "forced" on a state as the price of freedom, perhaps allowing an ex-colonial power to maintain economic control over new states, and concluding: "We submit here that the very contents of a treaty ought to be examined when the question of validity is discussed: the material contents of the instrument ought to be accepted as a separate ground of voidance, irrespective of whether the treaty has been concluded under force or ought to be revised/rescinded according to the principle *rebus sic stantibus*."). For the third world expression of this approach, see M. BEDJAOU, *supra* note 52; Abi-Saab, *The Newly Independent State and the Rules of International Law, An Outline*, 8 HOWARD L.J. 95, 108 (1962); Sinha, *Perspective of the Newly Independent States on the Binding Quality of International Law*, 14 INT'L & COMP. L.Q. 121 (1965).

The newly independent States believe that political and economic privileges have been extorted by the colonial powers in the past from the peoples of Asia and Africa. On becoming independent, these States increasingly rely on the argument that "unequal" or "inequitable" treaties thus extracted, and treaties imposed by duress, are invalid *ab initio*. Accordingly, they declare that it is the right of the State which was obliged to enter such treaties to terminate them by denunciation.

Rebus sic stantibus is frequently resorted to by the newly independent states in order to terminate their inherited burdens. The doctrine is invoked by them not only on the basis of justice but also because a treaty fails to accord with the present position of power in the world.

Id. at 123-24.

67. See Kearney & Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495 (1970) (the treaty as "the mechanism without which international intercourse could not exist, much less function . . . the cement that holds the world community together"); M.

jective view of consent, are seen as ways of protecting the subjective ability of the other state to know the terms upon which it binds itself.⁶⁸

Similarly, doctrines about the creation of custom combine hard and soft approaches. Often this blending is visible in the subjective, consensual element in each doctrine. Custom is created not merely by habitual repetition, for example, but requires also *opinio juris*: an intent to be bound, or a recognition that compliance with the habitual norm resulted from a sense that it was binding.⁶⁹ In this approach, doctrines

MCDUGAL & W. REISMAN, *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE* 1119 (1979) (emphasizing the community-serving functions of treaties).

The special importance of agreements among the strategies of states resides in the fact that, in the absence of centralized legislative institutions in the world arena, agreements offer one of the closest approaches to the considered and deliberate prescription of future policies which is the characteristic function of constitutive legislative institutions in municipal arenas.

Id.; see also I H. LAUTERPACHT, *supra* note 25, at 59.

68. See A. VERDROSS & B. SIMMA, *supra* note 4, at 391-92:

Der (subjektiven) Konsenstheorie wird die [objektive] Vertrauensstheorie gegenübergestellt, die nicht danach fragt, welcher Regelung die Vertragsparteien zugestimmt haben, sondern was sie vernünftigerweise voneinander erwarten können, wenn sie bestimmte Erklärungen abgeben oder ein bestimmtes Verhalten beobachtet haben. An die Stelle des Konsenses tritt somit die rationale Auslegung des Textes durch den Schiedsrichter oder Richter.

Id. This approach is often visible in discussions of interpretation. See Favre, *L'interprétation objectiviste des traités internationaux*, 17 SCHWEIZER JAHRBUCH FÜR INTERNATIONALES RECHT 75 (1960):

Donner une interprétation raisonnable d'un texte, c'est, de la part du juge, introduire un élément nouveau, objectif, dans l'accord des parties. C'est opérer la balance des intérêts en présence . . . c'est arrêter, à la place des parties, ce qu'un homme juste et "raisonnable" aurait fait s'il avait eu à rédiger l'accord.

Id. at 82; see also Falk, *On Treaty Interpretation and the New Haven Approach: Achievements and Prospects*, 8 VA. J. INT'L L. 323 (1968); Gottlieb, *The Conceptual World of the Yale School of International Law*, 21 WORLD POL. 108 (1968).

69. On *opinio juris* generally, see *supra* note 41. Although most commentators now agree that a subjective element is necessary for the consensual creation of custom, it is unclear how proof of that element should be provided. This discourse reposes the opposition of hard and soft tendencies. *Opinio juris* was conceived as the subjective, motivational, or intentional element of custom which, along with objective practice could create custom. It seemed required to distinguish "mere habit" or "courtesy" from law. See I. BROWNIE, *supra* note 1, at 4-8 (explaining that states differentiate between obligation and use). But *opinio juris* must be inferred from practice as well. This objective approach to *opinio juris* (itself the subjective element in the hard, consensual approach to custom, a soft source) was expressed by the International Court of Justice in the North Sea Continental Shelf Case: "State practice should have been both extensive and virtually uniform in the sense of the provision invoked—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved." North Sea Continental Shelf Cases (Ger. v. Den.; Ger. v. Neth.), 1969 I.C.J. 3, 43 (Judgment of Feb. 20). This approach is made more explicit by Judge Lachs in dissent: "In sum, the general practice of States should be recognized as *prima facie* evidence that it is accepted as law. Such evidence may, of course, be controverted—even on the test of practice itself, it shows much uncertainty and contradiction." *Id.* at 231-32; see also Sørensen, *Principes de droit international public*, 101

about frequency and the importance of those who must participate in custom building emphasize the ability to register consent. Thus, relatively more states will need to participate, or those who will be bound will need to participate more directly.⁷⁰ In this view, doctrine should downplay the importance of the states who must consent in favor of a more universal approach, or should treat "important" as meaning those affected by the norm most adversely rather than those whose impor-

RECUEIL DES COURS I (1960). Various attempts have been made to determine what practice is an objective measure of this intent. The most successful views blend hard and soft tendencies most elegantly. Consider, for example, the view that *opinio juris* is an objective warning protecting the power freely to consent, which can therefore only be satisfied by practice following an articulated norm:

The articulation of a rule of international law . . . in advance of or concurrently with a positive act (or omission) of a State gives a State notice that its action or decision will have legal implications. In other words, given such notice, statesmen will be able freely to decide whether or not to pursue various policies, knowing that their acts may create or modify international law. . . . [T]he absence of prior notification that acts or abstentions have legal consequences is an effective barrier to the extrapolation of legal norms from patterns of conduct that are noticed *ex post facto*.

A. D'AMATO, *supra* note 1, at 75. Akehurst expresses the subjective view of *opinio juris* clearly: "Practice creates a rule of customary law that particular conduct is obligatory, if it is accompanied by statements on the part of States that such conduct is obligatory," and distinguishes his approaches subjectively: "The traditional view implies, even if it does not state expressly, that *opinio juris* consists of the genuine beliefs of States. It is submitted, however, that a statement by a State about the content of customary law should be taken as *opinio juris* even if the State does not believe in the truth of its statement." Akehurst, *supra* note 1, at 36-37 (footnote omitted). In practice, however, these elements can hardly be distinguished or combined. Either there is a continuous conduct which is evidence of a legal duty which will finally be regarded as sufficient, or the conduct will consist of expressions of *opinio juris* unaccompanied by "real actions." Kelsen suggested that the *opinio juris* requirement served no other purpose than to conceal the role played by the judge in the creation of customary law. See Kelsen, *Theorie du droit international coutumier*, *supra* note 41, at 266.

70. This heightened sensitivity to the consensual nature of customary law in doctrines about creation of custom is expressed in Baxter, *supra* note 12, at 44; Akehurst, *supra* note 1, at 16.

A rule of customary law is established if it is accepted by the international community, and . . . the number of States taking part in a practice is a more important criterion of acceptance than the number of acts of which the practice is composed, and a much more important criterion than the duration of the practice.

Id.; see also Virally, *supra* note 1, at 135: "The obligatory character (of custom) follows from the general consent on the part of states The qualities of continuity and generality, requisite in order that an international practice may give rise to a custom, reflect the presence of this consent." *Id.* The number of states necessary to create custom is less when there is no conflicting practice because general consent is more likely in such circumstances and greater when a previous rule of custom is to be overruled. See Akehurst, *supra* note 1, at 18-19; cf. Fisheries Jurisdiction Case (U.K. v. Nor.), 1951 I.C.J. 116, 151-52 (Judgment of Dec. 18) (sep. op. Alvarez, J.); S.S. "Lotus" Case (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 34 (Judgment of Sept. 7) (diss. op. Loder, J.).

tance can be measured in terms of some external standard.⁷¹

Sometimes, hard rhetoric in doctrines about the creation of custom recharacterizes soft doctrinal positions as ways of emphasizing consent rather than justice. Thus, for example, the physical requirement of habitual compliance will be seen as a way of ensuring subjective consent, on the grounds that actions speak louder than words.⁷² The soft doctrine that universal consent is not necessary will be seen as a way of permitting states to develop their subjective intentions without being hindered by recalcitrant or uninterested states.⁷³ The soft sense that "important" states who understand the system should surely consent to ensure wise rules is understood to reflect not the wisdom of those who

71. Most writers follow the I.C.J. on this point: "State practice, including that of States whose interests are specially affected should have been both extensive and virtually uniform." *North Sea Continental Shelf Cases* (W. Ger. v. Den., W. Ger. v. Neth.), 1969 I.C.J. 3, 43 (Judgment of Feb. 20). See, e.g., A. VERDROSS & B. SIMMA, *supra* note 4, at 281; Baxter, *supra* note 1, at 66 ("The practice of those States particularly affected by the treaty must count heavily"), cf. Akehurst, *supra* note 1, at 22 ("Suggestions are often made that the practice of some states is more important than the practice of other states . . . the author has already attacked such suggestions. . .").

72. See *supra* note 69; see also A. D'AMATO, *supra* note 1, at 88 ("A claim is not an act . . . [C]laims . . . , although they may articulate a legal norm [i.e., they may be evidence of *opinio juris*] cannot constitute the material component of custom"); *Anglo-Norwegian Fisheries Case* (U.K. v. Nor.), 1951 I.C.J. 116, 191 (Judgment of Dec. 18):

Customary international law is the generalization of the practice of States. This cannot be established by citing cases where coastal States have made extensive claims, but have not maintained their claims by the actual assertion of sovereignty over trespassing foreign ships. . . .

The only convincing evidence of State practice is to be found in seizures, where the coastal State asserts its sovereignty over the waters in question by arresting a foreign ship and by maintaining its position in the course of diplomatic negotiation and international arbitration.

Id. at 191 (diss. op. Read, J.).

73. See 1 H. LAUTERPACHT, *supra* note 25, at 62 ("It is clear that if absolute and universal uniformity were to be required, only a very few rules could rank as general customary rules of international law."). The persistent objector doctrine makes the creation of a new customary rule possible even against outspoken and consistent opposition of a state. This doctrine, developed by the *Anglo-Norwegian Fisheries Case* (U.K. v. Nor.), 1951 I.C.J. 116 (Judgment of Dec. 18), is adopted by most writers. See, e.g., 1 H. LAUTERPACHT, *supra* note 25, at 66; H. THIRLWAY, *supra* note 24, at 110; Virally, *supra* note 1, at 137. cf. A. D'AMATO, *supra* note 1, at 261 (applying the doctrine to "special," but not "general" custom). Although one could say that the consensual nature of custom is jeopardized by this doctrine, most defenders of "persistent objector doctrine" argue that it protects the ability of a large number of states to establish norms consensually and not be frustrated by a single state. See 1 H. LAUTERPACHT, *supra* note 25, at 66.

The fact that universal consent is not required for the creation of custom and that general consent is sufficient, is not a factor pointing to the irrelevance of consent in the creation of custom; it is merely a factor pointing to the irrelevance of the consent of every single state.

Id.

have struggled to dominance, but the greater burden not to counter the subjective consent of the important states.⁷⁴ Likewise, the hard positions emphasizing consent of the specially affected can be reimagined so as to enshrine the just notion that the specially affected are also most likely to produce good norms.⁷⁵

A similar rhetorical pattern structures doctrines about the extent of the force of treaty and customary international law. In the first instance, doctrines about the ability of treaties to bind municipally or to bind third and successor states seem preoccupied with measuring the extent of consent. Treaties are binding internally if enacted as municipal legislation,⁷⁶ if so provided by internal constitutional law,⁷⁷ or if "self-executing," a characterization that depends primarily upon the intent of the parties to create a self-executing document.⁷⁸ Treaties bind third parties and successor states if they accept the obligation,⁷⁹ and give third parties rights if such was the intent of the signatories.⁸⁰

74. See Akehurst, *supra* note 1, at 23 (it is harder to overlook the state whose practice is more frequent or famous than that of other states); A. D'AMATO, *supra* note 1, at 96-97 (states with highly sophisticated international legal practice are more likely to be given more weight in developing customary consensus).

75. See, e.g., North Sea Continental Shelf Cases (W. Ger. v. Den., W. Ger. v. Neth.), 1969 I.C.J. 3, 126 (Judgment of Feb. 20) (diss. op. Lachs, J.) (emphasizing the participation in the Continental Shelf Convention of interested states "who are actively engaged in the exploration of continental shelves").

76. This is the approach of the United Kingdom and the Scandinavian countries. See I. BROWNIE, *supra* note 1, at 50 (describing techniques of statutory enactment); Waldock, *supra* note 1, at 131 (describing practice of British courts which "refuse to apply treaties modifying legal rights or obligations within domestic law unless Parliament has first enacted a law expressly incorporating the treaty into domestic law").

77. A number of states adhere to the principle that treaties made in accordance with their respective constitutions bind the courts without any specific act of incorporation. This practice is described by I. BROWNIE, *supra* note 1, at 52; Mosler, *Application du droit international public par les tribunaux nationaux*, 91 RECUEIL DES COURS 625 (1957); Waldock, *supra* note 1, at 130.

78. This is the United States approach. See *Fujii v. California*, 38 Cal. 2d 718, 721, 242 P.2d 617, 620 (1952) ("In determining whether a treaty is self-executing courts look to the intent of the signatory parties as manifested by the language of the instrument"). For a survey of United States practice, see J. RUSSOTTO, *L'APPLICATION DES TRAITÉS SELF-EXECUTING EN DROIT AMÉRICAIN* (1969). For a comprehensive and revealing analysis of the hard and soft strands of argument in the discourse about self-executing treaties, see N. Grabar, *Limit on the Self-Execution of Treaties in United States Doctrine* (1982) (unpublished manuscript, on file Harvard Law School Library).

79. See *supra* notes 21-22. This is codified in Article 35 of the Vienna Convention on the Law of Treaties which allows third parties to be bound if they "expressly accept that obligation in writing." Vienna Convention, *supra* note 5, at art. 35. In practice, separate "devolution" agreements generally govern the transfer of obligations to successor or third parties.

80. See *supra* notes 21-22. This doctrine was formulated by the Permanent Court of International Justice in the Free Zones of Upper Savoy and the District of Gex Cases (Fr. v. Switz.), 1932 P.C.I.J. (ser. A/B), No. 46, at 147 (Judgment of June 7) ("It cannot be lightly presumed that stipulations favorable to a third State have been

Each of these doctrines, however, is also associable with softer notions of justice. Sometimes this takes the form of an objective approach to consent. Intent to be self-executing can be implied from the treaty itself—perhaps from its objective clarity.⁸¹ Successors are bound if it is reasonable to expect them to have intended to be bound—if they have not abrogated or denounced the treaty.⁸² Moreover, these characteristically hard positions are simply reinterpreted as expressions of justice rather than consent. For example, treaties are thought to be self-executing when that appears required by the nature of the provision regardless of any implication about consent.⁸³ Successors are not bound by unequal treaties while successors are bound and third parties receive rights when it would be unjust to allow otherwise.⁸⁴ These soft positions can also be reinterpreted as methods of protecting the subjective intentions of the other contracting parties to know to what it is they have agreed.

In the first instance, by contrast, doctrines about the extent of the force of custom seem governed by custom's ability to register justice or the nature and requirements of the international system. Nonparticipants in the process of custom formation such as new states and those outside the region in which the custom is developed are bound if the rule seems justly to suit their situation as well, or if it is a wise norm or one associated with other basic norms defining the nature of the system like "reciprocity" or "sovereignty" or "equity." Successor states and governments are bound because they partake in the international system whose nature customary norms express.⁸⁵

adopted with the object of creating an actual right in its favour. There is, however, nothing to prevent the will of sovereign States from having this object and this effect."). See Jiménez de Aréchaga, *Treaty Stipulations in Favor of Third States*, 50 AM. J. INT'L L. 338 (1956). The classic examples of such treaties are the United Nations Charter (particularly Article 35(2) permitting non-members to call upon the Security Council in some cases), and treaties regulating canals or international straits. See I. C. ROUSSEAU, *supra* note 6, at 187-88.

81. See *supra* note 78.

82. See *supra* notes 12 and 14. This is the approach of the classic neo-universal succession theory which implies consent by successor states and devolves all treaty obligations upon them *ipso jure* unless the new state opts out by denunciation should the treaty seem incompatible with its basic interests. See C. JENKS, *supra* note 22, at 94; 2 D. O'CONNELL, *supra* note 22, at 23-24.

83. See *supra* note 78; I. BROWNLIE, *supra* note 1, at 53 ("the term [self-executing] is also used to describe the character of the rules themselves"); see also *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (developing objective approach to self-execution).

84. See sources quoted *supra* note 23.

85. Although most classic commentators argue against the "unequal treaty" exception on the basis of hard arguments (see *supra* note 22), they base their opposition to the *tabula rasa* theory of state succession in soft arguments. See Waldock, *supra* note

Nevertheless, discourse about these doctrines is also animated by a harder emphasis on consent. Sometimes this rhetorical change in emphasis is expressed by countervailing doctrines. Successor states, new states and extra-regional states should only be bound, in this version, to customs which they accept or helped (perhaps as colonies) to develop.⁶⁶ The soft doctrines, however, are also interpreted to express consent rather than justice. New states should be bound by custom because they consent to it by participating in the international system to whose nature they consent and from which, in exchange for their consent to consensual norms, they have received the "advantages" of statehood.⁶⁷ Doctrines which have been rhetorically characterized as consensual are also often reinterpreted as expressions of a concern for objectivity and justice. For example, successor states and ex-colonies should only be

1, at 52 (emphasizing reciprocity):

[T]he fundamental objection to it [the *tabula rasa* approach] is that it really denies the existence of a general international legal order and the new States have at least as much to lose as anyone else from a denial of the validity of existing international law. If consent is so far the basis of customary law that a new State may reject any customary rule it chooses, how can it be said that an older State is not free, vis-à-vis the new State, to reject any customary rule that it may choose. Either there is an international legal order or there is not.

Id.; see also Virally, *supra* note 1, at 138 (emphasizing equity):

This is beyond dispute: nothing else would be acceptable either to the new state concerned or to the other states. As a result, the new state becomes bound by all those rules of international customary law which are applicable indifferently to all independent states. By its entry into the international community the new State acquires the status of an independent state, with all the rights and obligations which are attached to that Status by general international law.

Id.; cf. Sørensen, *Principes de droit international public*, 101 RECUEIL DES COURS 1, 45-46 (emphasizing basic norms of international system):

A l'encontre de cette opinion on pourrait opposer l'argument suivant. D'après la doctrine classique, les règles coutumières ne se limitent pas à imposer des obligations aux états nouveaux. Elles créent également des droits en leur faveur et à la charge des états anciens, par exemple le respect de leur souveraineté territoriale.

Id.

86. See *supra* note 23. This is the position of voluntarist socialist doctrine. See G. TUNKIN, *supra* note 23, at 129.

87. See *supra* note 23; see also G. TUNKIN, *supra* note 23, at 179. "If however, a new State enters without reservations into official relations with other countries, this signifies that it accepts the specific complex of principles and norms of prevailing international law as being the basic principles of relations among states." *Id.*; see also DDR LEHRBUCH, *supra* note 10, at 264 (emphasizing both hard and soft bases for implication):

Da [die neuen Staaten] diese Beziehungen zu den schon bestehenden Staaten aufnehmen und entwickeln wollen, ergibt sich daraus, dass es ihren Interessen und ihrem Willen entsprechen wird, solche Normen des Völkergewohnheitsrechts, die für die Entwicklung derartiger Beziehungen wesentlich und international weitgehend anerkannt sind, als auch für sich bindend anzusehen . . . sie stimmen damit diesen Normen zu.

Id. (emphasis added).

bound by those customs which they helped to create because this is the only way to ensure that the system of norms reflects the interests of states which it binds, itself a condition of justice.⁸⁸

Taken as a group, doctrines about treaties and custom also blend hard and soft in a repetitive fashion. Just as treaty and custom seem differentially hard and soft, doctrines limiting the extent of the force of treaty or customary law have a similar but inverse structure. If doctrines of treaty creation seem consensual (ratification, for example), they are tempered by exceptions which are based in justice (like *rebus sic stantibus*). If doctrines of custom creation seem based on a conception of the good, they are tempered by doctrines providing for consensual opting out (persistent opposer, etc.). These subordinate doctrines, moreover, are inferior "exceptions" to doctrines about the creation of treaty or custom.

The presence of these two streams in treaty law is easy to uncover. Throughout the Vienna Convention on the Law of Treaties consent vies with justice and subjective consent vies with objective consent for supremacy as the source of obligation to abide by treaty law.⁸⁹ Some-

88. See *supra* notes 22-24. These considerations are blended by M. BEDJAOUI, *supra* note 52. Cf. Anand, *Role of the "New" Asian-African Countries in the Present International Legal Order*, 56 AM. J. INT'L L. 383, 388 (1962):

International law has in fact come to be accepted by these countries except where it is still found to support past colonial rights. . . . There is never any plea for its over-all rejection. The "new" countries have come to accept international law as such and they always plead their cases according to its rules. They in fact claim to be "scrupulous" adherents to it. They believe it acts as a protection for them because they are the weaker members of international society.

Id.

89. The Vienna Convention, *supra* note 5, contains four major substantive sections, which consider treaty formation (conclusion and entry into force), treaty compliance (application, observation, and interpretation), treaty modification or amendment, and treaty lapse (invalidity, termination, and suspension). In the first instance, it seems that the first two parts are in some tension with the latter pair. The first deal with the binding force of treaties, the latter with derogations from that force. Moreover, the first two are primarily cast in terms of consent, the latter in terms of justice. Thus, the first contain primarily doctrines about registering and understanding consent, while doctrines of duress or changed circumstances form the main body of the latter two sections. This potential tension is avoided throughout the document by adoption of what might be thought of as a principle-exception framework. Consent operates as the *primary* source of obligation until it is trumped by an exception in situations of injustice. The treatment of consent as *primary* is reinforced by the characterization of the justice component as an *exception*. Yet the very nature of an exception, of course, is that it overrules the principle, and is in that sense *primary*. This framework is repeated within each of the sections, a repetition which reduces sensitivity to the polarity of principle and exception. Thus, for example, the fundamental rule of consent is coupled with a "good faith" requirement and the section about treaty formation is littered with the unresolved invocations of an objective approach to consent. See Vienna Convention, *supra* note 5, at art. 26. This objective approach, coupled with the good faith requirement, allows justification of the consensual aspects of the first two major sections in

times these two strands are kept apart. Modern hornbooks consider separately the formal *pacta sunt servanda* rule and the obligation of good faith governing treaty obligations.⁹⁰ Sometimes they are blended together. Article 26 of the Vienna Convention incorporates both: "every treaty in force is binding upon the parties to it and must be performed by them in good faith."⁹¹ Throughout the Convention, absolute duty is coupled with a good faith lubricant, and the formal triggers for duty or release from duty to perform are paired with an exception for unjust results, or implied contravention of intended results.

Emphasis on the *pacta sunt servanda* rule is often supported by arguments about consent, while good faith obligations and exceptions for duress or *rebus sic stantibus* are usually associated with the view that treaties are binding as expressions of justice.⁹² These associations are also familiar when reversed. The *pacta sunt servanda* rule seems a con-

terms of social justice. In part III, justice concerns are fundamental, yet are introduced as exceptions, or limits on consent. Thus, for example, Article 31 reads: "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms . . . in the light of [the treaty's] object and purpose," thus introducing nonconsensual elements as *additions* to the basic intentional basis which are understood to supplement or explicate the subjective intent. *Id.* at art. 31. Thus, those soft elements which are introduced in this section of the treaty are cast in terms of consent, just as the consensual elements of the earlier sections were cast in terms of social justice. Likewise, the basic provision for *jus cogens* (Article 53) which sets limits on the scope of the freedom to make treaties is stated as an *exception* to general freedom and cast in terms of consent, defining *jus cogens* thus: "for the purposes of the present Convention, a preemptory norm of general international law is a norm *accepted and recognized* by the international community of States as a whole. . . ." *Id.* at art. 53 (emphasis added).

90. See, e.g., 1 C. ROUSSEAU, *supra* note 6, at 53; W. HOLDER & G. BRENNAN, *THE INTERNATIONAL LEGAL SYSTEM* (1972); M. McDUGAL & W. REISMAN, *supra* note 67.

91. Vienna Convention, *supra* note 5, at art. 26.

92. See *supra* note 89; *infra* note 94; see also I. BROWNIE, *supra* note 1, at 595, 599; E. MENZEL & K. IPSEN, *supra* note 25, at 329-30. The principle of good faith is connected to the idea of justice in the jurisprudence of the Permanent Court of International Justice and International Court of Justice. Waldock observes that the "good faith" idea has been regarded as a "general principle of law" in the sense of Article 38 of the Statute of the Court. Waldock, *supra* note 1, at 58-59; see *Certain German Interests in Polish Upper Silesia* (Ger. v. Pol.), 1926 P.C.I.J. (ser. A) No. 7, at 30, 37-39 (Judgment of May 25); *Free Zones of Upper Savoy and the District of Gex* (Second Phase) (Fr. v. Switz.), 1930 P.C.I.J. (ser. A) No. 24, at 12 (Order of Dec. 6); *Conditions of Admission of a State to Membership in the United Nations*, 1948 I.C.J. 57, 79-80 (Advisory Opinion of May 28). When expressed in this way, the two principles seem at odds with one another, a contradiction which most commentators seem to acknowledge with such observations as "[t]reaties are inviolable, but not forever" (International Law Commission, Summary Records of the Fifteenth Session, 694th meeting, remarks by Anado, [1963] 1 Y.B. INT'L L. COMM'N 135, 142) or "[t]he principle of a respect for treaty obligations is one of the pillars of international law. . . . At the same time, the *pacta sunt servanda* rule cannot be fetishized" (Haraszti, *Treaties and Fundamental Change of Circumstances*, 146 RECUEIL DES COURS 1, 59 (1975)).

dition of justice,⁹³ while the good faith or *rebus sic stantibus* rules seem restatements of the consensual force of norms.⁹⁴

The interesting point, however, is not this duality, apparent throughout the doctrines of both treaty and custom, but the various ways in which this polarity can be rhetorically managed. Sometimes this is achieved by reference to an interpretive method which "complements" the rhetorical emphasis of the doctrine in question. Arguments for an intent-based interpretation of soft norms and a justice-based interpretation of hard doctrines have been analyzed elsewhere.⁹⁵ Despite the appearance of resolution which such an approach gives these doctrines, however, once an intent-based approach is chosen, it remains difficult

93. See *supra* note 29; see also A. VERDROSS & B. SIMMA, *supra* note 4, at 295-96.

94. The treatment of good faith or *rebus sic stantibus* as "implied" terms in the treaty is standard in most texts, just as it is standard to justify *pacta sunt servanda* as a matter of social justice. See J. MÜLLER, *supra* note 17 (*rebus sic stantibus* is an implied term in all treaties); see also C. FENWICK, INTERNATIONAL LAW 454 (4th ed. 1965). Fenwick posits that all international contracts are entered into under certain implied conditions, which accompany the express conditions of the treaty and are equally part of the "valuable consideration" which forms the essence of the contract. This view is criticized strongly by the International Law Commission as "a fiction by which it was attempted to reconcile the dissolution of treaties in the consequence of a fundamental change of circumstance with the rule *pacta sunt servanda*." Reports of the Commission, *supra* note 11, at 258. Many commentators are now forthright about this contradiction. See C. FENWICK, *supra* at 458.

[I]nternational law must continue to witness the struggle of two conflicting principles: on the one hand the necessity of stability in international relations and on the other hand the demand for such changes in the legal situation created by past treaties as will meet the requirements of present justice. . . . [I]n international relations a way must be found to make obligation and justice coincide, with perhaps a margin on the side of obligation in the interest of that law and order which is the primary condition of justice.

Id. Many continue to blend the two strands by treating them as matters of "interpretation" which must be carried out so as to reflect both. See, e.g., Lissitzyn, *Treaties and Changed Circumstances*, 61 AM. J. INT'L. L. 895, 896 (1967).

Thus viewed, the problem of the effect of a change of circumstances on treaty relationships becomes in principle one of interpretation—of establishing the shared intentions and expectations of the parties. This approach is consistent with . . . the principle of *pacta sunt servanda* A treaty is not breached if it is not applied in circumstances in which the parties did not intend or expect it to be applied. Indeed, to expect performance contrary to shared expectations not only could be regarded as inconsistent with good faith, but could also produce resentment which would undermine rather than promote stability.

Id. For a discussion on the history of the clause, see Haraszti, *supra* note 92, at 46 *passim*.

95. See *supra* note 94; see also Gross, *Treaty Interpretation: The Proper Role of an Impartial Tribunal*, AM. SOC'Y INT'L. L. PROC. 108 (1969); Larson, *Between Scylla and Charybdis in Treaty Interpretation*, 63 AM. J. INT'L. L. 108 (1969) (contrasting the extreme positions of Falk, *On Treaty Interpretation and the New Haven Approach: Achievements and Prospects*, 8 VA. J. INT'L L. 323 (1968) and Metzger, *Treaty Interpretation and the United States-Italy Air Transport Arbitration*, 61 AM. J. INT'L. L. 1007 (1967)).

to stabilize whether one should concentrate upon formal expressions of intent or supply what must have been the parties' intention, or what would have been a reasonable state's intention under the circumstances had the problem been foreseen.

I am more interested in rhetorical strategies of closure which rely upon the relationships among doctrinal strands and characterizations. For these strategies, the important thing to understand about these various doctrinal discussions is not only the recurring applicability of hard arguments in soft contexts and *vice versa*. Far more crucial is the potential these sub-doctrines offer, because they are differentiated and defined by the same tendencies which differentiated custom and treaty, to support the sense that the overall doctrinal structure has this tension under control. For example, each doctrine about the creation of treaty or custom can be set off against an exception which expresses the opposite tendency. By setting the rule against the exception, tempering it by its rhetorical opposite, sources argument can appear to have taken both hard and soft considerations "into account" and thereby reach closure in particular cases. This combination of differentiation and hierarchically organized recharacterization through proliferation suits doctrines about treaty and custom to rhetorical strategies which will sustain the hard and soft images of international law as a whole.

To develop argumentative strategies for embracing and containing these tensions, I explore discourse about four doctrines: one creating binding obligations and one ending obligation for both treaty and custom. Treaty obligations seem consensually created. Dropping a treaty obligation before its fulfillment seems appropriate only when some extraconsensual standard provides an alternative to the harsh fulfillment of the original intent. Of course, it would also be possible to examine *pacta sunt servanda* from the perspective of its "good faith" softener and think of *rebus sic stantibus* as an implied term of the original treaty. To investigate the rhetorical possibilities opened up by these associations, I consider a series of doctrinal arguments about "unilateral declarations" and *rebus sic stantibus*. I then consider arguments about custom creation and termination which utilize similar, if often opposing, rhetorical strategies.

A. THE CASE OF UNILATERAL DECLARATIONS

Argument about the binding force of unilateral declarations at international law takes place in what might be thought of as the most consensual corner of sources discourse. As such it seems exemplary of treaty doctrine as a whole, and the techniques for managing the rela-

tionship between hard and soft strands of sources rhetoric seem particularly vivid. The relationship between unilateral declarations and treaties is difficult to grasp. From one perspective, all legally binding acts are unilateral, to the extent that bilateral and multilateral acts are composed of separately binding unilateral promises.⁹⁶ From another perspective, however, even acts which seem unilaterally binding are bilateral in the sense that they can only be binding if another party can call upon the obligation.⁹⁷ These two visions of the distinctiveness of unilateral acts seem differentially hard and soft. Those who imagine unilateral acts to have a separate legal significance might seem to rely upon a consent-based approach to legal obligations. In this view, even multilateral treaties are composed of individual obligations, binding because of the consent of the state agreeing to be bound. Analysts characterize multilateral treaties as unilateral obligations by relying upon this consensual element. In this extreme hard view, other systemic or relational considerations distinguishing multilateral arrangements would not affect to the authoritative nature of the obligation. Similarly, those who emphasize the systemic or bilateral nature of unilateral acts might rely upon a soft vision of obligation. States might seem bound, even by a unilateral act, because of the expectations which it has raised in others.

These associations might be reversed. We might focus on the unilateral nature of all acts in an objective way, seeing their binding character in communal acceptance. Alternatively, we might suppose that it is the unilateral components of multilateral acts which bind because these reflect the systemic conditions applicable to each sovereign. An approach emphasizing the multilateral nature of unilateral acts, more-

96. See Rubin, *The International Effects of Unilateral Declarations*, 71 AM. J. INT'L L. 1, 8 (1977).

97. See, e.g., Franck, *World Made Law: The Decision of the ICJ in the Nuclear Test Cases*, 69 AM. J. INT'L L. 612, 617 (1975):

"[C]ommon lawyers, reared in the culture of "consideration," have difficulty accepting as truly binding a unilateral commitment wholly devoid of anything like a grain of mutuality. . . .

At common law, reliance is a necessary ingredient: acts or abstentions based on the assumptions that the unilateral promisor will keep his word."

Id.; see also E. SUI, *supra* note 1, at 111: "La détection de ces promesses purement unilatérales exige un effort de recherche minutieux afin de déterminer si, derrière la façade de l'unilatéralité formelle d'une déclaration de volonté, ne se cache pas une bilatéralité de fond." *Id.* American scholars in particular have little enthusiasm for the idea, advanced by Suy, Reuter, Rousseau, and other French and Italian writers that some unilateral acts alone are binding. In modern texts, the term "unilateral acts" does not appear in the index. See, e.g., B. WESTON, R. FALK & A. D'AMATO, *INTERNATIONAL LAW AND WORLD ORDER*; L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *INTERNATIONAL LAW: CASES AND MATERIALS* (1980).

over, might rely on hard arguments. An objective approach to unilateral declarations might seem appropriate because it protects the subjective will of the other states. Consequently, even in what might seem the hardest corner of sources doctrine we find both hard and soft arguments available.

Although it has often been recognized that unilateral acts and declarations sometimes create international legal obligations, it is clear that not all such declarations do so.⁹⁸ A number of criteria have been suggested for distinguishing the binding from the nonbinding unilateral declaration. Some rely strictly upon the declarant's intention to be bound, and some supplement their reliance upon intention with some more systemic factor, such as reliance, raised expectations, or the existence of another state which could reasonably have had its expectations raised and thus has standing to hold the declarant to its word.⁹⁹ The

98. Pflüger was one of the first to dedicate a treatise to the subject of unilateral acts and declarations. See E. PFLÜGER, *DIE EINSEITIGEN RECHTSGESCHÄFTE IN VÖLKERRECHT* (1936). An important monograph is E. SUY, *supra* note 1. See also sources cited *supra* note 97. Rubin, *supra* note 96, at 28 questions: "Whence came the Court's conviction that such unilateral declarations are binding?" and concludes that the pronouncement of the Court appears to have been *ultra vires* because it comes:

Not from any treaty . . . , thus not from Article 38(1)(a) of the Statute of the Court; not from any known international custom as evidence of a practice accepted as law, thus not from Article 38(1)(b) of the Statute; not from any principle accepted by Anglo-American courts or commentators or from "any general principles of law," thus not from Article 38(1)(c) of the Statute; and indeed, not from the unequivocal writings of any publicists or judicial decisions that have focused squarely on the question, thus not from Article 38(1)(d) of the Statute.

Id. (footnote omitted).

99. Several theories have been advanced to justify the binding force of unilateral declarations. Some rely upon "good faith" or principles of community justice; others upon the "intention" of the declarant or the reasonable intention of the listener; and still others on some formulaic blend of the two like "*pacta sunt servanda*." For the first type, see Schwarzenberger, *The Fundamental Principles of International Law*, 87 RECUEIL DES COURS 195, 312 (1955):

If a subject of international law chooses to take up a position in relation to a matter which is legally relevant and communicates this intent to others it is bound within such limits to accept the legal implications of such a unilateral act. . . . No doubt, in the formative stage of this rule, the obnoxiousness of self-contradictory behavior and *venire contra factum proprium* assisted in creating the *opinio iuris sive necessitatis* which marks the border-line between international comity and international customary law.

Id.; see also Jacqué, *A Propos de la Promesse Unilatérale*, in *MÉLANGES À PAUL REUTER* 326 (1981). For texts of the second sort, see Fitzmaurice, *supra* note 17, at 230:

Such a [unilateral] Declaration may or may not create binding legal obligations . . . it seems fairly well settled that it can and will do so only if clearly intended to have that effect, and held out, so to speak, as an instrument on which others may rely and under which the declarant purports to assume such obligations.

Id. For texts which combine these two approaches, see P. REUTER, *DROIT INTERNATIONAL PUBLIC* 142 (5th ed. 1976):

Une promesse, faite unilatérale en faveur d'un, de plusieurs ou de tous les Etats

apparently harder of these two positions, in which an intentional declarant is bound, may rely on the actual subjective intent of the declarant, or may imply that intent from the circumstances. In the extreme, the subjective intention of the declarant may only be known from what the declarant claims to have been his subjective intent. This very extreme approach removes softer considerations to rhetoric about evidence and the nature of proof. Argument about unilateral declarations, like the doctrines of treaty law generally, thus seems continually to complement its primarily hard rhetoric with a softer alternative.

The classic unilateral declarations case exemplifies various strategies for managing the relationship between these two strands of sources rhetoric. The 1974 Nuclear Tests case between Australia and France arose out of objections by Australia to French nuclear testing in the South Pacific.¹⁰⁰ During 1974, the President of the French Republic made a series of public statements to the effect that since advancing technology would permit future testing to be conducted underground, France would cease atmospheric nuclear testing.¹⁰¹ The International Court of Justice sought to determine whether these statements legally bound France to refrain from further atmospheric tests.¹⁰²

A number of rhetorical strategies were available to Australia and France. One way of structuring the possibilities in accordance with their relative reliance upon consent might be the following:

(ou d'une organisation) peut-elle engager son auteur à l'égard de cet Etat (ou organisation) de ces Etats? Il n'y a aucune raison de ne pas l'admettre lorsque la promesse est manifestement faite avec cette intention. Cette affirmation est basée sur le principe de la bonne foi et plus spécialement sur l'obligation de respecter les convictions que l'on fait naître par son comportement.

Id.; see also A. VERDROSS & B. SIMMA, *supra* note 4, at 344:

Die überwiegende Lehre anerkennt die Verbindlichkeit eines Versprechens, wenn der versprechende Staat eine solche begründen wollte und die anderen Staaten ihr Verhalten nach diese Erklärung orientiert haben. Die Verbindlichkeit des Versprechens besteht also, um das Vertrauen, das andere Staaten einer solchen Erklärung entgegenbringen, zu schützen.

Id. (emphasis added). For a text of the third type, see E. SUY, *supra* note 1, at 45.

100. Nuclear Tests Case (Austr. v. Fr.), 1974 I.C.J. 253 (Judgment of Dec. 20).

101. Parts of these statements are quoted by the Court itself. *Id.* at 265, 266.

102. The issue was not originally presented to the Court in this way. Rather, Australia complained that the tests violated substantive international law and sought a judgment to that effect. During the proceedings, various French government officials made public statements to the effect that the testing program was to be terminated. The Court, taking cognizance of these statements, declined to reach the merits of Australia's claim, holding instead that France was bound by its unilateral statements to discontinue testing. Ironically, Australia had actually stressed in urging the Court to reach the merits their sense that France was *not* bound by these statements. France did not appear. The judgment considered the claim that France was bound as though France would oppose and Australia support that ruling.

Australia: (Hard) Intent to be bound alone binds. The unilateral declaration is binding.

France: (Hard) Intent binds, but we did not intend to be bound. These were merely "policy statements." Moreover, if intent binds only we can know our intent.

Australia: (Softening) Intent binds, but must be judged by the evidence.

France: (Hard) If intent binds, we now change our intent: all statements of intent must reserve the possibility of changing our mind.

Australia: (Soft) This is not possible because it would upset systemic values like the fairness of fulfilling reasonable expectations or reliance or of keeping one's promises.

France: (Soft) We accept those systemic values, but no one should have relied since we were not bound and it was not a promise.

Australia: (Hard) I have ten states here who did rely, including ourselves and only I can interpret my reliance. You must keep your word regardless of whether you thought it was a promise so that I might rely and be able to consent informedly.

France: (Soft) Our approach to the systemic values which are implicated here is different. It seems equitable or fair to let us remain unbound.

Australia: (Hard) Accepted and recognized norms are otherwise.

In this hypothetical oral argument, France is able repeatedly to invoke Australia's principle against her, forcing her to switch from hard to soft arguments. Were the argument to continue, each party would be driven through incompatible positions. Of course, it would be surprising if any or even most of these arguments were to be found in the International Court of Justice opinion, or, for that matter, in the pleadings. The aim of the argument is to terminate this potentially endless dialogue in a persuasive fashion. In the International Court of Justice opinion, this was accomplished by switching repeatedly between two incompatible perspectives. The Court's opinion considers whether a unilateral declaration can be binding, under what conditions this may be true, and who may decide these questions. At each stage the judgment embraces the contradictory tendencies illustrated by the hypothetical debate.

The substantive portion of the Court's judgment begins with a statement of what it takes to be the rule of applicable law: "It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal

obligations."¹⁰³ This conclusion is supported by two different principles. First, the Court argues that unilateral declarations are binding because and to the extent that they express the intention of the declarant to be bound. This classic hard argument is expressed as follows:

When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration.¹⁰⁴

This approach is picked up in the dissenting opinion of Judge de Castro, who uses it to support the conclusion that France cannot be bound by these "policy statements."

For a promise to be legally binding on a State, it is necessary that the authorities from which it emanates should be competent so to bind the State (a question of internal constitutional law and international law) and that they should manifest the intention and will to bind the State (a question of interpretation).¹⁰⁵

On the other hand, the Court justifies the conclusion that unilateral declarations are binding with soft arguments about the systemic requirements of good faith:

One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.¹⁰⁶

Commentators reflect this dual basis for the binding nature of unilateral declarations. Macdonald and Hough, for example, summarize the holding of the Nuclear Test case as follows: "In order to find that a statement imposes a binding obligation, it is essential to find that the person making the statement intended it to do so. The issue is not whether in the circumstances the person should be bound but rather whether he intended to be bound."¹⁰⁷ Eric Suy restates the view that binding acts are "*une manifestation de volonté . . . à laquelle une norme de cet ordre juridique rattache des conséquences cor-*

103. *Id.* at 267.

104. *Id.*

105. *Id.* at 374.

106. *Id.* at 268 (emphasis added).

107. Macdonald & Hough, *The Nuclear Tests Case Revisited*, 20 GER. Y.B. INT'L L. 338, 352 (1977).

respondantes à la volonté."¹⁰⁸ On the other hand, Macdonald and Hough conclude: "The binding character of unilateral declarations is based on the need for good faith (trust and confidence) in international relations."¹⁰⁹

Invoking both theories presents the Court with a rhetorical problem, for these two approaches could as easily appear incompatible as complementary and might each as easily support the conclusion that unilateral declarations should not be binding. This potential for rhetorical contradiction and indeterminacy needs to be appreciated in order to understand the delicacy of the Court's resolution.

Although the Court argues that the binding nature of unilateral declarations can be grounded in the intent of the declarant, reliance upon the subjective intentions of the declarant opens up the possibility that France should be allowed to change its mind. Commentators seem to recognize this point when they suggest that if the declaration were *binding*, it must not have been truly unilateral. Intent alone cannot support the idea of obligation.

Also, it seems questionable that, if the French declaration was binding, it was unilateral. As Suy points out, "La détection de ces promesses purement unilatérales exige un effort de recherche minutieux afin de déterminer si, derrière la façade de l'unilatéralité, formelle d'une déclaration de volonté, ne se cache pas une bilatéralité de fond." If a declaration is made in response to a request for such a declaration, it is bilateral. And if France's statements constituted an undertaking, it is plausible to view them as a response to Australia's request for such an undertaking.¹¹⁰

The hard intent-based approach seems to preclude the binding nature of purely unilateral obligations, requiring what at first seemed the softer rule; that purely unilateral obligations are not binding:

The ICJ's logic seems odd in positing a system in which states are *not* conceived as constantly negotiating with each other, but in which unilateral acts have legal results identical to the results they would have if states were constantly negotiating with each other. Those problems cannot wholly be avoided, but they can be minimized by confining the discussion to a more superficial level by avoiding the discussion of the theory that underlies the conception of the legal effects of "unilateral" acts that the Court seems to have had in mind.¹¹¹

108. E. SUY, *supra* note 1, at 22. On unilateral acts, see *supra* notes 96-97; Schwarzenberger, *supra* note 99, at 548-61; M. HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE, 1920-42*, 631-36 (1943).

109. Macdonald & Hough, *supra* note 107, at 341.

110. *Id.* at 354; E. SUY, *supra* note 1, at 111.

111. Rubin, *supra* note 96, at 9.

To this commentator, the hard consent-based approach which the Court seemed to adopt appeared to require a community which the Court precluded.

Thus, analyses that reflect a view of the international order as emphasizing sovereign equality and independence, as regarding all acts by states as essentially "unilateral" but part of a system of constant adjustment of rights and obligations in which legal significance is given to each of those acts, are simply inconsistent with the ICJ's basic approach.¹¹²

Although the Court argues that the systemic interests in predictability and good faith require that unilateral obligations be binding, one might as easily imagine a world in which the expectation of obligation arose only when registered by the community by acceptance, consideration, or exchange. The principle of good faith could be thought to require only that bilateral, or systemically implicated obligations are binding. Good faith would then seem incompatible with the *unilateral* nature of a unilateral declaration. Perhaps this is what commentators mean when they argue that "if France's statements constituted an undertaking," it might better be seen to be bilateral. One commentator pointed to the incompatibility of the soft "good faith" approach and the *unilateral* aspects of the norm which the Court invoked:

But since no concept of "good faith" can make binding a policy declaration or other pronouncement that is *not* binding because not conceived as binding by any party concerned, to argue that "good faith" alone creates the obligation is to argue in support of an obvious absurdity.¹¹³

This same commentator noted that from a hard approach, all binding acts are unilateral.

Every legally significant act in a legal system that posits individual legal personality is, in a sense, unilateral. Thus, in most if not all legal systems that have a concept of contract, the contractual tie is created by the law giving legal value to various acts of the several parties to the transaction.¹¹⁴

Despite the ambiguity of each principle's meaning for the binding nature of unilateral declarations, moreover, each of these two principles, seems to require the abandonment of the other. If states are to remain free and if the independence of intent means anything, the state ought to be able to decide when it is bound—free of external requirements of good faith. If any system of good faith is to endure, on the other hand, states cannot remain free to change their minds once having given their word. This problem might be thought of as the tension

112. *Id.*

113. *Id.*

114. *Id.* at 8 (footnote omitted).

between the extreme forms of positions which when limited might coexist. To test that vision, we must examine how the Court was able to make these two justifications seem compatible.

The opinion rendered these two principles compatible in part by expressing each in a way which affirmed its opposite and denied itself. We have seen that each principle has two elements, one which supports and one which opposes unilateral declarations. The Court exploited this rhetorical diversity to blend both approaches in a way which seemed to support the binding nature of unilateral declarations. The soft argument of good faith was made to seem compatible with the intent-based hard argument by emphasizing the manifestation of each which supported the bindingness of unilateral declarations. For example, the systemic conditions of justice were understood to mean protecting the freedom of each sovereign.

In the Court's opinion, the soft principle of good faith was made compatible with the seemingly intent-based rule in two ways. First, the Court emphasized that good faith protects the ability of other states to "place confidence in" and "rely upon" unilateral statements in making their own subjective calculations. The good faith argument, then, is able to remain consistent with a hard intent-based approach because it associates itself with Australia's interests, not those of France. Second, the soft argument simply embraces the content of intent. The ability of France to bind itself depends upon the systemic value of good faith. Thus, the hard intent-based norm, like the rule of *pacta sunt servanda*, is seen to be based on good faith because those intending to bind themselves must "assume" they can do so. The Court was able to make the two strands of its justification seem consistent in part because the soft alternative is presented in a hard manifestation.

As we have seen, however, a purely hard position could as easily devour the bindingness of undertakings. The Court, in arguing that bindingness is in fact an intent-favoring norm, must elaborate this hard, intent-based argument so as to prevent its association with France's ability to redefine the terms of its own obligations. This the Court accomplishes in two ways. First, the Court emphasizes the subjective freedom of *other* states who must be able to rely on French good faith. Second, and more importantly, the Court elaborates the meaning of an intent-based system of unilateral declarations in such a way as to deny France the freedom to define its own intent.

This the Court accomplishes in two steps. First, it suggests that intent is to be objectively measured by the way in which another state could be expected to view French statements. This objective approach, in turn, is justified by both hard and soft arguments. Second, the Court

switches discussion from the choice between French and Australian consent to an issue of the Court's appropriate role. The arguments for the Court's role in assessing evidence operate like arguments about objective measurement of consent to prevent the intent argument from precluding a finding of obligation.

These arguments occur in the context of the Court's discussions of the conditions under which a state is bound by its unilateral statement. Although dissenting Judge de Castro argues that only unilateral acts which are accepted can bind; "[h]ence—and this should not be forgotten—any promise (with the exception of *pollicitatio*) can be withdrawn at any time before its regular acceptance by the person to whom it is made (*ante acceptationem, quippe iure nondum translatum, revocari posse sine injustitia*)."¹¹⁵ By contrast, the Court holds "that the unilateral undertaking resulting from these statements cannot be interpreted as having been made in implicit reliance on an arbitrary power of reconsideration."¹¹⁶ The Court also holds:

An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.¹¹⁷

This softening of the emphasis on France's intent is justified because France so intended. The question before the Court is how to distinguish instances of such binding intention from other statements. In one view, the only consistent method is to let France decide. De Castro writes:

[I]n my view the attitude of the French Government warrants . . . the inference that it considers its statements on nuclear tests to belong to the political domain and to concern a question which, inasmuch as it relates to national defence, lies within the domain reserved to a State's domestic jurisdiction.¹¹⁸

The Court picks up this approach in holding that the obligation is co-terminous with French intent: "The Court finds further that the French Government has undertaken an obligation the precise nature and limits of which must be understood in accordance with the actual terms in which they have been publicly expressed."¹¹⁹

115. Nuclear Tests Case (Austr. v. Fr.), 1974 I.C.J. 253, 374 (Judgment of Dec. 20).

116. *Id.* at 270.

117. *Id.* at 267.

118. *Id.* at 375.

119. *Id.* at 270.

Indeed, they go so far as to indicate that no requirements about the form which an intentional statement can or should take could be compatible with the notion of the obligation being based in consent.

With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements. . . . Thus the question of form is not decisive. As the Court said in its Judgment on the preliminary objections in the case concerning the *Temple of Preah Vihear*:

"Where . . . as is generally the case in international law, which places the principle emphasis on the intentions of the parties, the law prescribes no particular form, parties are free to choose what form they please provided their intention clearly results from it." (*I.C.J. Reports* 1961, p. 21)

The Court further stated in the same case: ". . . the sole relevant question is whether the language employed in any given declaration does reveal a clear intention. . . ." ¹²⁰

Nevertheless, the Court recognizes that a purely subjective approach is not compatible with the notion of obligation: "Of course, not all unilateral acts imply obligation; but a State may choose to take up a certain position in relation to a particular matter with the intention of being bound—the intention is to be ascertained by interpretation of the act."¹²¹ This is immediately limited to reflect the hard nature of this basic argument by the sentence which follows: "When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for."¹²²

The Court squares this objective approach with the consent based argumentation in two ways. First, it interprets the objective approach to reflect the *true* subjective intention of the declarant.

In announcing that the 1974 series of atmospheric tests would be the last, the French Government conveyed to the world at large, including the Applicant, its intention effectively to terminate these tests. It was bound to assume that other States might take note of these statements and rely on their being effective.¹²³

120. *Id.* at 267-68.

121. *Id.* at 267.

122. *Id.*

123. *Id.* at 269. Thomas Franck describes this approach to intentionality: Intentionality, as the Court said, must be the test. But the intention cannot be determined solely by reference to the speakers' state of mind but must also take into account that of the listeners. A spokesman for state policy—like the President of France, who speaks with the solemn voice of "acts of the French state,"—must be taken to intend the natural consequences of his words just as actors are assumed, in law, to intend the natural consequences of their acts. If a state speaks, though an ostensible agent, and the statement contains an express commitment to a course of future conduct by that state, it should not be neces-

Second, the Court squares the objective test with a consent-based approach by suggesting that objective interpretation is the Court's function, as a way of protecting France from the willfulness of Australia's interpretation.

It will be observed that Australia has recognized the possibility of the dispute being resolved by a unilateral declaration, of the kind specified above, on the part of France, and its conclusion that in fact no "commitment" or "firm, explicit and binding undertaking" had been given is based on the view that the assurance is not absolute in its terms, that there is a "distinction between an assertion that tests will go underground and an assurance that no further atmospheric tests will take place," that "the possibility of further atmospheric testing taking place after the commencement of underground tests cannot be excluded" and that thus "the Government of France is still reserving to itself the right to carry out atmospheric nuclear tests." The Court must however form its own view of the meaning and scope intended by the author of a unilateral declaration which may create a legal obligation, and cannot in this respect be bound by the view expressed by another State which is in no way a party to the text.¹²⁴

Having thus blended these two strands, the Court describes its interpretive process so as to juxtapose the hard and soft elements of its argument in adjoining sentences:

The validity of these statements and their legal consequences must be considered within the general framework of the security of international intercourse, and the confidence and trust which are so essential in the relations among States. It is from the actual substance of these statements, and from the circumstances attending their making, that the legal implications of the unilateral act must be deduced. The objects of these statements are clear and they were addressed to the international community as a whole, and the Court holds that they constitute an undertaking possessing legal effect.¹²⁵

Judge Barwick, in his dissent, after reference to a similar confluence of hard and soft factors concludes:

There seems to be nothing, either in the language used or in the circumstances of its employment, which in my opinion would warrant, and certainly nothing to complete, the conclusion that those making the statements were intending to enter into a solemn and far-reaching international obligation. . . . I would have

sary to inquire whether the state intends to be bound, but merely whether the states with an interest at stake could reasonably assume that the statement constituted a commitment.

Franck, *supra* note 97, at 616-17 (footnote omitted). Macdonald & Hough take the opposite view: "To 'assume' that a state 'intends' to be bound if other states 'could reasonably assume that the statement constituted a commitment' is to express this view in terms of a convenient, but misleading fiction." Macdonald & Hough, *supra* note 107, at 354.

124. Nuclear Tests Case (Austr. v. Fr.), 1974 I.C.J. 253, 268-69 (Judgment of Dec. 20).

125. *Id.* at 269.

thought myself that the more natural conclusion to draw from the various statements was that they were statements of policy. . . .¹²⁶

To summarize, the Court made the hard argument for the binding nature of unilateral declarations seem compatible with the good faith strand of its argument and with the idea of obligation by reinterpreting intentionality in soft terms. In the course of elaborating the meaning of an intent-based approach to unilateral declaration, the Court was again faced with a choice between two alternatives: an objective and a subjective one. The Court chose the objective one, thereby downplaying the subjective nature of its initial intent based approach. This was revealed in the arguments which the court made to defend this choice. First, the Court reinterpreted the subjective approach which it rejected to be incompatible with true intent-based subjectivism: if France could interpret its own consent it could not bind itself. Second, it reinterpreted the objective alternative to be truly reflective of the subjective approach, in terms, paradoxically, first of Australia's interests, then of those which France must have had. Any tension between these two positions is finessed by focusing on the court's role.

Argument about the application of doctrine about unilateral declarations illustrates one way in which the hard and soft strands of sources argumentation can be blended and stabilized. The elegance of the Court's opinion resides in its management of the relationship between two approaches to unilateral declarations which have the potential to contradict each other and themselves in important ways.

B. THE CASE OF *Rebus sic Stantibus*

Doctrines governing release from consensual obligations (e.g., denunciation, termination, impossibility, or the emergence of a new peremptory norm of *jus cogens*),¹²⁷ like those governing entry into consensual obligations are discussed in the rhetorics of both consent and justice. Although some of these doctrines (particularly denunciation and termination) seem primarily consensual, most seem to temper a consensual obligation with more systemic considerations. The doctrine of "changed circumstances" or "*rebus sic stantibus*" is exemplary in its rhetoric and structure.¹²⁸

The doctrine of *rebus sic stantibus* has been discussed in both hard and soft terms. Some commentators emphasize that a state may be released from its consensual obligations when the parties would have in-

126. *Id.* at 448-49.

127. See *supra* notes 14-16, 89-92 and accompanying text.

128. See *supra* notes 15, 89-92 and accompanying text.

tended release had they considered the potential for circumstances to so evolve.¹²⁹ Indeed, the doctrine is often referred to as the "*clausula rebus sic stantibus*" to emphasize the implication of a release clause into the treaty obligations which it modifies. The Permanent Court of International Justice, in the *Free Zones of Upper Savoy and the District of Gex* expressed this consensual approach to *rebus sic stantibus*.¹³⁰

The argument in favor of the view that the stipulations establishing the zones have lapsed is that these zones were created in view of and because of the existence of a particular state of facts, [and] this state of facts has now disappeared. . . .

To establish this position it is necessary, first of all, to prove that it was in consideration of the absence of customs duties at Geneva that the Powers decided, in 1815, in favour of the creation of the zones. There is nothing in the text of the treaties to support this, and the only occasion on which the Swiss representative at the Allied gathering in 1815 is shown to have relied on the absence of customs at Geneva was when he endeavored to secure the withdrawal of the French customs along the whole frontier from Basle to Geneva—an effort in which he was not successful. . . .

As the French argument fails on the facts, it becomes unnecessary for the Court to consider any of the questions of principle which arise in connection with the theory of the lapse of treaties by reason of change of circumstances. . . .¹³¹

Others, however, have understood the doctrine of *rebus sic stantibus* to be primarily designed to rectify extraordinary, if also unanticipated, harshness.¹³² Both of these strands find expression in most analyses of

129. See C. FENWICK, *supra* note 94; C. HILL, THE DOCTRINE OF "REBUS SIC STANTIBUS" IN INTERNATIONAL LAW (1934):

The definition of the doctrine of *rebus sic stantibus* generally given by the older writers on international law and accepted by many writers today states that the obligations of a treaty terminate when a change occurs in those circumstances which existed at the time of conclusion of the treaty and whose continuance formed, according to the intention or wills of the parties, a condition of the continuing validity of the treaty. . . .

This definition of the doctrine is merely a principle for carrying out the intention of the parties to the treaty and is not at all an objective rule of international law which operates to terminate the obligations of the treaty irrespective of the original will of the parties.

Id. at 8-9 (footnote omitted); see also Lissitzyn, *supra* note 94, at 889-92 (giving examples of similar statements by other commentators).

130. *Free Zones of Upper Savoy and the District of Gex* (Fr. v. Switz.), 1932 P.C.I.J. (ser. A/B) No. 46 (Judgment of June 7).

131. *Id.* at 156, 158.

132. See *supra* note 94 (discussing views on implied terms of treaties). See, e.g., A. VERDROSS & B. SIMMA, *supra* note 4, at 420:

Nach der richtig verstandenen objektiven theorie handelt es sich bei der *clausula rebus sic stantibus* weder um eine tatsächliche noch um eine subintelligierte Vertragsklausel, sondern um einen objektiven vr [völkerrechtlichen] Grundsatz Die entscheidende Frage geht also dahin, ob sich die Umstände nach Vertragsschluss so wesentlich geändert haben, dass den Parteien die Erfüllung des

the doctrine. In the following passage, for example, Wharton begins with a hard description of the consensual basis of the doctrine, softens this by suggesting that the changed elements need not have been specifically intended to lead to lapse of duties (this would collapse the doctrine of *rebus sic stantibus* into that of material conditions) but need have been merely a "strong inducement" to the adversely affected party, and concludes with a soft standard limiting *rebus sic stantibus* to situations of "unreasonable sacrifice."

A treaty may be modified or abrogated under the following circumstances:

(7) When a state of things which was the basis of the treaty, and one of its tacit conditions, no longer exists.

In most of the old treaties were inserted the "*clausula rebus sic stantibus*", by which the treaty might be construed as abrogated when material circumstances on which it rested changed. To work this effect it is not essential that the facts alleged to have changed should be material conditions. It is enough if they were strong inducements to the party asking abrogation.

The maxim "*Conventio omnis intelligitur rebus sic stantibus*" is held to apply to all cases in which the reason for a treaty has failed, or there has been such a change of circumstances as to make its performance impracticable except at an unreasonable sacrifice.¹³³

Article 62 of the Vienna Convention of the Law of Treaties restates this dual approach.

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of the treaty and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.¹³⁴

Vertrages *bona fide* nicht mehr zugemutet werden kann.

Id.; see also Haraszti, *supra* note 92, at 47:

[T]here is in international law a rule of general validity and operating independently of the agreement of the parties at treaty-making, which in the event of a fundamental change of the circumstances existing at the conclusion of the treaty authorizes either party to terminate the treaty . . . This, in our opinion, [the] solely acceptable doctrine, rejecting all fictions, best suits conditions.

Id.

133. 2 F. WHARTON, A DIGEST OF INTERNATIONAL LAW OF THE UNITED STATES, § 137a, at 161 (1886).

134. Vienna Convention, *supra* note 5, at art. 62. Lissitzyn, summarizing state practice with regard to *rebus sic stantibus*, emphasized these two elements. Lissitzyn, *supra* note 94, at 911. The hard consent based approach is cast here as a "general community policy."

In the several instances of state action just reviewed, which are illustrative rather than exhaustive of recent practice, the governments invoking the changes of cir-

Presenting these two dimensions of the *rebus sic stantibus* doctrine side by side is shrewd, for either alone seems incapable of supporting an escape from consensual obligations. If the true intent of the parties is thought the exclusive basis for extinguishing a consensual duty, the doctrine of *rebus sic stantibus* seems indistinguishable from the norm *pacta sunt servanda* and can mean no more than that express conditions must be met and termination clauses honored. If, on the other hand, the doctrine is to look beyond what the parties specifically intended, it seems that the doctrine becomes a substantive set of notions about justice or equity unconnected to the treaty itself—disconnecting

cumstance can all be regarded as maintaining in effect that their actions were not inconsistent with the general community policy of protecting and effectuating ascertained or reasonably imputable shared expectations of parties to international agreements. In short, these instances support the view that the problem of the legal effect of changes of circumstances on treaty relationships is one of determining the parties' shared intentions, expectations and objectives, that is, a problem of interpretation.

Id. at 911 (footnote omitted). The Harvard Research in International Law restates this hard vision of *rebus sic stantibus*, but describes the two alternate, soft approaches. It identifies, moreover, both a subjective and an objective stand to the hard approach.

The idea common to most concepts of the doctrine is that a treaty becomes legally void in case there occurs a change in the state of facts which existed at the time the parties entered into the treaty. It is generally admitted, however, that not every change in those facts terminates the binding force of a treaty Many writers affirm that a change in the state of facts terminates the binding force of a treaty only when the parties entered into the treaty with reference to this state of facts and envisaged its continuance unchanged as a determining factor which moved them to undertake the obligations stipulated.

. . . .

Although the doctrine of *rebus sic stantibus* as conceived . . . above is based upon the idea of a relation between the binding force of the treaty and a continuance of a state of facts essentially unchanged, because the parties intended that the continuance of the state of facts should be a condition of the binding force of the treaty, two variations of this concept may be distinguished. In the one case, a tacit clause *rebus sic stantibus* is presumed to be contained in every treaty. In the second case, no such tacit clause is presumed for all treaties; but if, upon examination, it is clear that a particular treaty was entered into with reference to the existence of a particular state of facts, the continued existence of which was envisaged by the parties as a determining factor moving them to undertake the obligations stipulated, then the rule of *rebus sic stantibus* applies

There is a second concept of the doctrine which adopts as a test for determining whether a given change in the state of facts shall render the treaty no longer binding, not the intention of the parties, but a test of quite a different nature. It is that the changes shall be "essential," fundamental or "vital"

A third concept of the doctrine of *rebus sic stantibus* makes the test of whether or not a change in the state of facts causes termination of a treaty, the fact that fulfillment of the treaty after occurrence of a change in the state of facts would be so injurious to one of the parties that such party has a right under the law or right of necessity to terminate the treaty.

Harvard Research in International Law, *The Law of Treaties*, 29 AM. J. INT'L L. SUPP. 657, 1097-98, 1100-01 (1935).

consensual sources from their mooring in consent.

Despite the strong motive these difficulties provide for a combined rhetorical presentation of the *rebus sic stantibus* doctrine, however, getting the hard to lie down with the soft is no easier here than elsewhere. Hard justifications for *rebus sic stantibus* seem to deny the doctrine's aspiration to temper or depart from treaty law—from the consensual source of the obligation which the doctrine will extinguish. Soft arguments for *rebus sic stantibus*, however, seem to take the doctrine out of sources law altogether, transforming it into a doctrine of substantive international law.

One rather simple strategy used to manage this tension articulates each approach to *rebus sic stantibus* in a way which transforms it into its opposite. For example, intent remains the basis upon which equitable standards can be applied if the parties can be assumed to have intended this derogation from their intent. In this image, the doctrine is not displaced by its hard justification because the intent upon which it is thought to rely is given soft content. Similarly, the soft rhetoric does not displace the doctrine from the field of treaty law because those conditions of justice which interrupt the consensual obligation such as "fundamental," "vital," "necessary," and so forth, are themselves situated, perhaps by implication, in the intent of the states parties. Equity is treated to mean enforcement of the *fundamental* nature of the treaty.

This rather elementary rhetorical strategy takes a characteristic form in argument about the application of the doctrine of *rebus sic stantibus*. A legal dispute over the doctrine normally arises only when there is disagreement about whether *rebus sic stantibus* indeed excuses failure to perform some particular treaty obligation. Typically, one state claims to be excused from its obligations over the objection of a state, a court or a commentator. Each position advanced in such an argument is typically associated with one or the other strands of the *rebus sic stantibus* doctrine. For example, the state claiming to be excused might argue that *rebus sic stantibus* leaves it able to determine when circumstances have changed sufficiently to have been outside the contemplation of its consent. This subjectivist position seems associated with the hard strand of the *rebus sic stantibus* doctrine: that its justification lies in its fulfillment of consent. Those opposing release from duty might respond by interpreting *rebus sic stantibus* so as to impose an external standard on the subjective consent of the state seeking release. This response would rely upon the soft strand of *rebus sic stantibus*: that its justification lies outside consent. As the debate develops, each side might seek to augment its position by reference to the alter-

native rhetorical strand. The trick, for advocates as for tribunals or commentators who seek to sort out these claims, is to blend these elements into an argument which supports either release from or fulfillment of the initial obligation.

Various approaches to this problem are illustrated by the arguments made in regard to the 1941 United States suspension of its participation in the International Load Line Convention regulating certain aspects of maritime shipping.¹³⁵ Claiming that the Convention had presumed a situation of peaceful commerce, President Roosevelt, relying on an opinion by Acting Attorney General Francis Biddle, declared the Convention "suspended and inoperative." The President's proclamation suggests that the *rebus sic stantibus* doctrine gives the United States the "right" unilaterally to suspend the Convention.

WHEREAS the conditions envisaged by the Convention have been, for the time being, almost wholly destroyed, and the partial and imperfect enforcement of the Convention can operate only to prejudice the victims of aggression, whom it is the avowed purpose of the United States of America to aid; and

WHEREAS it is an implicit condition to the binding effect of the Convention that those conditions envisaged by it should continue without such material change as has in fact occurred; and

WHEREAS under approved principles of international law it has become, by reason of such changed conditions, the right of the United States of America to declare the Convention suspended and inoperative:

NOW, THEREFORE, I, Franklin D. Roosevelt, President of the United States of America, exercising on behalf of the United States of America an unquestioned right and privilege under approved principles of international law, do proclaim and declare the aforesaid International Load Line Convention suspended and inoperative in the ports and waters of the United States of America, and in so far as the United States of America is concerned, for the duration of the present emergency.¹³⁶

The position that *rebus sic stantibus* gives states a unilateral right of revocation is supported by some international law commentators. Lisitzyn's commentary on the draft articles of the Vienna Convention is exemplary:

Strictly speaking, there is no requirement in all cases that nonperformance be preceded or accompanied by a formal notice to the other parties, although concern for orderliness, prudence and courtesy make the giving of such notice generally desirable. If the treaty operates as municipal law, a formal enactment or proclamation may be necessary.

The exercise of the right to cease or limit performance does not depend on the

135. The text of the Convention appears at 47 Stat. 2228 (1933).

136. Proclamation No. 2500, Aug. 9, 1941, 6 Fed. Reg. 3,999 (1941); revoked as of Jan. 1, 1946 by Proclamation No. 2675, Dec. 21, 1945, 10 Fed. Reg. 15,365 (1945).

specific consent of the other party or upon a third-party decision.¹³⁷

The opposing view, that unilateral suspension is not compatible with *rebus sic stantibus*, is advocated by other commentators—generally by those who emphasize that a purely consensual approach to *rebus sic stantibus* would either collapse the doctrine into treaty law or lead to an unqualified ability to avoid treaty obligations. Hyde's 1945 treatise is exemplary: "It requires . . . something more than the sheer power of a contracting State to disregard with impunity the terms of a valid treaty, in order to establish a legal right to do so."¹³⁸

Of course, neither of these two positions can be fully supported using only a hard or a soft rhetoric. Although unilateral suspension seems associated with a hard consensual rhetoric, if the United States were allowed unilaterally to suspend its treaty obligations, the subjective intent of the other signatories would seem threatened. Moreover, if a unilateral capacity to suspend were within *their* contemplation, it would seem to limit America's ability to bind itself in such a way that performance could not be suspended in this way. The unilateral suspension position seems to demand a soft as well as a hard defense.

Similarly, although the position that the United States should not be permitted unilaterally to suspend the Convention seems associated with some extra-consensual or systemic justification, it also seems that if America is unable to determine the limits of its own obligations when circumstances change, an important systemic interest in sovereign autonomy would be threatened. Moreover, such an extra-consensual approach threatens the norm of *pacta sunt servanda* to which *rebus sic stantibus* is merely an exception. Consequently, opposition to the unilateral suspension position seems to demand a hard as well as a soft rhetoric.

In light of these rhetorical demands, it is not surprising that the President's declaration cited the likelihood of "prejudice" to the "victims of aggression, whom it is the avowed purpose of the United States of America to aid."¹³⁹ Since both rhetorical styles seem compatible with and indeed demanded by both positions, the rhetorical challenge is

137. Lissitzyn, *supra* note 94, at 911-12.

138. 2 C. HYDE, *INTERNATIONAL LAW* 1523 (2d rev. ed. 1945). The Swiss Federal Court followed this approach in its 1923 decision, *In re Lepeschkin*, 49(1) *Entscheidungen des Schweizerischen Bundesgerichtes* 188, 194-97 (1923), 1951 *JOURNAL DU DROIT INTERNATIONAL (Clunet)* 1135, 1137-38 (1924), 2 *ANN. DIG.* 323, 334-35 (1923-24).

139. Similarly, the systemic interest invoked by the Swiss Federal Court as it limited the unilateral right to suspend is one of *notice* "through the usual international law channels." See *In re Lepeschkin*, 2 *ANN. DIG.* 323, 325 (1923-24).

to express them in such a way as to seem compatible with one another and with the position being advocated. Both those opposing and those supporting Roosevelt's proclamation did this quite elegantly by elaborating a form of each strand which embraced the other.

The President's assertion of a unilateral right to suspend the Convention was defended by Acting Attorney General Francis Biddle.¹⁴⁰ Biddle manages the rhetorical difficulties generated by his position in two moves. First, he treats the unilateral suspension right as a mere matter of "procedure" which reflects a preexisting lapse in the obligation. As a procedural matter, unilateral suspension does not seem to threaten the idea of international obligation. Instead it is a mere expression of the (absent) obligation.

As to the procedure to be adopted by the Government that relies on the principle of *rebus sic stantibus*, it may well be that ordinarily the procedure would call for the government to inform the other parties to the treaty with respect to the matter and request agreement for termination or suspension of the treaty. The matter of procedure, however, does not affect the right of termination or suspension The fundamental character of the change in conditions underlying the treaty . . . leaves the Government of the United States entirely free to declare the treaty inoperative or to suspend it for the duration of the present emergency.¹⁴¹

Biddle then turns to the obligation itself. As indicated in this short passage from his argument, that obligation depends upon the characterization of the changes which have occurred as "fundamental" in some sense. Biddle's second move is to a soft rhetoric of "emergencies" and "fundamentality." This move allows Biddle to sidestep the suggestion that a unilateral suspension would contravene the obligation's basis in the consent of other states by grounding both the obligation and the suspension in a set of general systemic considerations. The problem is that a soft rhetoric threatens either America's unilateral right or the treaty context of the claim for *rebus sic stantibus*. Biddle avoids this by elaborating the extra-consensual conditions which govern the procedural right to suspend in terms of the intention of the parties. Fundamental, to Biddle, means fundamental *to the treaty*. *Rebus sic stantibus* is triggered when there has been "essential" change in the "basic conditions" upon which the treaty "was founded."

It is a well-established principle of international law, *rebus sic stantibus*, that a treaty ceases to be binding when the basic conditions upon which it was founded have essentially changed. Suspension of the convention in such circumstances is the unquestioned right of a state adversely affected by such essential change.

140. 40 Op. Att'y Gen'l 119 (1941).

141. *Id.* at 123.

It is sometimes said that the change which brings the principle into operation must be essential or fundamental. But whether or not this is an integral part of the principle itself, there can be no doubt that the changed conditions affecting the Load Line Convention are most essential and most fundamental.¹⁴²

Biddle argues that obligations lapse with change in the "assumptions" upon which the treaty was based. He does not suggest that these assumptions are within the unilateral authority of one party to interpret. He treats their lapse as a matter of *fact* which remains only to be procedurally registered.

It is clear from its general nature that the convention was a peacetime agreement. As stated in its preamble the contracting governments entered into it "to promote safety of life and property at sea by establishing in common agreement uniform principles and rules with regard to the limits to which ships on international voyages may be loaded" This general purpose, as the terms of the convention demonstrate, was to be achieved by limiting international competition in the loading of cargo vessels. That peacetime commerce and voyages were assumed as the basis of the convention is also demonstrated by the nature of its detailed provisions and regulations. A perusal of them leaves no doubt that peacetime commerce was a basic assumption of the treaty. The present situation with respect to shipping is a wholly different one. Conditions essential to the operation of the convention, and assumed as a basis for it, are in almost complete abeyance International shipping is not being carried on under normal conditions subject to agreements arrived at for the purpose of regulating international voyages freely undertaken and completed. On the contrary, the actual destruction of vessels engaged in such commerce, however loaded, is one of the principal means by which the war is now being conducted among various of the contracting parties It is well known that the international sea lanes are the rendezvous for varied instrumentalities of war set loose for the destruction of shipping. It is equally well known that a serious shortage exists in shipping in the case of numerous, if not all, signatories to the convention, including those whose defense the Congress has declared essential to the defense of the United States In short the implicit assumption of normal peacetime international trade, which is at the foundation of the Load Line Convention, no longer exists.

Under these circumstances there is no doubt in my mind that the convention has ceased to be binding upon the United States.¹⁴³

Biddle thus develops his argument for the American suspension of the Convention in two steps. He begins with a hard assertion of the American right, but casts it as a matter of procedure, dependent upon the lapse of an acknowledged international obligation. He then grounds this lapse in general notions about what is "fundamental" to a treaty, understood to have been in the contemplation of the Convention signatories. His unilateral interpretation of these systemic notions, even of

142. *Id.* at 121-23.

143. *Id.* at 120-21.

the consent of other signatories, is treated as a matter of fact rather than of unilateral assertion. Biddle's argument is interesting because he blends hard and soft rhetorics by allowing each to deny itself. The unilateral right to terminate is a procedural dependent of the obligation and the general obligation is an expression of collective intent which can be unilaterally noticed.

Interestingly, commentators attacking the American position deployed similar rhetorical strategies. Professor Briggs developed a strong opposition to Roosevelt and Biddle in a commentary which appeared in the American Journal of International Law in 1942.¹⁴⁴ Briggs identifies a contradiction within Biddle's argument between his reliance upon consent and obligation. To the extent Biddle relies upon arguments about the general nature of the treaty, the *rebus sic stantibus* doctrine which Biddle invokes should be unnecessary. To the extent Biddle relies upon the consent of treaty signatories, the unilateral aspect of his argument seems undercut.

The necessity for suspending a convention which has assertedly already ceased to be binding through the operation of an alleged principle of international law is not clear to the writer. Nor is it clear why circumstances of admittedly general application should lead to the suspension of the treaty only by the United States.¹⁴⁵

Briggs argues that the doctrine of *rebus sic stantibus* does not contemplate unilateral suspension of treaty obligations, citing Professor Chesney Hill and the Harvard Research Draft on the Law of Treaties, itself also cited for the opposite proposition by Biddle.

Indeed, Mr. Biddle, if interested in one of the most able and comprehensive analyses of state practice on the subject, might well have consulted Chesney Hill's *The Doctrine of "Rebus Sic Stantibus" in International Law*, which states:

Despite any theoretical objections to the contrary, it remains true that customary international law lays down the rule that a party who seeks release from a treaty on the ground of a change of circumstances has no right to terminate the treaty unilaterally, and that recognition that the doctrine is applicable must be obtained either from the parties to the treaty or from some competent international authority.¹⁴⁶

Briggs criticizes Biddle's suggestion that the United States has an absolute right to control the ambit of its own obligations, a position which seems to Briggs to be incompatible with the possibility of systemic obligation.

144. Briggs, *The Attorney General Invokes Rebus Sic Stantibus*, 36 AM. J. INT'L L. 89 (1942).

145. *Id.* at 93.

146. *Id.* at 94.

This surprising, and, indeed, reckless and unnecessary, espousal by the United States of a much questioned doctrine by which Germany, Italy, Japan, and Soviet Russia might equally well justify the suspension, termination, or even violation, of inconvenient treaties renders desirable an examination of the conditions and legal principles set forth by the Attorney General in his opinion.¹⁴⁷

Briggs returns to this theme later in his commentary, criticizing the unilateral approach for reading any systemic element out of the *rebus sic stantibus* doctrine. His opposition to the unilateral position blends hard and soft considerations. To a certain extent, he fears that reliance upon unilateral action by the United States will devour the systemic elements of justice encapsuled in the idea of "extraordinary circumstances." He also recognizes that the unilateral approach, by allowing a single state to impose its conception of "necessity" upon its treaty partners, might derogate from the ability of other states freely to enter into treaties. His critique of unilateralism, then, is not merely a critique of the hard institutionalization of consent which it seems to represent. It is simultaneously a suggestion that subjective notions of necessity are incompatible with the consensual rights of the community. Unilateralism threatens consent as well as justice.

The Attorney General concedes that "ordinarily" a state which relies on the principle of *rebus sic stantibus* should "request agreement" of the other parties for termination or suspension of a treaty, but believes this a mere matter of procedure which does not affect the right of termination. This arbitrary rejection of one of the essential elements of the concept of *rebus sic stantibus* suggests that the suspension of the International Load Lines Convention is not so much based on the principle of *rebus sic stantibus* as upon some vague and slippery doctrine of state necessity. One is reminded of Secretary of State Cordell Hull's assertion that certain rules of Hague Convention XIII, which he admitted are declaratory of international law in "ordinary" circumstances, cease to be binding in situations "extraordinary in character." One recalls also the statement of Professor Josef L. Kunz that there are "the politicians—often, consciously or unconsciously, also among men who want to be considered as scholars—who have always so conveniently two international laws . . . one for one's own nation and those we like, the other against the nations we do not like."¹⁴⁸

This double strategy is a difficult one to sustain. In arguing that unilateral suspension renders the obligation system hostage to the whim of a single state, Briggs threatens his image of the *rebus sic stantibus* doctrine, for it is precisely to protect the system of obligations that Biddle interprets *rebus sic stantibus* in terms of the "necessary" and "fundamental." To the extent Briggs relies upon soft rhetoric, he threatens to reduce his image of *rebus sic stantibus* doctrine into either Biddle's

147. *Id.* at 90.

148. *Id.* at 94-95 (footnotes omitted).

necessity approach or to expand it into a rule of substantive public international law. Briggs thus faces exactly the inverse of the contradiction which he identifies in Biddle's argument.

To reduce this threat, Briggs introduces consensual elements into his argument. Indeed, his soft approach seems to imply nothing beyond the consent of the parties themselves. His text investigates at great length the extent to which the parties intended that the United States would be free of its obligations should war arise.

Moreover, the evidence presented by the Attorney General fails to establish that the parties to the convention—the purpose of which was to establish minimum safety regulations—intended that the occurrence of war should release the parties from the obligations assumed. The fact that safety of life and property at sea is noticeably less evident in time of war than in time of peace proves neither the desirability of relaxing those safety regulations which continue to be possible nor that the parties to the convention in question so intended.¹⁴⁹

His soft rhetoric about the *rebus sic stantibus* doctrine is not grounded in what seems to have been fundamental to the treaty, but rather in what the parties seem actually to have contemplated.

Nevertheless, the few states which have invoked [the *rebus sic stantibus* doctrine] have been in agreement on one point: the doctrine has been "clearly based juridically upon the intention of the parties at the time of the conclusion of the treaty."

To what extent was a unilateral right to terminate the International Load Lines Convention because of "changed conditions" envisaged by the parties to that treaty?¹⁵⁰

Two difficulties arise from Briggs's development of soft rhetoric. First, he is confronted with the same choice between subjective and objective notions of intent which he criticizes Biddle for failing to resolve.¹⁵¹ Second, this consensual interpretation of systemic obligation

149. *Id.* at 93.

150. *Id.* at 90 (footnote omitted). This is the approach used by Brierly in his short treatise on international law.

Neither a treaty in international law nor a contract in English law is dissolved merely by a change in circumstances; they are only dissolved if a term can fairly be read into them providing that in the event which has happened they *are* to be dissolved. Both doctrines attempt not to defeat but to fulfil the intention . . . of the parties.

J. BRIERLY, *supra* note 1, at 262.

151. Both views are expressed by commentators who follow Briggs's interpretation of justice in terms of intent. Hyde expresses these two prongs as follows:

If changed conditions ever serve in principle to confer upon a contracting State the right to free itself from obligations laid down in a treaty, it is because those conditions mark the existence of a new order of things which in a broad sense were not contemplated by the parties at the time of the conclusion of their agreement and which render highly unreasonable a demand for performance

could reduce the doctrine of *rebus sic stantibus* to that of *pacta sunt servanda*, negating the soft perspective it was designed to rescue.

Briggs does not resolve this difficulty. Perhaps because his argument, unlike that of Biddle, is less a defense of some action than a critique, he never reintegrates his reliance upon the treaty language into a soft rhetoric of justice. Like Biddle, Briggs could have utilized a distinction between procedure and substance, or fact and law to do so, perhaps arguing that the treaty language was merely one procedural manifestation of the systemic requirements of obligation. Instead, he edges quite close to the abyss of an absolute hard rhetoric—ironically exactly the abyss he felt the right to unilateral suspension would open up. As Briggs sees it, there seem no circumstances except those enumerated by the parties and hence covered by other release doctrines which could safely trigger the *rebus sic stantibus* doctrine under this approach.

In 1930 maritime experts representing thirty states drafted and signed at London the International Load Lines Convention in order, as the preamble states, "to promote safety of life and property at sea by establishing in common agreement uniform principles and rules with regard to the limits to which ships on international voyages may be loaded." The treaty came into force between fifteen of the signatories, including the United States, on January 1, 1933, and by September 1, 1935, had been ratified or acceded to by 36 "governments." The convention contains no provision permitting its suspension in time of war by either belligerents or neutrals, but Article 25 stipulates that the convention may be denounced at any time after it has been in force for five years, such denunciation not to take effect until twelve months after it has been received. Article 20 states, in part, that "modifications of this Convention which may be deemed useful or necessary improvements may at any time be proposed by any Contracting Government . . . and if any such modifications are accepted by all the Contracting Governments . . . this Convention shall be modified accordingly." It is clear that no provision of the treaty authorizes the action taken by the United States Government, which was neither a denunciation subject to one year's notice, nor a proposed modification in the line of improvement, subject to unanimous acceptance,

That which causes a demand for performance to be unreasonable, and which, conversely, clothes a party with freedom to rid itself of the obligation to perform is the coming into being of a new condition of affairs which was not only not brought to the attention of the parties when they concluded their agreement, but also one which, if it had then been brought to their attention, would have necessarily produced common acknowledgement that the agreement would be inapplicable, and hence permit a party to regard it as no longer binding in case that condition or situation should subsequently arise.

- 2 C. HYDE, *supra* note 138, at 1524-27. Chesney Hill comments similarly:

A change of circumstances becomes relevant to the obligatory force of a treaty only in so far as it is related to the wills of the parties to the treaty at the time of the conclusion of the treaty. It is not an objective rule of international law which is imposed upon the parties, but is a rule for carrying the intention of the parties into effect.

- C. HILL, *supra* note 129, at 77.

but was a unilateral declaration that the treaty was immediately "suspended and inoperative" in so far as the United States is concerned.¹⁵²

Although quite different in their conclusions, Briggs and Biddle have quite similar rhetorical styles. Each blends consensual and extra-consensual considerations by interpreting each to embrace its opposite. In this, their arguments about *rebus sic stantibus* are similar to arguments about unilateral declarations. Although these two doctrines of treaty law (one about beginning and the other about terminating a consensual obligation) present these rhetorics in different ways, they share a set of rhetorical strategies for mixing the hard with the soft. Taken together, these two doctrines introduce a similar blend of hard and soft to treaty doctrine as a whole. Although both are doctrines about treaty law a seemingly consensual source of international law, treaties, unilateral declaration doctrine, because it concerns the creation of consensual obligations, seems to concern the binding nature of consent most directly. *Rebus sic stantibus*, on the other hand, seems to be about the soft conditions under which consent-based obligations fall. Taken together the rule (unilateral declaration) and the exception (*rebus sic stantibus*) allow treaty law itself to embrace the tension between hard and soft rhetoric. Although these two doctrines were thus defined by this initial differentiation, each in turn embraced and managed the tension within itself. As a whole we see within treaty law a rhetorical pattern of proliferating differentiation and recombination managing what might otherwise seem a tense relationship between an absolute sovereign autonomy to consent and a systemic pattern of legal obligation.

C. THE CASE OF CUSTOM

Although both the form and the authoritative basis for international customary law are generally considered to be less consensual than the form and basis for treaty law, the law of custom, like treaty law, blends consensual and non-consensual rhetorics. The strategies used to blend these elements in argument about custom are similar to those which animated argument about doctrines of treaty law. Interestingly, however, arguments about custom arrange their reliance upon hard and soft rhetorics differently than treaty law argument. Indeed, custom seems in many ways the rhetorical mirror image of treaty law.

That the law of custom, like treaty law, should contain both consensual and non-consensual doctrines and rhetorical tendencies is unsurprising. As a general matter, international custom is seen both as an

152. Briggs, *supra* note 144, at 91 (footnotes omitted).

ersatz treaty, raising the same issues about consent which were raised by treaty law, and as an expression of the requirements and equity of the interstate system.¹⁵³ Just as sovereign consent was predominant in the theory and doctrine of treaty law, in custom the non-consensual element is generally thought to predominate.¹⁵⁴ Although custom is generally thought to be found in repeated state behavior, as a formal matter custom might be written and indeed is often thought to have been expressed in the form of a multilateral treaty. As we saw in the case of unilateral declarations, moreover, consensual rhetoric can ground oral statements and behavioral practices as well as written expressions of sovereign will.

As was true of treaty law, some doctrines about custom seem hard and others soft. In particular, it seems that doctrines about the creation of custom seem to be about the conditions of justice or the nature of the system of international law, while doctrines about the limits of custom seem to be about the failure of consent by the state to be bound. This doctrinal arrangement—exactly the inverse of doctrines about creating and terminating an obligation of treaty law—seems to follow from custom's predominantly non-consensual nature. For example, Waldock begins his elaboration of the doctrines of custom formation in a way which reflects his soft view of custom, finding it:

clear that, if a custom becomes established as a general rule of international law, it binds all States which have not opposed it, whether or not they themselves played an active part in its formation. This means that in order to invoke a custom against a State it is not necessary to show specifically the acceptance of the custom as law by that State; its acceptance of the custom will be presumed so that it will be bound unless it can adduce evidence of its actual opposition to the practice in question. The Court in applying a general custom may well refer to the practice, if any, of the parties to the litigation in regard to the custom; but it has never yet treated evidence of their acceptance of the practice as a *sine qua non* of applying the custom to them.¹⁵⁵

Initially it seems that custom is formed in a way which might render state consent irrelevant—just as treaty law initially seemed oblivious to the systemic implications of its consensually generated rules. But the softness of this doctrine is tempered in several ways. It seems that a

153. See *supra* notes 40-45 and accompanying text.

154. Waldock's summary of these two dimensions of custom is exemplary:

The view of most international lawyers is that customary law is not a form of tacit treaty but an independent form of law; and that, when a custom satisfying the definition in Article 38 is established, it constitutes a general rule of international law which, subject to one reservation, applies to every State.

Waldock, *supra* note 1, at 49.

155. *Id.* at 50 (footnote omitted).

customary rule cannot form against the opposition of a sovereign and will lapse when confronted with a later consensually adopted doctrine—just as a treaty could not form against the opposition of some systemic norm of *jus cogens* and would lapse when confronted with either a later “peremptory norm” or a “fundamental” change of circumstances. Waldock’s formulation suggests that sovereign consent to systemic rules is presumed, not irrelevant. He extends this approach in developing a reservation to his general statement about custom formation:

The reservation concerns the case of a State which, while the custom is in process of formation, unambiguously and persistently registers its objection to the recognition of the practice as law . . . [t]he rule so created will not bind the objectors; in other words, . . . in international law there is no majority rule even with respect to the formation of customary law.”¹⁵⁶

Moreover, it seems that although custom is discovered in practice, that practice must be accompanied—even motivated—by a sovereign acknowledgement that the practice is norm-generating or compliant. This requirement of *opinio juris* is reminiscent of the requirement that treaty law, although the expression of sovereign will, be expressed in an appropriate, communally recognized form.

At the level of doctrinal structure, custom and treaty law differentiate themselves from one another by reversing the arrangement of their internal components. Custom seems softer than treaty because doctrines about getting into custom are softer — tempered by consent — while doctrines about initiating treaty obligations are harder — tempered by systemic considerations. Treaty seems harder than custom because it confines systemic considerations to the exceptional doctrines about lapse — tempered by consensual implication — while custom confines consensual considerations to exceptional doctrines about lapse — tempered by *jus cogens*.

Since custom doctrine mixes consensual and extra-consensual considerations, argument about the application of these doctrines is rhetorically quite similar to argument about treaty law doctrine, if often somewhat inverted. In the *Anglo-Norwegian Fisheries Case*, the United Kingdom objected to the method by which Norway delimited its territorial waters, claiming that Norway thereby violated a customary norm of international law.¹⁵⁷ Norway responded that such a norm did not exist, or, that if it did, it did not apply to the Norwegian coast.

156. *Id.* at 49-50.

157. *Anglo-Norwegian Fisheries Case*, (U.K. v. Nor.) 1951 I.C.J. 116 (Judgment of Dec. 18).

Norway defended this position in part by opposing the claim that a general norm had been created, relying on a somewhat more consensual vision of customary creation than had the United Kingdom. Norway claimed, moreover, never to have consented to the general rule and to have consistently and successfully opposed its application to the rocky and deeply indented Norwegian coastline. Norway also claimed that the combination of Norwegian practice and the acquiescence of other sovereigns, including the United Kingdom, created an opposing and permissive customary norm which could be invoked against the United Kingdom. Sometimes they cast this opposing norm as an exception for such peculiar coastlines and sometimes they styled it a "historic title." The United Kingdom opposed this norm of custom much as Norway had opposed theirs.

Thus, like many custom cases, the *Fisheries* opinion contains arguments about the creation and limitation of two different and opposing customary norms. Each party argued for and against a norm of custom—and did so by weaving hard and soft rhetorics together in ways familiar from argument about unilateral declarations or *rebus sic stantibus*. As a result, what looks like a limit to one customary norm is also the creation of another and the opinion must decide between two customary norms, each both justified and opposed in hard and soft rhetorics.

The Court ruled that the Norwegian delimitation method did not contravene international law.¹⁵⁸ In reaching this conclusion, the Court found both that the proposed United Kingdom norm was not binding on Norway and that the proposed Norwegian scheme was binding on the United Kingdom. Initially, the Court supported the first proposition with consensual and the second with non-consensual rhetoric. The Court rejected the United Kingdom's claim that a general customary norm bound Norway in the following terms:

The claim of the United Kingdom Government is founded on what it regards as the general international law applicable to the delimitation of the Norwegian fisheries zone

.....
In these circumstances the Court deems it necessary to point out that although the ten-mile rule has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law.

In any event the ten-mile rule would appear to be inapplicable as against Nor-

158. *Id.* at 143.

way inasmuch as she has always opposed any attempt to apply it to the Norwegian coast.

.....
The Court, having thus established the existence and the constituent elements of the Norwegian system of delimitation, further finds that this system was consistently applied by Norwegian authorities and that it encountered no opposition on the part of other States.

.....
The Court considers that too much importance need not be attached to the few uncertainties or contradictions, real or apparent, which the United Kingdom Government claims to have discovered in Norwegian practice. They may be easily understood in the light of the variety of the facts and conditions prevailing in the long period which has elapsed since 1812, and are not such as to modify the conclusions reached by the Court.

In the light of these considerations, and in the absence of convincing evidence to the contrary, the Court is bound to hold that the Norwegian authorities applied their system of delimitation consistently and uninterruptedly from 1869 until the time when the dispute arose.¹⁵⁹

On first reading, it seems that the Court rejects application of the United Kingdom norm to Norway primarily because Norway has not consented. A second reading complicates the image. We know that Norway has not consented—has opposed the United Kingdom norm—because Norway has succeeded in creating a “system of delimitation” which has been “consistently” applied without “opposition”—has, in other words, generated what might be thought of as an opposing norm of customary law binding upon the United Kingdom despite its apparent unwillingness to comply. So long as both norms (or both the United Kingdom’s norm and its exception) are expressed consensually, they coexist uneasily. It seems difficult to explain why the Court should conclude that “too much importance need not be attached” to “uncertainties or contradictions” in the Norwegian practice while finding the fact that “other States have adopted a different limit” dispositive in concluding that the ten-mile rule “has not acquired the authority of a general rule of international law.”

The Court avoids a direct clash between two consensually supported norms by moving to a softer defense of the Norwegian system—emphasizing practice rather than *opinio juris* and stressing the interests of local fishermen who have traditionally been economically dependent upon fish caught in the disputed regions. The Court defends the Norwegian system in the following terms:

These ancient concessions tend to confirm the Norwegian Government’s contention that the fisheries zone reserved before 1812 was in fact much more exten-

159. *Id.* at 126, 131, 136-37, 138.

sive than the one delimited in 1935. It is suggested that it included all fishing banks from which land was visible, the range of vision being, as is recognized by the United Kingdom Government, the principle of delimitation in force at that time. The Court considers that, although it is not always clear to what specific areas they apply, the historical data produced in support of this contention by the Norwegian Government lend some weight to the idea of the survival of traditional rights reserved to the inhabitants of the Kingdom over fishing grounds included in the 1935 delimitation, particularly in the case of LoppHAVET. Such rights, founded on the vital needs of the population and attested by very ancient and peaceful usage, may legitimately be taken into account in drawing a line which, moreover, appears to the Court to have been kept within the bounds of what is moderate and reasonable.¹⁶⁰

After reciting the geographic peculiarities of the northern Norwegian coast, the Court emphasizes the soft realism of accepting the Norwegian position.

In these barren regions the inhabitants of the coastal zone derive their livelihood essentially from fishing.

Such are the realities which must be borne in mind in appraising the validity of the United Kingdom contention that the limits of the Norwegian fisheries zone laid down in the 1935 Decree are contrary to international law.¹⁶¹

As a rhetorical matter, of course, an extra-consensual defense stressing consistency and competitive access could as easily have been used to support the ten-mile rule. Moreover, such a defense of the Norwegian rule invites a consensual response which focuses on gaps in the Norwegian practice and in the acquiescence of foreign states. Indeed, the United Kingdom argued that its previous attitude had at most been one of benign neglect rather than *opinio juris*, in any case displaced by its current opposition.

The key rhetorical moment, however, was achieved when the deadlock between two consensual norms was broken. Once the Court had characterized one rule in consensual terms and the other in extra-consensual terms, its argument took on a certain momentum. The Norwegian rule became "the" rule which needed to be displaced. The rest of the opinion was a rhetorical mopping up operation, deploying the strategies we encountered in the cases of unilateral declarations and changed circumstances to make the soft lie down with the hard.

This mopping up operation proceeded by exploiting the fact that both a hard and a soft rhetoric were available both to support and oppose each norm. The Court turned from a soft defense of the Norwegian system to a hard offense against the United Kingdom's opposition

160. *Id.* at 142.

161. *Id.* at 128.

to it, arguing that the absence of opposition indicated that the United Kingdom had consented to the Norwegian system, whatever its actual intent.

From the standpoint of international law, it is now necessary to consider whether the application of the Norwegian system encountered any opposition from foreign States.

.....
The general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact. For a period of more than sixty years the United Kingdom Government itself in no way contested it It would appear that it was only in its Memorandum of July 27, 1933, that the United Kingdom made a formal and definite protest on this point.

The Court is thus led to conclude that the method of straight lines, established in the Norwegian system, was imposed by the peculiar geography of the Norwegian coast; that even before the dispute arose, this method had been consolidated by a constant and sufficiently long practice, in the face of which the attitude of governments bears witness to the fact that they did not consider it to be contrary to international law¹⁶²

This offensive use of hard rhetoric against the United Kingdom is tempered in two ways so as not to clash directly with the United Kingdom's consensual claims. First, the Court tempers its hard opposition to the United Kingdom's proposed norm by suggesting that the ten-mile rule—as applied to Norway—is incompatible with certain systemic considerations “inherent the nature of the territorial sea.”

In this connection, certain basic considerations inherent in the nature of the territorial sea, bring to light certain criteria which, though not entirely precise, can provide courts with an adequate basis for their decision, which can be adapted to the diverse facts in question.

Among these considerations, some reference must be made to the close dependence of the territorial sea upon the land domain. It is the land which confers upon the coastal State a right to the waters off its coasts. It follows that while such a State must be allowed the latitude necessary in order to be able to adapt its delimitation to practical needs and local requirements, the drawing of base-lines must not depart to any appreciable extent from the general direction of the coast.

Another fundamental consideration, of particular importance in this case, is the more or less close relationship existing between certain sea areas and the land formations which divide or surround them. The real question raised in the choice of base-lines is in effect whether certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters. This idea, which is at the basis of the determination of the rules relating to bays, should be liberally applied in the case of a coast, the geographical configuration of which is as unusual as that of Norway.

Finally, there is one consideration not to be overlooked, the scope of which

162. *Id.* at 138, 139.

extends beyond purely geographical factors: that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage.¹⁶³

Second, the United Kingdom's acquiescence is implied objectively from its practice, rather than found subjectively in *opinio juris*, in contrast to the Court's approach in evaluating the French unilateral declarations in the *Nuclear Tests* cases.

The United Kingdom Government has argued that the Norwegian system of delimitation was not known to it and that the system therefore lacked the notoriety essential to provide the basis of an historic title enforceable against it. The Court is unable to accept this view. As a coastal State on the North Sea, greatly interested in the fisheries in this area, as a maritime power traditionally concerned with the law of the sea and concerned particularly to defend the freedom of the seas, the United Kingdom could not have been ignorant of the Decree of 1869 which had at once provoked a request for explanations by the French Government

The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom.¹⁶⁴

This softer assessment of the United Kingdom's rule might need to confront the Court's soft argument favoring the Norwegian practice, forcing the Court to choose between the systemic value of open seas and the systemic value of "natural prolongation" as expressions of sovereignty just as it might have seemed necessary to choose between Norwegian and United Kingdom fishermen when the Court justified the Norwegian rule in soft terms. The Court deploys a number of rhetorical strategies to avoid such a direct choice.

One strategy is to return to a hard justification for the Norwegian exception to the United Kingdom rule—precisely the position which was downplayed when the Court was expressing the United Kingdom's rule in hard terms. This time, however, the Norwegian opposition is tempered by soft considerations of systemic principle to which the Norwegian delimitation must, of course, comply.

The Norwegian Government does not deny that there exist rules of international law to which this delimitation must conform. It contends that the propositions formulated by the United Kingdom Government in its "conclusions" do not possess the character attributed to them by that government. It further relies on its own system of delimitation which it asserts to be in every respect in conformity with the requirements of international law.

163. *Id.* at 133.

164. *Id.* at 138-39.

.....

It does not at all follow that, in the absence of rules having the technically precise character alleged by the United Kingdom Government, the delimitation undertaken by the Norwegian Government in 1935 is not subject to certain principles which make it possible to judge as to its validity under international law. The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.¹⁶⁵

Another strategy is to express the systemic, softer basis for the Norwegian rule in terms of a customarily accepted scheme of "historic title" in the establishment of which the United Kingdom, like other states, has participated.

By "historic waters" are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title. The United Kingdom Government refers to the notion of historic titles both in respect of territorial waters and internal waters, considering such titles, in both cases, as derogations from general international law. In its opinion Norway can justify the claim that these waters are territorial or internal on the ground that she has exercised the necessary jurisdiction over them for a long period without opposition from other states, a kind of *possessio longi temporis*, with the result that her jurisdiction over these waters must now be recognized although it constitutes a derogation from the rules in force. Norwegian sovereignty over these waters would constitute an exception, historic titles justifying situations which would otherwise be in conflict with international law.

As has been said, the United Kingdom Government concedes that Norway is entitled to claim as internal waters all the waters of fjords and sunds which fall within the conception of a bay as defined in international law whether the closing line of the indentation is more or less than ten sea miles long.¹⁶⁶

Although the Court's opinion has not directly confronted either the choice between Norwegian and British consent or between systemic interests in Norwegian and British fisheries or in open seas and historic titles, it has produced an elegant and persuasive account of its decision for Norway. One might say that the decision expresses a preference for historic title, or Norwegian fisheries or British consent, but the decision does not rhetorically present these choices. Similarly, one might say that the opinion, although primarily "about" customary law, is important primarily for its doctrinal expression of consensual doctrines of estoppel and persistent opposition which here trump the customary norm. But the opinion itself weaves an elegant blend of consensual and non-

165. *Id.* at 126, 132.

166. *Id.* at 130-31. Judge Hackworth concurs on the basis of this connection. *Id.* at 144.

consensual rhetoric on behalf of one customary norm and against another. This blend is created much as it was created in the International Load Line Convention materials and in the *Nuclear Tests* opinions—by interpreting soft doctrines in consensual terms and supporting consensual norms with systemic considerations.

The major difference is that the opening moment, in which the Court chooses to consider treating Norway's system as the norm which will lapse only in the face of persistent opposition by the United Kingdom, is cast in soft rhetoric, whereas in the earlier cases we considered, the norm was established in hard rhetoric and then lapsed in the face of systemic considerations, however consensually expressed. This moment reveals something about rhetorical strategies of decision. These shifting rhetorical possibilities can be mobilized in a way which seems tilted in favor of Norway by exploiting the contrast between consensual and nonconsensual norms rather than by expressing a direct choice for the Norwegian system. In this, the opinion reaches persuasive closure in much the way the doctrinal system achieves doctrinal distinctiveness—by expressing doctrines in differentially hard and soft rhetoric.

In both situations, moreover, *extreme* versions of the two rhetorical strands are avoided by interpreting each in terms of the other, thus allowing them to coexist easily. Thus, the Court saves the apparent effectiveness of hard arguments by treating them as capable of objective systemic definition. In the first instance, the Court uses an objective practice-based approach to British consent, finding in a benign practice a willingness to live with the Norwegian system. On the other hand, the Norwegian will is understood to be bound by systematic considerations of justice. Both consensual strands of the Court's argument are thus given soft interpretations. Similarly, although the Norwegian rule is supported and the United Kingdom norm is opposed by soft arguments, these soft arguments are defined by historically acknowledged practices.

The opinion of the International Court of Justice in the *North Sea Continental Shelf Cases* develops, but never quite resolves, similar arguments about the creation and limitation of a special norm of customary law.¹⁶⁷ Germany, Denmark, and the Netherlands, having agreed that the boundaries of their adjoining continental shelves should be determined by agreement, requested the Court to state the rules of international law, if any, which should be taken into account. The judgment, confined to an analysis of the relative authority of alternative legal norms, was almost exclusively concerned with sources doctrine.

167. (W. Ger. v. Den., W. Ger. v. Neth.) 1969 I.C.J. 3 (Judgment of Feb. 20).

As it turned out, moreover, the Court did not feel it necessary definitively to choose among norms or to specify in any detail how any norm should be applied to the continental shelf in the North Sea: "The Court is requested . . . to decide what are the applicable 'principles' and rules of international law. The Court is not asked actually to delimit the further boundaries which will be involved. . . ."168

Denmark and the Netherlands proposed that the shelf be delimited in accordance with the principle of "equidistance" which they argued was binding upon the Federal Republic. Because the German North Sea coast is deeply indented, this rule would have allocated much of the oil rich outer shelf to Denmark and the Netherlands. The Federal Republic proposed that the "just and equitable share" rule bound Denmark and the Netherlands to allocate Germany a portion of the shelf proportional to the relative length of Germany's coastline, despite its indented shape.

The Court presented the arguments for both rules in a similar order. First, the Court treated the contentions of both sides that their proposed norm could be deduced from the first principle of continental shelf doctrine: that the right to continental shelf dominion is based upon the "natural prolongation" of the sovereign's coastal territory. The Court reaffirmed the principle of "natural prolongation" but rejected both of the interpretations offered by the parties.

Although the Court rejected the two interpretive claims in slightly differing ways, both were treated as insufficiently consensual expressions of a systemic norm. As a result, the second half of the Court's opinion compared hard justifications for the two rules. This approach is thus quite different from that of the *Fisheries* case which created a sense of rhetorical progression by contrasting hard and soft justifications. Here the Court considers both proposed rules from a soft perspective and then from a hard perspective. This approach makes it far more difficult for the Court to weave a persuasive and continuous rhetorical fabric—and it is perhaps well that the opinion confronted no narrative demand for decisiveness.

Let us follow these two argumentative presentations in turn. Although the first stage of the opinion treats the two proposed norms from a soft perspective, this uniformity is hardly necessary, for the parties appear to have presented slightly divergent arguments for their proposed interpretation of the "natural prolongation" principle. Indeed, the Court seems to have struggled to transform each into a springboard for a similar parallel investigation of consent.

168. *Id.* at 13.

As presented by the Court, the Germans sought to interpret the soft standard so that it might depend upon their participation in delimitation according to its terms, rendering the automatic and nonconsensual "natural prolongation" principle dependent upon actual usage and a consensual settlement of claims. They thus seemed to be grafting a consensual requirement onto a systemic argument of principle. The Court rejected this argument by stressing the systemic and principled nature of "natural prolongation" as an extension of sovereignty—excluding any necessity of sovereign participation in its interpretation.

It will be convenient to consider first the contentions put forward on behalf of the Federal Republic. The Court does not feel able to accept them. . . . The doctrine of the just and equitable share appears to be wholly at variance with what the Court entertains no doubt is the most fundamental of all the rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention, though quite independent of it,—namely that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right Furthermore, the right does not depend on its being exercised. . . .¹⁶⁹

By emphasizing the inherency of "natural prolongation" rather than "participation" in sovereignty, the Court drove a wedge between the two halves of the German argument, forcing a consensual defense of the proportionality approach.

The Court approaches the soft arguments for the Danish-Dutch norm quite differently. It presents arguments for the equidistance principle in exclusively soft terms—precisely the terms in which it rejected the proportionality norm—and rejects them as insufficiently grounded in German consent. The opinion considers and rejects the view that the equidistance principle is implied by the idea of natural prolongation and is hence "a rule that is part of the corpus of general international law;—and, like other rules of general or customary international law, is binding on the Federal Republic automatically and independently of any specific assent, direct or indirect, given by the latter."¹⁷⁰

The Court could have structured its rejection of the Danish-Dutch norm parallel to its rejection of the German norm, as incompatible with the inherency of "natural prolongation" in sovereignty. Equidistance, by tying the principle of "natural prolongation" to the formal equality

169. *Id.* at 21-22.

170. *Id.* at 28.

of sovereigns, would have introduced a hard element into a principle which expresses the systemic respect for territorial configurations. Instead, the Court rejects the Dutch-Danish norm for being *insufficiently* grounded in sovereign consensual autonomy.

The *a priori* argument starts from the position . . . according to which the right of the coastal State to its continental shelf areas is based on its sovereignty over the land domain, of which the shelf area is the natural prolongation into and under the sea. From this notion of appurtenance is derived the view which, as has already been indicated, the Court accepts, that the coastal State's rights exist *ipso facto* and *ab initio* without there being any question of having to make good a claim to the areas concerned, or of any apportionment of the continental shelf between different states. . . . Denmark and the Netherlands, for their part, claim that the test of appurtenance must be "proximity," or more accurately "closer proximity:" all those parts of the shelf being considered as appurtenant to a particular coastal state which are (but only if they are) closer to it than they are to any point on the coast of another state

The conclusion drawn by the Court from the foregoing analysis is that the notion of equidistance as being logically necessary, in the sense of being an inescapable *a priori* accompaniment of basic continental shelf doctrine, is incorrect A review of the genesis and development of the equidistance method of delimitation can only serve to confirm the foregoing conclusion

[A]t no time was the notion of equidistance as an inherent necessity of continental shelf doctrine entertained. Quite a different outlook was indeed manifested from the start in current legal thinking.¹⁷¹

On the one hand, the Court seems to have deployed a rhetorical strategy familiar from the *Fisheries* case. By rejecting the two proposed interpretations of the natural prolongation principle with arguments which differentially emphasize the hard and the soft, the Court has generated a sense of movement forward, placing a burden upon the Dutch to prove consent, and eliminating the German norm from further consensual consideration. On the other hand, however, the Court has created a difficulty for itself. By rejecting the German norm for attempting to introduce consensual elements into natural prolongation and rejecting the Dutch argument for insufficiently demonstrating the consensual basis for their interpretation of the natural prolongation principle, the Court has preserved the soft integrity of the principle—without creating a preference for either interpretation. The Court seems confronted with an awkward choice. Either they can maintain the high ground and interpret "natural prolongation" themselves—an alternative which stands uneasily with the justification for their rejection of the Danish-Dutch interpretation—or they can shift to a more purely consensual rhetoric—which will need to leave their purified sys-

171. *Id.* at 29, 32, 35.

temic principle somewhat behind. They choose the latter.

The remainder of the opinion is devoted to the Danish and Dutch claim that Germany is bound to the equidistance rule because it is part of the body of consensual custom or treaty law which binds Germany. The trouble is that unmoored from the discussion of systemic considerations, an argument cast purely in terms of sovereign autonomy and consent seems unable to generate any particular rule. Although Denmark and the Netherlands presented consensual arguments of both treaty and custom for equidistance, Germany asserted that it had not or did not consent.

Limited to the idea that subjective consent is to be the basis for customary norms, the Court is confronted with two classically polar claims. On the one hand, it seems to require that Germany be bound by whatever norm Denmark and the Netherlands subjectively claim to have consented to on the basis of their objective and reasonable belief that Germany had bound itself thereto. The idea that objective or implied consent is to be the basis of obligation seems in Danish hands to devour any subjectively based German protest to imposition of the proposed customary norm. On the other hand, the idea of implied consent seems incompatible with the notion that Germany is bound by its consent.

Having rejected the soft arguments attributed to the Netherlands and Denmark, the Court examines what it treats as fallback positions which justify binding the Federal Republic by its consent. The equidistance principle was alternatively to be considered binding because Germany had signed a treaty (Geneva Convention) containing it, or had assented to the treaty's contents, or because the treaty declared preexisting positive customary law, or crystallized new law, or because the treaty rule had since become a customary norm through the assent of the international community.

As presented by the Court, Germany responds to each of these hard arguments in consensual terms, terms which would ordinarily compel the Danish and Dutch to abandon their consensual justification for the rule and return to the soft argumentation which the Court had already rejected. Germany was not bound by the treaty because it never intended to be bound, and had not ratified, despite its signature and unilateral declarations assuming the treaty's obligations. Germany argued further that it did not accept either a prior customary law declared or an emergent law crystallized. Moreover, Germany rejected the view that new custom had been created because the requisite subjective intent was missing.

The Dutch and Danish responded to each of these objections by mov-

ing to implication: German consent could be implied even absent ratification, or, supported by Judge Lachs in dissent, *opinio juris* must be implied from conduct.¹⁷² Germany countered that it had been a consistent dissenter to precisely this rule, whatever the norm's customary status elsewhere.

The Court adopts the German point of view at each stage in this exchange. Germany is not bound by the Convention which contains the equidistance rule. Germany is not bound by its unilateral acceptance of the Convention because it did not intend to be bound.¹⁷³ The Convention did not "crystallize" the equidistance principle as a customary norm because it was proposed "by the [International Law] Commission with considerable hesitation, somewhat on an experimental basis,"¹⁷⁴ with insufficient consensus to produce custom. Even when the Court considers somewhat softer, more systemic responses to Germany's arguments, it rejects them. Thus, the equidistance rule is not binding as custom because not sufficiently consciously accepted by states over a long enough period of time to have registered sufficient consent.

With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even 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. In the present case, however, the Court notes that, even if allowance is made for the existence of a number of States to whom participation in the Geneva Convention is not open, or which, by reason for instance of being landlocked States, would have no interest in becoming parties to it, the number of ratifications and accessions so far secured is, though respectable, hardly sufficient

.....
As regards the time element, the Court notes that it is over ten years since the convention was signed, but that it is even now less than five since it came into force Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked;—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.

172. *Id.* at 231. Judge Lachs stated: "it is surely over-exacting to require proof that every state having applied a given rule did so because it was conscious of an obligation to do so." *Id.*

173. "The Federal Republic was one of the signatories of the convention, but has never ratified it, and is consequently not a party. . . ." *Id.* at 25.

174. *Id.* at 38.

The essential point in this connection—and it seems necessary to stress it—is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris*;—for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.¹⁷⁵

The dissenting opinions differed with the majority on one or another of these points, preferring a somewhat softer approach. Judge Lachs was willing to imply *opinio juris*, which he regarded as merely a matter of “evidence,” and to do so on the basis of fewer instances over a shorter period so that the law could remain “commensurate with the rate of movement of events which require legal regulation.”¹⁷⁶ In the end, Judge Lachs takes a softer approach:

For to become binding, a rule or principle of international law need not pass the test of universal acceptance. This is reflected in several statements of the Court, e.g.: “generally . . . adopted in the practice of States” (*Fisheries, Judgment, I.C.J. Reports 1951*, p. 128). Not all States have . . . an opportunity or possibility of applying a given rule. The evidence should be sought in the behaviour of a great number of States, possibly the majority of States, in any case the great majority of the interested States . . .¹⁷⁷

Judge Tanaka, in his dissent, is willing to eliminate reliance upon the subjective consent altogether.

Next, so far as . . . *opinio juris sive necessitatis* is concerned, it is extremely difficult to get evidence of its existence in concrete cases. This factor, relating to internal motivation and being of a psychological nature, cannot be ascertained very easily, particularly when diverse legislative and executive organs of a government participate in an internal process of decision-making in respect of ratification or other State acts. There is no other way than to ascertain the existence of *opinio juris* from the fact of the external existence of a certain custom and its necessity felt in the international community, rather than to seek evidence as to the subjective motives for each example of State practice, which is something which is impossible of achievement.¹⁷⁸

Judge Sprensen is willing to take an objective approach to *opinio juris*, citing Sir Hersch Lauterpacht.

Unless judicial activity is to result in reducing the legal significance of the most potent source of rules of international law, namely, the conduct of States, it would appear that the accurate principle on the subject consists in regarding all

175. *Id.* at 42-43, 44.

176. *Id.* at 230.

177. *Id.* at 229.

178. *Id.* at 176.

uniform conduct of Governments (or, in appropriate cases, abstention therefrom) as evidencing the *opinio necessitatis juris* except when it is shown that the conduct in question was not accompanied by any such intention (Sir Hersch Lauterpacht: *The Development of International Law by the International Court*, London 1958, p. 380).

Applying these considerations to the circumstances of the present cases, I think that the practice of States referred to above may be taken as sufficient evidence of the existence of any necessary *opinio juris*.¹⁷⁹

Rather than blending the hard with the soft, the Court simply stresses the hard, leaving the soft to the dissenting opinions. In this, the majority and the dissent have differentiated themselves from one another by monopolizing the rhetorical tendencies which also differentiate doctrines from one another. This rhetorical strategy, while it effectively banishes the proposed Danish-Netherlands rule, has a difficult time coming up with an alternative. In rejecting the soft Danish-Netherlands argument, the Court indicated the dependence of soft argument on hard consensus for which it had criticized the German position. Having completed its rejection of the Danish position, the Court never considers the hard arguments which Germany may have advanced for the proportionality rule.

The Court was perhaps fortunate, given its rhetorical approach, that the parties had agreed not to save it from the task of knitting, from opposed protestations about lack of consent, a coherent norm to apply to the delimitation. Having considered both sets of soft arguments and rejecting them with a rather hard analysis, not much was left out of which to fashion a decision. The parties were content to have the equidistance rule eliminated and the Court did not actively defend an alternative rule, or even the absence of that rule. The result was the anticlimactic conclusion that the parties must "agree" to an apportionment which must be in accord with "equitable principles" including equidistance and "a reasonable degree of proportionality." At the last moment, the Court returns to a more persuasive combination strategy:

It was, and it really remained to the end, governed by two beliefs;—namely, first, that no one single method of delimitation was likely to prove satisfactory in all circumstances, and that delimitation should, therefore, be carried out by agreement (or by reference to arbitration); and secondly, that it should be effected on equitable principles.¹⁸⁰

The Court suggests that this combination is what most people mean [hard] by the idea of natural prolongation [soft]. This consensus leads to the conclusion that:

179. *Id.* at 247.

180. *Id.* at 43.

On a foundation of very general precepts of justice and good faith, actual rules of law are here involved which govern the delimitation of adjacent continental shelves . . . , namely:

- (a) the parties are under an obligation to enter into negotiations with a view to arriving at an agreement . . . ;
- (b) the parties are under an obligation to act in such a way that, in the particular case, and taking all the circumstances into account, equitable principles are applied,—for this purpose the equidistance method can be used, but other methods exist and may be employed, alone or in combination, according to the areas involved;
- (c) for the reasons given . . . the continental shelf of any state must be the natural prolongation of its land territory and must not encroach upon what is the natural prolongation of the territory of another State.

[I]n the course of the negotiations, the factors to be taken into account are to include:

- (1) the general configuration of the coasts of the Parties, as well as the presence of any special or unusual features;
- (2) so far as known or readily ascertainable, the physical and geological structure, and natural resources, of the continental shelf areas involved;
- (3) the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal state and the length of its coast measured in the general direction of the coastline, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitations between adjacent states in the same region.¹⁸¹

III. CONCLUSIONS ABOUT SOURCES DISCOURSE

The elaborately articulated modern doctrine and argument about the sources of international law are strikingly abstract and independent of the specific norms of process or substance whose authority it establishes.¹⁸² The authority of various sources, their limitations, and the hierarchical relationship among sources do not depend upon the content of norms. Argument about the authority of various norms, when conducted in the rhetoric of sources doctrine, proceeds independently of the norm's particular content or application. At the same time, however, modern sources discourse is a distinctly doctrinal affair. Argu-

181. *Id.* at 46-47, 53-54.

182. Not only are "sources of law" perceived to be a topic sufficiently unified to be the subject of separate monographs and books, *see supra* note 1, they are generally treated separately in casebooks and treatises. *See, e.g.,* W. BISHOP, *INTERNATIONAL LAW* (3d ed. 1971); J. BRIERLY, *supra* note 1; I. BROWNIE, *supra* note 1; L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *supra* note 97; A. VERDROSS, *supra* note 1; Waldock, *supra* note 1.

ment about the binding nature of particular international legal norms may be abstract, but it is neither theoretical nor political. Norms are legally binding which fit within one of a series of doctrinally elaborated categories, not when a persuasive argument about political interest or theoretical coherence can be made for their observance.

In establishing, delimiting, and hierarchically arranging the categories of authoritative norms in a way which is both doctrinal and yet independent of particular legal doctrines, sources discourse has developed a variety of puzzling rhetorical patterns. Throughout sources discourse, doctrines and arguments repeatedly invoke a distinction between consensually and non-consensually based norms. Most of the rhetorical strategies developed by sources discourse can be understood to recapitulate in one form or another this basic distinction. It is used to distinguish treaties from custom, to contrast various schools of thought about the nature of custom, to divide arguments for and against the application of specific norms in various situations, and in dozens of other ways throughout the materials on sources.

For all this repetition, however, the distinction between consensual and non-consensual sources or doctrines or positions remains frustratingly fluid. These two opposed themes present rhetorical possibilities and strategies more than decisive identifications and differentiations. The important point is that using these rhetorical themes to articulate and distinguish the sources of law gives sources discourse a doctrinal feel without presenting the choice between two norms as a substantive clash between two substantive doctrinal schemes or two sovereigns.

Although a sources discourse which operated completely within the rhetoric of either consent or systemic considerations would also seem doctrinal, it would not be able to avoid presenting a more substantive face. A consensual rhetoric could certainly differentiate and prioritize norms in an abstract way, but in choosing among two norms one would need to choose between the claims of two sovereigns about their autonomous consent. A purely extra-consensual rhetoric, while it would obviously avoid this problem, would have a difficult time avoiding a more substantive seeming choice among various systemically grounded norms. By combining these two rhetorics, sources discourse can defend its independence from sovereign autonomy and substantive legal regulation.

In this survey of sources discourse I have presented a few of the more obvious strategies for combining these incompatible rhetorics. The most apparent rhetorical strategy of combination is simply repetition—differentiating various doctrines from one another as hard and soft and then repeating the distinction in distinguishing each doctrine

from its exception or interpreting doctrinal strands which have once been characterized and perhaps adopted as hard in soft terms. Arguments about the fluid and proliferating doctrinal field which results from this repeating practice of distinction and recombination are often able to combine both rhetorics by careful management of an argument's order—establishing a disjuncture between hard and soft arguments in order to create a sense of decisive forward movement, much as the doctrinal corpus used notions of hierarchy to accommodate sources which were characterized as both hard and soft.

If we think of these various strategies together, the rhetorical patterns seem less fluid. Taken as a whole, sources doctrine seems to favor consensual rhetoric. Consensual doctrines seem to dominate, and consensual interpretations of softer doctrines seem most compelling. The doctrinal hierarchy seems tilted in favor of a rhetoric of consent. Sources argument as a whole, however, seems tilted towards the systemic authority of legal norms. Indeed, sources rhetoric as a whole seems to move toward law and away from sovereign autonomy. A certain systemic authority seems to be taken for granted in rhetoric which is most emphatic about its consensual foundation. In this way, sources discourse seems to combine both rhetorics. That sources discourse can be doctrinal indicates its systemic basis. That it speaks incessantly about consent insulates it from a substantive legal regime. The argument and doctrine taken together seem to move from sovereign autonomy toward systemic authority.

So long as consensual rhetoric seems associable with sovereign autonomy and extra-consensual rhetoric with sovereign cooperation or international solidarity, these patterns suggest something about the goal or project of sources discourse. Sources discourse, so long as it seems hard, guarantees that the legal order will not derogate from—indeed will express—sovereign authority and autonomy. So long as it seems soft, sources rhetoric guarantees that the international legal order will not be hostage to sovereign whim. So long as hard sources rhetoric remains different from soft rhetoric, can seem superior to soft rhetoric and is able to coexist with soft rhetoric, the international legal order can seem to express and transcend sovereign power.

The important point, however, is not simply the coexistence of these two rhetorics. Each must also *temper* the other in important ways and the discourse as a whole must seem to move forward from autonomy to community. Let me take up these two additional dimensions in turn. Although it is difficult to see exactly why, it seems that contemporary sources discourse is uncomfortable with both hard and soft rhetoric in their extreme forms. One could imagine a sources discourse which was

dependent either upon sovereign will or upon the content of the individual norms which made up the international legal order. Imagining such systems suggests something about the motivation for the elaborately hybrid contemporary doctrine and argument about international legal sources.

Were sources discourse completely derivative of other doctrines, it might simply describe the places where one might look to find descriptions of state behavior or elaborations of norms whose authority was derived from someplace else. Interestingly, international law scholars writing before 1648 characteristically spoke of sources in this way.¹⁸³ Their derivative approach to sources was indicated in part by the dispersal of sources doctrine throughout other doctrinal discourse.

A scholar who imagined that the authority of norms was well established elsewhere and who wanted only to describe the ways in which these rules were manifested, could have had a much smaller abstract discussion. He would not be concerned about abstractly identifying the relative hierarchy of his sources. The norms themselves would do that for him. More powerful norms would simply be more powerful, or would say they were more powerful, and there would be no particular reason to suspect that this hierarchy depended upon the way in which a norm was made known. Moreover, such a scholar would not need to delimit the boundaries of his sources very clearly in an abstract fashion. The boundaries of the body of norms would be logically independent of the form of their manifestation. The norms would be limited by their content, not the particular catalog in which they were found. Pre-1648 discussions of the sources of international law did not consistently establish a hierarchy among sources, but suggested that norms from each catalog might, depending upon their content, overrule those of another. Likewise, they did not abstractly delimit their various catalogs. Instead, they suggested that each was limited by the norms which filled it. For example, natural law was defined by the norms which were natural and necessary. These were then elaborated. The category or "source" ended when norms of this sort ran out.

We might also imagine a sources discourse which simply catalogued norms which comported with sovereign will. Such an approach would threaten other doctrinal fields. As the articulation of the content as well as the form of power, sources discourse would no longer simply ground doctrines of process and substance. A scholar who imagined discourse

183. For a discussion of the concepts of the sources of legal authority in the work of primitive scholars Vitoria, Suarez, Gentili, and Grotius, see Kennedy, *Primitive Legal Scholarship*, 27 HARV. INT'L L.J. 1 (1986).

about the "sources" of international law to be descriptive of catalogs of state interests would have a different sense of what needed explaining in doctrines about the sources of international law. He would not need to establish a hierarchy among the sources he considered. When norms conflicted, the norm expressing the more important sovereign interest or the more forceful sovereign will would predominate. There would be no reason to assume that the form of their manifestation could be an accurate guide to their relative strength. Likewise, such a scholar would not be particularly interested in abstractly defining and limiting the various catalogs he felt one could refer to for the content of state interest. The state interests or patterns of authority which were sources would limit the body of norms, and the catalogs would be defined by the norms which filled them, rather than *vice versa*.¹⁸⁴

Contemporary people who talk about sources are not content to say that states obey rules because it is in their interest to do so and that we look to custom, treaty, etc. to discover what is in their interest. Rather, these people accept that the state is best situated to understand and follow its own interests. They want to know the source of norms which bind sovereigns who do not perceive the obligation to be in their own immediate interests. They are looking for the source of norms which can bind the dissident, the nonconformist, the state which wants to do something else. There would be no legal dispute in need of normative resolution unless there was a conflict of interest, unless two states thought their interests could best be served by acting in different fashions. To resolve that dispute by looking for the source of norms only in state interest would lead us only to the conflict.

Likewise, people who talk about sources are not content to say that they are discussing only the ways in which a higher order which animates and therefore binds the state system is made known. They want to acknowledge the authority of states to differ about the content of such a higher order and seek in their discourse about sources to deter-

184. During the extreme period of positivism in the mid-nineteenth century, when a view of international law quite similar to this dominated, the writing of abstract casebooks fell out of fashion in the Anglo-Saxon world, to be replaced by catalogs of state behavior and exercises of sovereign will. See, e.g., H. WHEATON, HISTORY OF THE LAW OF NATIONS IN EUROPE AND AMERICA (1845); H. WHEATON, ELEMENTS OF INTERNATIONAL LAW (1866) (containing a short non-abstract list of sources of the practices guiding international life as indicated by prior publicists). Although this was not true in continental Europe during this period, the treatises produced there often lacked an abstract discussion of the validity of various sources. See, e.g., F. HOLTZENDORF, HANDBUCH DES VÖLKERRECHTS (1887); F. VON LISZT, DAS VÖLKERRECHT (1898) (stating "nur die Rechtsüberzeugung der Staaten vermag Recht zu schaffen"); H. HALLECK, INTERNATIONAL LAW, OR RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR (1861).

mine which of several possible manifestations of such a higher order is authoritative. Indeed, the contemporary scholar discussing the sources of international law does so distinctly from his elaborations of the content of the norms of international law. He tries to develop an abstract set of doctrines about the sources of international law which are independent of the content of the norms which result and of the authorities which produce them. This would only seem worth doing if it seemed that something about the content of international law hinged on this abstract discussion; if the ensuing catalogs of norms were defined by the abstract discussions and not *vice versa*. This would seem true if the authority of the various norms depended upon their inclusion in the abstractly defined categories; if sources discourse was about the justification and limitation of normative authority.

Paradoxically, then, the hesitancy to adopt either extreme position about the basis for international normative authority preserves the authority of sources discourse. People who discourse about the sources of international law are trying to do two things. They seek the norms which can bind states against their own perception of their interests. They seek to elaborate the normative order in a way which does not presume away the diversity of state interests. Sources discourse argues about the normative forms which can bind states without overthrowing their authority. The discourse is not about the form of the catalog of norms. It is about the sources of normative authority in a system of autonomous sovereigns.¹⁸⁵

Thus it seems that the rhetorical tendency to temper hard with soft in sources discourse is more than a persuasive technique. It expresses a hesitancy to embrace either of the extremes with which it flirts. We might think of sources discourse as a whole as sustaining its distinctive position of independence and authority by *invoking* in a hyperbolic way

185. See 1 G. DAHM, *VÖLKERRECHT* (1958) (presenting extensive doctrinal discussions): "Das Problem ist damit in aller Schärfe gestellt: Wie kann es in einer nicht auf über-und Unterordnung, sondern auf Gleichberechtigung souveräner Staaten beruhenden Gemeinschaft Völkerrecht geben?" *Id.* at 8; see also Barile, *La Structure de l'ordre juridique international*, 161 *RECUEIL DES COURS* 9 (1978):

La règle en question répond, en premier lieu, aux principes de souveraineté et d'indépendance des états, membres fondamentaux de la communauté internationale. Le principe de parité entre les états, étroitement lié à celui de leur souveraineté et de leur indépendance, qui, du reste, est à la base également de toutes les autres normes du droit des traités (que l'on pense aux règles qui garantissent d'une certaine façon, plutôt limitée à vrai dire—voir le paragraphe 13 de ce chapitre, la liberté du consentement et aux autres qui déterminent les vices et la nullité des accords) s'exprime, dans la règle *pacta sunt servanda*, dans la valeur *inter partes* des traités

Id. at 80.

images of sovereign autonomy and systemic authority which it is unwilling to embrace. Rather than combining hard and soft rhetorics, we should think of sources discourse as *excluding* the referents of both hard and soft rhetoric. In one way, this exclusion preserves the autonomy and authority of sources doctrine. But in another way, this exclusion refers us away from sources discourse and establishes a substantive legal fabric which remains comfortable with sovereign autonomy. Thought of this way, a sources discourse which deploys the rhetorical strategies which I have outlined seems self-effacing rather than assertive.

The rhetorical proliferation and continual displacement characteristic of sources discourse typifies this self-effacing authority. The rhetorical style and direction of sources discourse, is thus related to its supplemental position within doctrinal discourse as a whole. Neither itself authoritative nor descriptive of an authority located elsewhere, sources doctrine maintains an uneasy independence from other doctrine while leading us towards the substantive legal order. Paradoxically, discourse about the authoritative source of international legal norms occupies a space in modern doctrinal work at once fundamental and trivial. Its importance has a logical flavor. In an era assuming the centrality of origins, doctrines about the authority of authoritative norms seem logically prior to doctrines of substance or process. They are usually presented first in international legal treatises. Moreover, in an era distinguishing theory and doctrine by their relative levels of abstraction from a particular notion of reality, doctrines about the sources of law seem more intimately connected to the structure of the systemic power apparatus than do the individual and specific doctrines whose authority they validate. Sources discourse seems theoretically superior to doctrines of substance or process. As we might expect from this viewpoint, this discourse is very closely related to much theoretical work. Sources discourse is the doctrinal counterpart to the obsession of theory with questions of the legitimacy, strength, and authority of international law.¹⁸⁶

On the other hand, despite this apparent doctrinal priority, sources discourse functions as the last resort of all doctrinal argument. Only when the persuasive power of other doctrines is diminished are advocates forced to say: "this doctrine or outcome may not be persuasive or coherent, but it is authoritative." Consequently, one might only uncover the structure of arguments about the sources of international law after

186. See Kennedy, *Theses About International Law Discourse*, 23 GER. Y.B. INT'L L. 353 (1980).

theoretical and other doctrinal argument had run out. Moreover, despite the theoretical superiority of sources discourse, doctrines about sources seem derivative of a systemic vision articulated first in doctrines of process or substance—where, for example, the “sovereign” whose consent will ground a source will be defined. In argument, sources discourse plays a supplemental role, validating and supplanting a constellation of sovereign authorities produced by doctrines of substance and process.

The key to understanding the structure of sources doctrine is this paradoxical position anterior and inferior to other doctrine. Sources discourse is distinct from other doctrines, allowing space for theoretical elaborations of authority within doctrine. It formally precedes other doctrines as theory formally encompasses doctrine, yet it supplements other doctrinal discourse. One way of thinking about the significance of the rhetorical strategies characteristic of sources doctrine is to see them as managers of this supplemental separation or dependent autonomy from other doctrines. Another way of approaching the same issue, however, is to think of these rhetorical maneuvers as translations into doctrine of difficulties encountered by international legal theory.

At first, the hard and soft rhetorics characteristic of sources doctrine seem reminiscent of positivism and naturalism. We might associate positivism with the view that sources discourse could supplant other doctrines by mapping the interests of state authority. Maintaining the supplemental position of sources discourse (its dependence upon an authority apparatus articulated elsewhere) seems similar to avoiding the pitfalls of an extreme positivism which postulates an authority which it cannot ground. We might associate naturalism with the view that sources discourse could be consumed by doctrines of substance and process. Maintaining the independent position of sources discourse (its ability to validate other norms) seems similar to the dilemma of an extreme naturalism which posits an order to which it cannot give content. In this view, we would equate the struggle to blend hard and soft rhetorics with the dilemma confronting a theory of international law which is to be neither naturalist nor positivist.

Like our preliminary associations of hard and soft rhetorics with images of an independent and a dependent discourse of sources, these preliminary associations simplify naturalism and positivism. Each of these theoretical positions, which developed after the collapse of primitive scholarship, like contemporary sources discourse, were aimed at resolving the division of authority and order. Although they tended towards these two extremes, each school offered a mediation of the relation between order and autonomy. Sources discourse likewise situates

itself between two extremes which it expresses only hyperbolically—only as it excludes them. The problem of sources discourse, like the problem of international legal theory, is to achieve a mediation—to carve out an independent and yet supplemented position within doctrine. But the problem within doctrinal discourse of this type is somewhat different.

Perhaps it is easiest to think of sources discourse as a translation of these theoretical concerns into doctrine—as the transposition of theoretical scepticism into doctrinal proliferation. In theoretical literature, the problem of realism and idealism is presented directly. International legal theory argues directly on behalf of the international legal order against the scepticism of either the political realist or the moralist. Whether positivist or naturalist, the theoretician must respond to the posited or hypothetical absence of an international legal order. As a result, the theoretician must posit and justify the authority of legal norms—indeed by arguing their consensual origin or justice.

In sources discourse, by contrast, the legal order is always already presumed and one is always arguing for some norms against others. Sources discourse seems to argue against the normative order—expressing its authority against the substantive regime on behalf of its origin—even as it establishes that regime by removing us from theoretical scepticism and opposition. As a result, the management of hard and soft rhetorics, while similar to the management of natural and positive justifications for an international legal order, seems to reverse their tone. Here, for example, consensual rhetoric seems to reassure the sovereign while critiquing substantive order even as it establishes the authority of the source. In theoretical literature, by contrast, positivism seems to respond to the realist with evidence of practice. The net result of these two discursive enterprises is to sustain a sense of movement towards and into doctrine.

Discourse about sources searches abstractly to delimit the norms which bind sovereigns in a way which relies neither on the interests of sovereigns nor on some vision of the good which is independent of state interests. The search is for a decisive discourse—not for a persuasive justification—which can continually distinguish binding from nonbinding norms while remaining open to expressions of sovereign will. The argumentative moves made by those engaged in sources discourse reflects this central goal.

The result is a discourse of evasion which constantly combines that which it cannot differentiate and emphasizes that which it can express only by hyperbolic exclusion. Pursued in this fashion, sources doctrine moves us forward from theory towards other doctrines which it supple-

ments, remaining both authoritatively independent and parasitic. This paradoxical position between theoretical discourse and the doctrines of substance and process is maintained by endlessly embracing and managing a set of ephemeral rhetorical differences. The turn to sources doctrine thus seems to provide an escape from fruitless theoretical argument, moving us towards legal order, precisely by opening up an endlessly proliferating field of legal argumentation.

1987

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Recommended Citation

Kennedy, David. "The Sources of International Law." American University International Law Review 2, no. 1 (1987): 1-96.

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