

HIERARCHY AND THE SOURCES OF INTERNATIONAL LAW: A CRITICAL PERSPECTIVE

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INTRODUCTION – OF ANARCHY, HIERARCHY AND SOURCES ORTHODOXY

The discipline of international law, like all academic disciplines, is built around a set of accepted truths, intuitions and histories, which together form its distinctive *episteme* – as Foucault defines it – i.e. its paradigmatic structure of thought and argument.¹ One of these epistemic truths is that international law constitutes a distinctly anarchical order, not so much because it is chaotic and disorderly, but because it lacks a centralized and hierarchically structured law-making and law-enforcing authority.² Domestic legal systems do, as a norm, benefit from highly developed and sophisticated institutional machineries endowed with the power of legislation and lawful coercion. International law, by contrast, is thought to be a largely horizontal system of governance in which juridical authority and the exercise of key legal functions (law-making, law determination and law enforcement) are fragmented and decentralized.³

Horizontality – or the lack of hierarchy – is considered by most legal scholars a central fact of international life and the starting point for theorizing about international law. Nowhere is this more obvious, perhaps, than in the doctrine of sources. Conventional accounts of international law-making depict an eclectic and uncoordinated system in which States – as sovereign equals – create rules for themselves through various techniques and processes which can be engaged simultaneously or in competition with one another, no process being intrinsically superior, normatively, to the other.⁴ No constitution prevailing over ordinary statutes, no statutory law superior to common law, no decisions of higher courts binding on the decisions of lower courts: sources of international law are said to be of equal rank and status, so that a norm derived from one source is not as a matter of principle of a

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¹ MICHEL FOUCAULT, *THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES* (1971). The concept of *episteme* was originally used by Foucault to define the set of rules that govern the production of knowledge across disciplines in a given culture and at a given time (for instance the classical *episteme* of Western culture). The concept has also been used, however, to describe a discipline's own, indigenous knowledge structure or "regime of truth". See, e.g., Dominique Chateau, *Quelques Réflexions sur l'Épistémè de l'Esthétique*, 0 PROTHEUS – CAHIERS DES THÉORIES DE L'ART 59 (2000). On international law as a discipline possessing its own distinctive *episteme*, see Mirjam Sophia Clados, *Bioethics and International Law: An Analysis of the Intertwining of Bioethical and Legal Discourses* (2012) (unpublished Ph.D. dissertation, Ludwig-Maximilians-Universität München).

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

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

⁴ See ALAN BOYLE & CHRISTINE CHINKIN, *THE MAKING OF INTERNATIONAL LAW* 100 (2007) (describing the system of sources as "eclectic, unsystematic, overlapping, and often poorly coordinated").

higher value than a norm formed under another source. The concept of a formal, *a priori* hierarchy of sources is thus, on this view, alien to the structure of the international legal order.⁵

The functional equivalence of sources should not, however, obscure the fact that international legal thought and practice are replete with varied forms of hierarchies which, though not necessarily openly acknowledged as such, nevertheless run deep in the system and inform the ways in which international law is conceptualized, made and applied. This paper examines two types of sources hierarchy. The first type concerns what may be termed “informal hierarchies of pre-eminence”. These informal hierarchies stem from the fact that, whilst acknowledging the functional or formal equivalence of sources, certain actors (states, adjudicators, scholars) tend to express preferences for particular sources because these sources are thought to possess some specific qualities or uphold certain values (determinacy, versatility, universality and so on) deemed desirable. These are soft and transient hierarchies which, as shall become clear, very much depend on contexts, circumstances, the identity of the legal subjects and the projects they pursue. But these are hierarchies nonetheless, inasmuch as they involve a differentiation of sources “in a normative light”, i.e. normative judgments in which some sources are deemed superior (good, effective, democratic) and others inferior (bad, inefficient, illegitimate).⁶

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

The following analysis is, by necessity, schematic and impressionistic. The informal and material hierarchies addressed here are by no means the only hierarchical structures found in the doctrine and practice of sources. Due to space constraints, the focus must remain on representative and characteristic examples, leaving other patterns to be analyzed elsewhere (for instance class and racial hierarchies).⁷ For the same reason, two sets of questions have also been excluded at the outset from

⁵ See, e.g., JAMES CRAWFORD, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 22 (8th ed., 2012); MARK VILLIGER, *CUSTOMARY INTERNATIONAL LAW AND TREATIES – A STUDY OF THEIR INTERACTIONS AND INTERRELATIONS WITH SPECIAL CONSIDERATION OF THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES* 35 (1985); Michael Akehurst, *The Hierarchy of the Sources of International Law*, 47 BRIT. Y.B. INT'L L. 273, 274-5 (1974-5).

⁶ This broad understanding of hierarchy as “difference in a normative light” is borrowed from Martti Koskenniemi, *Hierarchy in International Law: A Sketch*, 8 EUR. J. INT'L L. 566 (1997).

⁷ On racialized tropes, biases and hierarchies in international law, see Makau Mutua, *Critical Race Theory and International Law: The View of an Insider-Outsider*, 45 VILL L. REV. 841 (2000); Robert Knox, *Race, Racialisation and Rivalry in the International Legal Order*, in *RACE AND RACISM IN INTERNATIONAL RELATIONS: CONFRONTING THE GLOBAL COLOUR LINE* (Alexander Anievas, Nivi Manchanda and Robbie Shilliam eds., 2014). For a class approach to international law, see B.S. Chimni, *Prolegomena to a Class Approach to International Law*, 21 EUR. J. INT'L L. 57 (2010); Tai Maha, *Reading 'Class' in International Law: The Labor Question in Interwar Egypt*, SOC. & LEG. ST. (2016, forthcoming).

this paper. The first concerns the hierarchy of norms question, i.e. the relationship between individual norms or bodies of norms by reason of their content, irrespective of their source (for instance the superior status of *jus cogens* over dispositive law). This problem is conceptually distinct from the hierarchy of sources and has been debated at length in other works.⁸ The second concerns the relationship between the so-called traditional sources of international law and new forms of law-making “beyond the state” by public and private transnational governance bodies.⁹

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

I. INFORMAL HIERARCHIES OF PRE-EMINENCE

This section is concerned with – and seeks to offer important qualifications to – a central tenet of the “no-hierarchy” thesis, i.e. the view that sources of international law enjoy equal status as law-making procedures and exist in no predetermined order of importance or preponderance. Before it is qualified, this view requires brief explicitation. Though its limitations are well-known (the provision has been criticized as inadequate, incomplete and outdated), Article 38(1) of the Statute of the International Court of Justice remains the starting or rallying point for debates about international law-making and is widely believed to express “the universal perception as to the enumeration of sources of international law.”¹⁰ Sources are listed in Article 38 in a specific sequence (*a* to *d*) in what looks, superficially, like a rough hierarchy.¹¹ During the drafting of Article 38, it was suggested that the

⁸ The hierarchy of sources concern the relationship between law-making processes in the abstract. By contrast, the hierarchy of norms concerns the differentiation between norms or bodies of norms by reason of their content/substance, not their legal form. On the difference between the two types of hierarchies and how they can be mobilized to resolve normative conflicts in international law, see JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW – HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* (2003). On the hierarchy of norms question, see generally Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT’L L. 291 (2006); Juan Antonio Carillo Salcedo, *Reflections on the Existence of a Hierarchy of Norms in International Law*, 8 EUR. J. INT’L L. 583 (1997); HIERARCHY IN INTERNATIONAL LAW: THE PLACE OF HUMAN RIGHTS (Erika De Wet & Jure Vidmar eds., 2012).

⁹ For a general overview of the problems posed by the rising (and largely uncontrolled) regulatory power of global governance bodies, see EYAL BENVENISTI, *THE LAW OF GLOBAL GOVERNANCE* (2014). On the heterarchical interaction of the national, international and transnational legal orders, see NICO KRISCH, *BEYOND PLURALISM – THE PLURALIST STRUCTURE OF POSTNATIONAL LAW* (2010).

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

¹¹ Statute of the International Court of Justice, art. 38, June 26, 1945, 33 U.N.T.S. 993:

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

- a. International conventions, whether general or particular, establishing rules expressly recognized by the consenting states;
- b. International custom, as evidence of general practice accepted as law;
- c. The general principles of law recognized by civilized nations;

sources listed in the provision should be considered in that specific order, with treaties prevailing over custom and custom prevailing over general principles.¹² The proposal was rejected, however, and as a result the order in which the sources are enumerated in Article 38 is generally thought to be of no legal relevance, though most scholars highlight the *summa divisio* which the provision establishes between primary and subsidiary sources of international law, the former (treaties and custom) standing as the only true sources of law whilst the latter (judicial decisions and doctrinal writings) are said to serve only the interpretation and ascertainment of existing norms, lacking the ability to create rights and obligations *ex nihilo*.¹³

Beyond this broad categorization, however, the consensus remains that Article 38 does not establish a rigid hierarchy of sources, particularly when it comes to the relationship between customary law and treaties. These are said to exist alongside each other in no particular order of pre-eminence, in a kind of decentralized and pluralistic arrangement where no source ranks higher than the other.¹⁴ The fact that a norm was created via one or the other sources listed in article 38 – i.e. its formal pedigree – is thought to be of little or no relevance to its legal status and authority. At a practical level, the absence of inherent hierarchies among sources of international law means that adjudicators are left to resolve conflicts of norms on an *ad hoc* basis, by means of interpretative techniques (e.g. harmonious interpretation) or conflict resolution principles (*jus cogens*, *lex specialis*, *lex posterior*).¹⁵ Unsurprisingly, these *ad hoc* resolutions nearly always lead to a prioritization of the tribunal's own body of law, in what may be termed a preference for the law of the forum or, more accurately perhaps, hegemonic assertions of jurisdiction. In these hegemonic struggles, conflicts of norms are thus rarely resolved in accordance with pre-established hierarchies and are instead largely determined by the identity of the adjudicator (who decides) and the project it was set up to defend (trade, human rights, security and so on).¹⁶

The absence of rigid and formal hierarchies in the doctrine of sources should not, however, serve to conceal the fact that states, adjudicators and legal scholars have, historically, expressed clear preferences for particular sources, and have thus established informal hierarchies, if not of validity, at the very least of importance or pre-eminence among law-making processes. The theory and practice of sources, in other words, is not entirely alien to what Parry once called “logical scales of values”,

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- d. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law”

¹² On the drafting history of Article 38, see Akehurst, *supra* note 5, at 274-5.

¹³ JAN KLABBERS, *INTERNATIONAL LAW* 25 (2013) (“judicial decisions and the writings of the most highly qualified publicists are listed as subsidiary means only It follows from the organizing principle of sovereignty that [these subsidiary means] cannot make law, but only apply it”); HUGH THIRLWAY, *THE SOURCES OF INTERNATIONAL LAW* 8 (2014) (“Neither a judge nor a scholar says ‘This is the law, because I say so’; they both lay down what they regard as established by one of the other sources”).

¹⁴ On the absence of hierarchy among treaty and customary law, see *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v United States)*, 1986 ICJ REP. 14, para. 176 (“it cannot therefore be held that Article 51 [of the United Nations Charter] is a provision which ‘subsumes and supervenes’ customary international law.... [I]n the field in question Customary international law continues to exist alongside treaty law”).

¹⁵ See generally *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission* (finalized by Martti Koskenniemi), UN Doc A/CN.4/L.682 (2006) [hereinafter *Fragmentation Report*]; PAUWELYN, *supra* note 8, at 89-109; and Maarten Bos, *The Hierarchy Among the Recognized Manifestations (“Sources”) of International Law*, 25 NETH. INT’L L. REV. 334 (1978).

¹⁶ For a theory of fragmentation as struggle for institutional hegemony and normative authoritativeness, see Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 MOD. L. REV. 1 (2007); *International Law and Hegemony: A Reconfiguration*, 17 CAMBRIDGE REV. INT’L AFF. 197 (2004).

i.e. the logical ordering of sources according to specific value judgments about their respective merits.¹⁷ Two such hierarchies are analyzed here, positing the superiority/primacy (if not the supremacy) of treaty law and customary law respectively. Other orderings are possible, however, and as noted by David Kennedy, “advocates of all logically available positions exist” regarding the hierarchical relationship among the various Article 38 sources.¹⁸

A. The Treaty Primacy Thesis

Legal reason is, fundamentally, a hierarchical form of reason “establishing relationships of inferiority and superiority between units and levels of legal discourse.”¹⁹ For this reason, and even though legal scholars are at one is arguing that there is no formal hierarchy among the sources of international law, they generally find it difficult to refrain from passing *some form of judgment* on the superiority of one or the other sources listed in Article 38 (and by implication on the inferiority of the others). The leading view in this regard, at least as far as modern international law is concerned, is that treaties are the “most prominent”, “most important”, “most fundamental”, “dominant”, “major”, “principal” or “primary” source of international law.²⁰ To some scholars, the pre-eminence of treaties is such that international law-making can be usefully divided into “treaty law” and “non-treaty law.”²¹ Treaties on the one hand; everything else on the other. In fact, it is not rare for legal scholars to regard treaties and international law as one and the same.

The “treaty primacy” thesis comes in various degrees and forms, which can be categorized in two principal streams of arguments. The first stream posits that treaties and custom are normatively equivalent but that, *as a matter of procedural order*, treaties take priority over other sources of international law. When deciding a case, the argument goes, courts and tribunals do routinely – and should as a matter of principle – look at treaties first, before considering non-treaty sources.²² This view is based on two principal justifications. The first is a pragmatic consideration. Treaties are generally thought to be superior instruments for resolving disputes owing to their written character, which confers a greater degree of precision and textual determinacy to treaty norms. Treaty norms are easier to locate, ascertain and apply than other norms, particularly customary norms, the precise content of which can be difficult and onerous to establish. As noted by Beckett, “state practice is

¹⁷ CLIVE PARRY, *THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW* 28 (1965).

¹⁸ David Kennedy, *The Sources of International Law*, 2 AM. U. J. INT’L L. & POL’Y 1, 16(1987).

¹⁹ Koskenniemi, *supra* note 6, at 566.

²⁰ *See, e.g.*, KLABBERS, *supra* note 13, at 25 (“the treaty has become the dominant source of international law”); CRAWFORD, *supra* note 5, at 30 (“treaties are the most important source of obligation in international law”); DUNCAN B. HOLLIS, *THE OXFORD GUIDE TO TREATIES* 8 (2012) (“treaties are an essential vehicle for organizing international cooperation and coordination. In both quantitative and qualitative terms, they are the primary source for international legal commitments and, indeed, international law generally”); CHARLES ROUSSEAU, *DROIT INTERNATIONAL PUBLIC – TOME 1: INTRODUCTION ET SOURCES* 59 (1970) (“si l’article 38 n’établit pas de hiérarchie entre les différentes sources qu’il énumère on constate qu’il y a accord sur les idées suivantes : la première source, incontestablement la plus importante, est formée par les traités”); WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 123-4 (1974) (“it is obvious that, in the fast moving articulate and complex international society of today, the international treaty increasingly replaces custom as the principal source of international law”).

²¹ *See, e.g.*, PATRICK DAILLER, MATHIAS FORTEAU AND ALAIN PELLET, *DROIT INTERNATIONAL PUBLIC* (8th ed., 2009) who subcategorize their chapter on international law-making into “*formation conventionnelle*” and “*formation non conventionnelle*”.

²² *See Fragmentation Report, supra* note 15, para. 85: ‘this informal hierarchy emerges as a ‘forensic’ or a ‘natural’ aspect of legal reasoning. Any court or lawyer will first look at treaties, then custom and then the general principles of law for an answer to a normative problem’.

widely dispersed, often awkward to identify, hard to weigh, and generally not uniform It is easier to consult a written source.”²³ Treaty law is also, by and large, devoid of the ontological and methodological uncertainties that are characteristic of customary law. Proving a treaty norm is generally unproblematic. There is hardly ever any dispute about the existence of a treaty: A treaty is either in force between the parties, or it isn’t.²⁴ Proving custom, by contrast, is a far more uncertain enterprise that nearly always gives rise to serious controversies and often leave adjudicators (or codifiers) exposed to criticism.²⁵ In these circumstances, it is not surprising that courts and tribunals should, as a matter of practice, demonstrate a preference for the formality and definition of treaty law. Noting this point, Charlesworth writes of a “hierarchy of sources in terms of ease of identification.”²⁶

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

“are determined, in the first instance, by their agreement as expressed in treaties, just as in the case of individuals their rights are specifically determined by any contract which is binding upon them. When a controversy arises between two or more States with regard to a matter regulated by a treaty, it is natural that the parties should invoke and that the adjudicating agency should apply, in the first instance, the provisions of the treaty in question In the above sense, treaties must be considered as ranking first in the hierarchical order of the sources of international law.”²⁷

The notion that treaties should take precedence as *lex specialis inter partes* has been recognized on various occasions in positive law. The 1907 Hague Convention (XII) relative to the Creation of an International Prize Court, for instance, explicitly provided that “if the question of law to be decided is covered by a treaty in force between [the parties], the Court is governed by the provisions in the said treaty. In the absence of such provisions, the Court shall apply the rules of international law.”²⁸ Though this procedural sequencing was not repeated in Article 38, the ICJ has itself stated on several occasions that “rules of [general] international law can, by agreement, be derogated from in particular cases or as between particular parties”²⁹ and that “in general, treaty rules being *lex specialis*, it would not be appropriate that a State should bring a claim based on customary-law rule if it has by treaty

²³ Jason Beckett, *Customary International Law*, in INTERNATIONAL LAW FOR INTERNATIONAL RELATIONS 134 (Başak Çali ed., 2010).

²⁴ Disputes occasionally arise regarding the validity of a treaty or its termination, though this is a rather rare occurrence. See, for a characteristic example, *Gabcikovo-Nagymaros Project (Hungary v Slovakia)*, 1997 ICJ REP. 7.

²⁵ The ICJ was notoriously criticized for its method of ascertaining customary law in the *Nicaragua* case, with some legal scholars blaming the Court for its “revisionist” approach, for blurring the lines between practice and *opinio juris* and for “trashing” customary international law. Similar criticisms were levelled against the ICRC when it published its 2009 restatement of customary international humanitarian law. See, on this point, my analysis in MARIO PROST, *THE CONCEPT OF UNITY IN PUBLIC INTERNATIONAL LAW* 100-2 (2012).

²⁶ Hilary Charlesworth, *Law-making and sources*, in THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 190 (James Crawford and Martti Koskeniemi eds., 2012).

²⁷ HERSCH LAUTERPACHT, *INTERNATIONAL LAW – COLLECTED PAPERS VOL. 1* 87-8 (1970).

²⁸ Convention [No. XII] Relative to the Creation of an International Prize Court, art. 7, Oct. 18, 1907, 100 BRIT. & FOREIGN ST. PAPERS 435 (1906-7)..

²⁹ *North Sea Continental Shelf cases (Federal Republic of Germany v Denmark/Netherlands)*, 1969 ICJ REP. 42, para. 72.

already provided means for settlement of such a claim.”³⁰ The International Law Commission, in its study on the fragmentation of international law, noted this jurisprudence, holding that “international tribunals give precedence to treaty law in matters where there is customary law as well – a practice that highlights the dispositive nature of custom and the tribunals’ deference to agreements as the ‘hardest’ and presumably most legitimate basis on which their decisions can be based.”³¹

The procedural priority of treaty law constitutes the first version of the “treaty primacy” thesis. The second version of the thesis is rather different. It posits that treaty law is not just operationally, but normatively superior to (i.e. *better* than) other law-making processes. The argument here is that the treaty is, comparatively, a “first-class” source of international law that possesses unique qualities and attributes. Though legal scholars have expressed a wide range of views in this regard, treaty law is generally thought to possess three essential qualities that set it apart from other sources: ontological determinacy, practical versatility, and process legitimacy. Ontological determinacy refers to the fact, already alluded to, that the nature of treaties as a source of international law is “unambiguous and uncontroversial.”³² Compared to customary law - whose nature, constitutive elements and methods of ascertainment remain matters of intense debate – the law of treaties appears remarkably reliable and well-settled, to the point that it has become practically unthinkable today to challenge its content.³³ Though some areas of the law of treaties are open-ended or subject to continued discussion (e.g. treaty interpretation, reservations), the Vienna Convention on the Law of Treaties, the argument goes, offers “consummate clarity”³⁴ to treaty law as a source of rights and obligations and effectively functions as a form of “meta law”, a “stable legal code” that regulates the whole life-cycle of treaties, from their making, identification and validation, to their application, interpretation, modification and termination.³⁵ Treaties thus enjoy a degree of “source determinacy” unknown to other law-making processes, promoting legal certainty and security in international relations.³⁶

As well as enjoying determinacy, treaties are generally favored for their practical versatility. Treaties can be used for a variety of purposes and in a variety of contexts, from the dramatic (war) to the mundane (duty free shopping).³⁷ They can be used to codify or restate pre-existing customary law, or to make a fresh start and create new rules almost instantly.³⁸ They can be used to regulate bilateral relations, or for larger legislative ambitions, laying down whole regimes to govern holistically areas such as humanitarian law or climate change. They can serve to articulate general principles of law

³⁰ Nicaragua, *supra* note 14, para. 274. See also Amoco International Finance Corporation v. Islamic Republic of Iran, 27 I.L.M. 1314 (1988), para. 112 (“as a *lex specialis* in the relations between the two countries, the Treaty supersedes the *lex generalis*, namely customary international law”).

³¹ *Supra* note 22, para. 81.

³² G.J.H. VAN HOOF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* 117 (1983).

³³ On the methodological problems posed by the identification of customary law, see OLIVIER CORTEN, *MÉTHODOLOGIE DU DROIT INTERNATIONAL PUBLIC* 149-78 (2009).

³⁴ THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 59-60 (1990).

³⁵ MARTIN DIXON, *TEXTBOOK ON INTERNATIONAL LAW* 55 (7th ed., 2013).

³⁶ For a discussion of “source determinacy” as a signifier of progress in international law, see Thomas Skouteris, *The Force of a Doctrine: Art. 38 of the PCIJ Statute and the Sources of International Law*, in *EVENTS: THE FORCE OF INTERNATIONAL LAW* (Fleur Johns, Richard Joyce and Sundhya Pahuja eds., 2011). The notion that the primary function of the law of treaties should be to provide certainty and security in legal relations was central to proceedings at the 1969 Vienna Conference. See *United Nations Conference on The Law of Treaties*, First session, Vienna, 26 March-24 May 1969, A/CONF.39/11.

³⁷ *RESEARCH HANDBOOK ON THE LAW OF TREATIES X* (Christian Tams, Antonios Tzanakopoulos and Andreas Zimmermann eds., 2014).

³⁸ On the treaty as an instrument of legal innovation/renovation in a fast-moving world, see CHARLES DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 162 (1968); FRIEDMANN, *supra* note 20, at 123-4.

(sovereign equality, non intervention, self-determination), but equally to adopt highly specific technical standards on commodity prices or water pollution. A number of things, to finish, can only be done by way of treaties, most notably the setting up of international institutions like the UN or the EU.³⁹

Lastly, and critically, the treaty is generally viewed as superior to other sources by reason of its perceived legitimacy as a law-making process. Treaty making, to begin, is premised on the principle of freedom of contract (though the exercise of this freedom is rarely unconstrained, see below). States are free to sign up to a treaty or to choose not to become a party.⁴⁰ They enjoy full freedom as regards the modalities and form of agreement. They are free to enter reservations, limiting or modifying the effect of the treaty in its application to them. And States are free, of course, to withdraw from treaties (in accordance with their provisions), as was recently illustrated by the withdrawal of Latin American States from the ICSID Convention.⁴¹ Treaty making is thus, in principle, a conscious, deliberative process respectful of State consent and contractual autonomy. It is also, to an extent, subjected to democratic scrutiny. Treaty negotiations, in important areas such as climate change or trade/investment, are largely covered by the media and the subject of public debate. Civil society is increasingly involved in treaty making, with the participation of NGOs in intergovernmental conferences and proceedings.⁴² And in many instances, treaty ratification involves a domestic “chain of legitimacy” where treaties must be approved by the Parliament or some representative institution, and sometimes even by popular referendum.⁴³ Treaty making, for the above reasons, is often regarded as comparatively more transparent and democratic than other law-making processes (especially the nebulous process of customary law formation), a fact that is said to increase the effectiveness of international law, as norms generated through legitimate processes are thought to exert greater “compliance pull” and thus harder to disobey.⁴⁴

B. The Custom Primacy Thesis

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

The first version of the thesis posits that custom is superior to other sources – in particular treaty law – inasmuch as it precedes and pre-determines them, in other words that there can be no treaty law without a pre-existing framework of customary law governing its formation. This argument has a long

³⁹ On the versatility of treaties, see generally Michel Virally, *The Sources of International Law*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 123-4 (Max Sorensen ed., 1968).

⁴⁰ BOYLE AND CHINKIN, *supra* note 4, at 31.

⁴¹ See, e.g., Lars Markert and Catharine Titi, *States Strike Back – Old and New Ways for Host States to Defend Against Investment Arbitrations*, in *YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY: 2013-2014* (Andrea Bjorklund ed., 2015).

⁴² Whether greater NGO participation necessarily leads to enhanced legitimacy is of course questionable. See on this point Kenneth Anderson and David Rieff, *Global Civil Society: A Sceptical View*, in *GLOBAL CIVIL SOCIETY* (Helmut Anheier, Marlies Glasius and Mary Kaldor eds., 2005); BOYLE AND CHINKIN, *supra* note 4, at 59-61.

⁴³ KLABBERS, *supra* note 13, at 37; Rüdiger Wolfrum, *Legitimacy of International Law from a Legal Perspective : Some Introductory Considerations*, in *LEGITIMACY IN INTERNATIONAL LAW* 6 (Rüdiger Wolfrum and Volker Röben eds., 2008).

⁴⁴ FRANCK, *supra* note 34; and *Legitimacy in the International System*, 82 AM. J. INT’L L. 705 (1988).

history. Writing at the turn of the 20th century, Oppenheim notoriously stated that custom “is the original source of international law.”⁴⁵ What he meant was not so much that, chronologically, custom came first and treaties second, but rather that custom was not dependent on any other source to exist, whereas treaties could only exist against the background of custom: “treaties are a source the power of which derives from custom. For the fact that treaties can stipulate rules of international conduct at all is based on the customary rule of the Law of Nations that treaties are binding upon the contracting parties.”⁴⁶

The limits of this theory are well known. As Lauterpacht famously noted, if one subscribes to the view that treaties are binding only because there is a customary rule to that effect, “there remains the question why custom is binding.”⁴⁷ It has, however, proved remarkably resilient. Kelsen, in his *General Theory of Law and State*, observed that “if we ask why a treaty is valid, we are led to the general norm which obligates the States to behave in conformity with the treaties they have concluded, a norm commonly expressed by the phrase *pacta sunt servanda*. This is a norm of general international law, and general international law is created by custom Customary international law is the first stage within the international legal order.”⁴⁸ Reuter, a leading scholar of the law of treaties and a firm believer in the “central position” of treaty law in international life, conceded that “treaties are binding by virtue not of a treaty but of customary rules. In that sense, international custom is even more central than the law of treaties since it is the very pillar on which treaties rest. If one were to speak of a ‘constitution’ of the international community, it would have to be a customary one.”⁴⁹ Crawford, in his recent Hague Lectures, took the same view, arguing that “international law is a customary law system, despite all the treaties: even the principle *pacta sunt servanda*, the obligation to comply with treaties, is a customary law obligation.”⁵⁰ Common to all these views about the primacy of custom is the notion that customary law has a privileged, elemental status “at the heart” of the international legal order and represents the source of all sources, the background that determines the condition of validity of all other legal norms and processes.⁵¹

This first version of the “custom primacy” thesis, it should be noted, is not so much concerned with custom as a law-making process as it is with certain basic, foundational principles (e.g. *pacta sunt servanda*) that happen to be of a customary nature.⁵² The second and third versions of the thesis, by contrast, have more to do with custom as a process and its comparative merits. The second version of the thesis, to begin with, posits that custom is the only process capable of producing law *in the proper sense of the term*, i.e. rules of general validity, applicable to the legal order as a whole and to all legal subjects. This view was notoriously put forward by Fitzmaurice, who argued that treaties ought to be viewed as mere contracts which can do little more than create specific rules, applicable to specific parties, in specific contexts. Unable to produce genuine rules of law, treaties, he concluded, cannot be considered as sources of international law but merely as sources of rights and obligations. They may lead to the emergence of law proper if their provisions pass into the general corpus of customary

⁴⁵ LASSA OPPENHEIM, *INTERNATIONAL LAW – A TREATISE*, VOL. I, 24 (1905).

⁴⁶ *Id.*

⁴⁷ LAUTERPACHT, *supra* note 27, at 58.

⁴⁸ HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 369 (1945).

⁴⁹ PAUL REUTER, *INTRODUCTION TO THE LAW OF TREATIES* 29 (1989).

⁵⁰ JAMES CRAWFORD, *CHANCE, ORDER, CHANGE: THE COURSE OF INTERNATIONAL LAW* 57 (2014).

⁵¹ Brigitte Stern, *Custom at the Heart of International Law*, 11 *DUKE J’L COMP. & INT’L L.* 89 (2001).

⁵² The notion that the rule *pacta sunt servanda* is a customary rule is of course open to question. Kelsen himself eventually abandoned this view, arguing instead that the rule *pacta sunt servanda* is an axiom incapable of juridical demonstration and not itself a part of the system of positive law. See HANS KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 26-8 (2nd ed., 1966).

international law. Owing to their contractual nature, however, Fitzmaurice viewed treaties as “no more a source of law than an ordinary private law contract.”⁵³

This view of treaties as a mere source of obligations has had a certain influence and was espoused by many scholars after Fitzmaurice. Parry, for instance, while recognizing that treaties are of paramount importance when determining the rights and duties of States *inter se*, argued that the contribution of treaties to “the whole content and stuff of the international legal system . . . is relatively small.”⁵⁴ To Parry, the treaty is essentially peripheral as a source of international law. It is custom, in his view, that defines the basic constitutional structure and general principles of international law as a system. The treaty, for its part, is simply “the contract of the international legal system” and in the same way that one can learn about English law without reading a single contract, or even a single statute, “one can have a very fair idea of international law without having read a single treaty and one cannot gain any coherent idea of the essence of international law by reading treaties alone.”⁵⁵ Brownlie, to provide another example, listed treaties alongside General Assembly resolutions and drafts adopted by the International Law Commission as “material sources” exercising direct influence on the content of the law, rather than “formal sources” of law proper – a distinction that endured until Crawford’s re-edition of Brownlie’s classical textbook.⁵⁶ The point in these arguments about sources is that a hierarchy of sorts is introduced between custom as legislation and treaties as contracts.

The third version of the “custom primacy” thesis, to finish, is more directly concerned with the specific attributes which custom is said to possess as a law-making process. To some legal scholars, customary law, as a formal source, is normatively superior (*better*) to other sources in its ability to generate universally applicable norms, i.e. norms which are binding on any and all States at once. Whilst treaties may theoretically achieve universal participation, the argument goes, this remains an extremely rare occurrence and the universality of treaties is, in any event, likely to be undermined by reservations and other flexibility mechanisms.⁵⁷ Norms generated through the customary process, by contrast, do not necessitate all states to opt in to become universal. Customary norms are *born* universal and states are not permitted to opt out of customary law unless they have persistently and unambiguously objected to its formation, a possibility that has played such a limited role in practice that it has become essentially theoretical.⁵⁸ As was stated unambiguously by the ICJ, “customary rules and obligations, by their very nature, must have equal force for all members of the international community and cannot therefore be the subject of any right of unilateral exclusion.”⁵⁹

Customary law, in this sense, offers the promise of majority rule and universal legality. Majoritarian universality is thus the great strength, the “unique selling point” of customary international law.⁶⁰ Whether this prospect is attractive and legitimate is, of course, very much a matter of perspective and circumstances. Creating legal norms without the consent of all concerned states would certainly

⁵³ Gerald Fitzmaurice, *Some Problems Regarding the Formal Sources of International Law*, in *SYMBOLAE VERZIJL* 157-8 (1958). For a rebuttal, see Maurice Mendelson, *Are Treaties Merely a Source of Obligation?*, in *PERESTROIKA AND INTERNATIONAL LAW* (William Butler ed., 1990).

⁵⁴ PARRY, *supra* note 17, at 34.

⁵⁵ *Id.*, at 35.

⁵⁶ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 12-3 (7th ed., 2008).

⁵⁷ On the tension between the universality and integrity of treaties, see generally Catherine Redgwell, *Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties*, 64 *BRIT. Y.B. INT'L L.* 245 (1993).

⁵⁸ Ted Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 *HARV. INT'L L. J.* 467 (1985).

⁵⁹ *North Sea Continental Shelf Cases*, *supra* note 29, at 38-9.

⁶⁰ Beckett, *supra* note 23, at 124.

appear illegitimate to most 19th century legal positivists, and the classical position of the International Court of Justice has consistently been that international rules only exist if and where they have been developed with the consent of those concerned.⁶¹ The notion of non-consensual law-making always did, however, appeal to scholars committed to the idea of universal law and frustrated with the strict contractual nature of treaties and the limits inherent in voluntary law-making.⁶² In recent years, this frustration has known something of a renewal, most notably in debates concerning global public goods. Many scholars have highlighted what they see as the inherent inadequacy of treaty law and its emphasis on state consent in dealing with global public good challenges such as climate change mitigation, fisheries depletion, the management of pandemics, or global security threats.⁶³ To resolve such problems, the argument goes, global rules must be developed which are binding on all states. Because we cannot expect rules, especially in such controversial areas, to receive the specific individual consent of each and every one of the nearly two hundred states composing the international community today, these rules must be developed "regardless of the attitude of any particular state"⁶⁴, i.e. without or perhaps even against the will of individual states.⁶⁵ Treaty making, in this context, becomes problematic in that it gives any state the right to object to the formation of any proposed rule of international law. An excessive commitment to consent is thus perceived as crippling efforts to develop the international norms which the world so desperately needs.⁶⁶

The limits of treaty making in addressing global public good problems has prompted a (re)turn to non-consensual law-making processes. Some scholars have argued for the use of international institutions with majoritarian voting rules.⁶⁷ Others, however, have simply advocated a wider use of custom as a way to achieve universal norms without the specific support of every member of the global community. Justice Weeramantry, for instance, has claimed that custom is vastly superior to the treaty as an instrument for dealing with global public good challenges. Pointing to the near impossibility of obtaining universal treaty ratification, he argues that "we need to have resort to a set of principles that do not owe their existence to an act of specific state consent but reach beyond state consent to the primordial verities and principles on which the international order is founded."⁶⁸ In his view, "customary international law provides such a source which will need to be increasingly relied upon in a future where unexpected and urgent problems of an unprecedented nature will keep arising, for which treaty law cannot provide the solution."⁶⁹

The superiority of custom as a source capable of producing legal universals is of course rooted in a particular vision of the world and of the role of law in it. The universal as a project is always

⁶¹ See Nicaragua, *supra* note 14, at 135 ("in international law there are no rules, other than such rules as may be accepted by the states concerned, by treaty or otherwise."); Barcelona Traction (Belg. v. Spain), 1970 ICJ REP. 3, at 47 ("here as elsewhere, a body of rules could only have developed with the consent of those concerned").

⁶² See, e.g., JOHANN KASPAR BLUNTSCHLI, LE DROIT INTERNATIONAL CODIFIÉ 58 (1895) ("si le droit international était exclusivement le produit de la libre volonté des états, aucun d'eux ne serait obligé vis-à-vis des autres d'en respecter les principes, quand ces principes n'auraient pas été sanctionnés par un traité").

⁶³ See Nico Krisch, *The Decay of Consent: International Law in an Age of Global Public Goods*, 108 AM. J. INT'L L. 1 (2014).

⁶⁴ Jonathan Charney, *Universal International Law*, 87 AM. J. INT'L L. 529 (1993).

⁶⁵ Christian Tomuschat, *Obligations Arising for States Without or Against their Will*, 241 RECUEIL DES COURS 195 (1993).

⁶⁶ See Andrew Guzman, *Against Consent*, 52 VA. J. INT'L L. 747 (2011); Laurence Helfer, *Nonconsensual International Lawmaking*, 2008 U. ILL. L. REV. 71 (2008).

⁶⁷ See, e.g., JOEL TRACHTMAN, *THE FUTURE OF INTERNATIONAL LAW: GLOBAL GOVERNMENT* (2013).

⁶⁸ CHRISTOPHER WEERAMANTRY, *UNIVERSALISING INTERNATIONAL LAW* 223-4 (2004).

⁶⁹ *Id.*

particularly located. The primacy of custom is here justified on utilitarian (solving global public good problems) and semi-naturalist grounds (the "primordial verities and principles" of the international order). And output legitimacy (generating norms despite opposition by a reluctant minority) matters more than normative legitimacy (the "justness" of norms and institutional arrangements) or process legitimacy (who decides and according to what procedures). Unsurprisingly, these justifications for the primacy of custom do not resonate with everyone and some states and scholars have historically resisted custom as a legitimate method for making (universally applicable) international laws. In the immediate post-colonial era, in particular, the approach of Third World States and scholars to international law was characterized by a clear rejection of custom. Importantly, this was not simply a rejection of specific customary norms, thought to express relationships of domination, inequality or privilege. The rejection was much deeper and concerned custom as a law-making process more generally. Custom as a process was deemed both illegitimate and ineffective. It was deemed anti-democratic, for it was created in accordance with the needs of powerful (Western) nations and then imposed onto the silent (non-Western) majority.⁷⁰ And it was deemed ineffective because it made the prospect of radical transformation of the legal system remote. Newly independent states were in need of institutions and structures allowing rapid modification and adaptation of the law, a need to which custom, with its slow and undecided tempo, was ill-adapted. Custom was thus perceived as a largely deficient source of international law: "backward looking, conservative because static, iniquitous in its content, ponderous in its formation, custom as traditionally conceived cannot be of real use in the development of new rules, and could actually be an obstacle to any attempt at change."⁷¹ Most Afro-Asian states, as a result, expressed a clear preference for reforming the law through deliberative mechanisms such as conferences, treaties and resolutions.⁷²

C. Conclusion on informal hierarchies

Doctrines about the sources of international law generally begin with an abstract definition of the sources listed in Article 38 and nearly always posit, as a general rule, that there exists no formal hierarchy among them. Beyond this, however, and as the above makes clear, the discourse on sources is replete with hierarchical discussions elaborating the procedural, practical or normative superiority of some sources over others. International law about sources, in this sense, is first and foremost a set of doctrinal boundaries and hierarchies. Critically, though, these hierarchies are not rigid, pre-determined or definitive but rather fluid and transient. The hierarchical arguments discussed above are not always, to begin with, mutually exclusive. It may be possible for instance to argue that treaties take precedence over custom as a matter of procedural or operational priority, and at the same time that treaty law remains somehow subordinate to customary law, as the latter determines its conditions of validity and interpretation. Lauterpacht is a case in point here, having argued on different occasions that, operationally, treaty law "ranks first in the hierarchical order of the sources of international law"⁷³ and, at the same time, that "in the international sphere, where legislation in the true sense of the

⁷⁰ This critique mirrored that which was levelled earlier by the Soviet doctrine against custom, seen as entrenching the hegemony of capitalist states. See, for example, Grigorii Ivanovich Tunkin, *Co-existence and International Law*, 3 RECUEIL DES COURS 3, 46-8 (1958).

⁷¹ MOHAMMED BEDJAOUI, *TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER* 137 (1979).

⁷² See generally ABDULQAWI YUSUF, *PAN-AFRICANISM AND INTERNATIONAL LAW* (2014), chapter 3; and R.P. ANAND, *CONFRONTATION OR COOPERATION? INTERNATIONAL LAW AND DEVELOPING COUNTRIES* 39-41 (2011).

⁷³ LAUTERPACHT, *supra* note 27, at 88.

world is non-existent, custom is still the primary source: it supplies the framework, the background and the principal instrument of the interpretation of treaties."⁷⁴

More importantly though, these arguments about sources hierarchies are rarely, if ever, fixed or set in stone. They are more often than not context-dependent and determined by the project or strategy pursued by the lawyers making them. These informal hierarchies reflect and continue the problematics and desires that motivate them. Arguments about the primacy of treaty law are generally driven by a desire for determinacy and consent-based legitimacy. Arguments about the primacy of custom are generally driven by a desire for autonomy (from consent) and universality. As contexts and desires shift, so too do sources hierarchies. In the classical doctrine of international law, the main hierarchy was not between treaties and custom but one between natural (divine) law and man-made rules. To a 19th century scholar, normative hierarchies had to reflect a positivist concern with state consent, thus giving priority to treaties as the ideal type of sources. To a 20th century Third World scholar, the hierarchy of sources is one typically characterized by a rejection of traditional sources and a preference for mechanisms giving force to the numerical strength of the non-Western world (e.g. GA resolutions). Source hierarchies are thus historically contingent.⁷⁵ They are also functionally determined. Each source possesses specific design features (determinacy, flexibility, universality and so on) that make it suitable to deal with particular classes of cooperation problems. States may prefer the design features of treaties when tackling problems with high distributional costs (e.g. climate change) but express preference for custom in dealing with problems that require norms articulated at a high level of generality or in domains where rules benefit all states in equal proportion (e.g. state immunities).⁷⁶ Likewise, the same lawyer might argue the superiority of the treaty in one context (as a legal scholar for instance) and, the next day, argue the primacy of customary law in another context (as a legal adviser, counsel or judge). And even within one and the same context, arguments about source hierarchies typically fluctuate between the "treaty primacy" and "custom primacy" theses, mediating the tension between determinacy and generality, consensualism and non-consensualism, sovereignty and community.⁷⁷

II. MATERIAL HIERARCHIES AND THE PRAGMATICS OF SOURCES

The previous section was concerned with the first facet of the "no-hierarchy" thesis, i.e. the notion that there exists no a-priori hierarchy of validity or importance among formal sources of international law. I now turn to the second, perhaps more problematic aspect of the no-hierarchy thesis, namely the view that law-making processes, in the way that they operate, are in essence non-hierarchical. This section offers a short introduction to the founding principle of legislative equality in international law before examining some of the hierarchies of status, worth and influence that characterize law-making in the international system. As noted above, these hierarchies do not concern the relationship between various sources in the formal sense of the term. These are material hierarchies that manifest themselves in the concrete workings of sources as law-making processes, i.e. in their pragmatics. These are hierarchies of sources nonetheless and, as explained below, to the extent that these

⁷⁴ HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 387 (1982).

⁷⁵ On the historically contingent nature of sources hierarchies, see Harlan Grant Cohen, *Finding International Law: Rethinking the Doctrine of Sources*, 93 IOWA L. REV. 65 (2007).

⁷⁶ Laurence R. Helfer and Ingrid B. Wuerth, *Customary International Law: An Instrument Choice Perspective*, 37 MICH. J. INT'L L. (forthcoming).

⁷⁷ As Kennedy has demonstrated, the whole discourse on sources can be interpreted as an attempt to mediate between consensualism and non-consensualism, in order to demonstrate international law's respect for sovereign autonomy and, at the same time, its systemic authority. See Kennedy, *supra* note 18.

hierarchies are accommodated and sanctioned by the international legal system, they cannot simply be discarded as belonging to the domain of politics, i.e. as something that does not concern international law strictly speaking. These material hierarchies are integral to the fabric and structure of international law, a fact that is rarely acknowledged in the context of debates on (the hierarchy of) sources.

A. *The principle of legislative equality*

It is a commonplace to say that international law, as a system, is premised on the sovereign equality of states. Since at least the middle of the 18th century, publicists of all schools and dispositions - naturalists and positivists alike - have highlighted the equality of states as one of the primary postulates of the law of nations.⁷⁸ As famously noted by Chief Justice Marshall in the *Antelope Case*: "no principle of general law is more universally acknowledged than the perfect equality of nations."⁷⁹ At times criticized but never abandoned, the principle has, through the centuries, "clung with tenacity to the trunk of legal science."⁸⁰ Reaffirmed in major textbooks and in leading international documents - from the Montevideo Convention to the UN Charter or the UN Declaration on Friendly Relations among States⁸¹ - sovereign equality, to this day, continues to be regarded as a canonical principle and is routinely reiterated by courts and tribunals as one of the basic constitutional doctrines of international law.⁸² While the orthodoxy of sovereign equality readily acknowledges the pervasive inequalities and power differentials among states in the "real world" of international relations ("of course some states are more equal than others")⁸³, these are usually relegated to the realm of the political - outside the law - in a way that only serves to reinforce the alleged autonomy of the legal domain and international law's egalitarian promise.

The principle of sovereign equality - perhaps because of its canonical status - is rarely examined in much depth and has no fixed or stable meaning. At minimum, however, it is generally thought to possess formal, existential and substantive implications. Formally, states are said to be "equal before the law", i.e. to have equal capacity to vindicate and exercise their rights, most notably in courts and tribunals where their claims are treated as having equal value and dignity.⁸⁴ Existentially, all states are

⁷⁸ On the early history of the doctrine of sovereign equality and the influence of the philosophical ideas of Grotius, Hobbes, Locke and others on its formation, see Arnold McNair, *Equality in International Law*, 26 MICH. L. REV. 131 (1927).

⁷⁹ *The Antelope*, 23 U.S. (10 Wheat.) 66, 122 (1825).

⁸⁰ Ann Van Wynen Thomas and A. J. Thomas Jr, *Equality of States in International Law - Fact or Fiction?*, 37 VA. L. REV. 791 (1951).

⁸¹ Montevideo Convention on the Rights and Duties of States, art. 4, Dec. 26, 1933, 165 L.N.T.S. 19 ("States are juridically equal, enjoy the same rights, and have equal capacity in their exercise"); Charter of the United Nations, art. 2(1), June 26, 1945 ("The Organization is based on the principle of the sovereign equality of all its Members"); Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/8028 (Oct. 24, 1970) ("All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature").

⁸² See, e.g., *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 2012 ICJ REP. 99, para. 57 ("the principle of sovereign equality of States is one of the fundamental principles of the international legal order"); CASSESE, *supra* note 3, at 48 ("It is safe to conclude that sovereign equality constitutes the linchpin of the whole body of international legal standards, the fundamental premise on which all international law rest").

⁸³ See, e.g., CRAWFORD, *supra* note 5, at 449 ("obviously, the allocation of power and the capacity to project it in reality are different things, which suggests that while all states are equal, some are more equal than others").

⁸⁴ On formal or "forensic" equality, see McNair, *supra* note 78, at 136 and 151 ("an international tribunal, or a municipal tribunal when giving effect to the international obligations of the State to which it belongs, pays the

said to possess self-definitional agency, i.e. the freedom to choose their political, social, economic and cultural system.⁸⁵ Substantively, to finish, all states - big or small - are said to possess a bundle of fundamental rights and privileges, including the right to territorial integrity, the right to freely dispose of their natural resources, sovereign immunities, the right to self-help, and the right to make treaties, join international organizations like the UN and litigate in international courts such as the International Court of Justice.⁸⁶

In addition to the above, sovereign equality is also understood to have important implications for international law-making (i.e. for sources). This is what McNair calls "equality for law-making purposes" or what Simpson, more recently, has dubbed "legislative equality".⁸⁷ The notion of legislative equality boils down to two broad principles. At a fundamental level, states are equal in that they are presumed to be obligated only to the extent of their actual or constructive consent, i.e. they cannot be subjected to obligations to which they have not consented. This is the famous *Lotus* principle according to which "the rules of law abiding upon States emanate from their own free will [and are] established between co-existing independent communities."⁸⁸ At a more practical or procedural level, sovereign equality requires states to be given an equal say in the creation of international norms. Traditionally, this has been taken to mean that states are entitled, in international proceedings, to equality of representation and equality of vote, and to an equal role in the formation of customary and treaty law.⁸⁹ States are said to have the same "capacity for rights" and equal competence to make and enforce laws. International law-making, on this view, is thus predicated on a (liberal) vision of states as independent, autonomous agents that engage in international juridical transactions on an equal footing and produce norms through conscious, regular and deliberate processes.⁹⁰

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

same attention to the rights of France as it does to the rights of Costa Rica" and "sovereign equality is used to denote equality before the law, equality in the assertion and vindication by law of such rights as a state may have". See also Declaration by President Basdevant of the International Court of Justice, ICJ Ybk (1950-1) at 17 ("before this Court, there are no great or small states").

⁸⁵ Nicaragua, *supra* note 14, para. 258 ("every State possesses a fundamental right to choose and implement its own political, economic and social systems"). On the notion of "existential equality", see GERRY SIMPSON, GREAT POWERS AND OUTLAW STATES - UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER 53-6 (2004).

⁸⁶ Most of these "equality rights" are restated in the UN Friendly Relations Declaration, *supra* note 81. For an early conceptualization of sovereign equality in terms of substantive rights, see ROBERT PHILLIMORE, COMMENTARIES ON INTERNATIONAL LAW 216-7 (1879), who extracted four specific "rights of equality" from the principle of sovereign equality (right of protecting subjects abroad, right to recognition, right to external marks of honor, right to make treaties).

⁸⁷ McNair, *supra* note 78, at 142-7; SIMPSON, *supra* note 85, at 48-53.

⁸⁸ The Case of the S.S. Lotus (France v Turkey), PCIJ REP. 1927, at 18.

⁸⁹ This is how Oppenheim, in particular, envisaged sovereign equality at the turn of the 20th century. See OPPENHEIM, *supra* note 45, at 162 ("the consequence of legal equality is that, whenever a question arises which has to be settled by the consent of the members of the Family of Nations, every State has a right to a vote, but to one vote only. And legally the vote of the weakest and smallest State has quite as much weight as the vote of the largest and most powerful").

⁹⁰ On sovereign equality as autonomy, see Hans Kelsen, *The Principle of Sovereign Equality of States as a Basis for International Organization*, 53 YALE L. J'L 207, 209 (1944) ("no state has jurisdiction over another state without the latter's consent and the courts of one state are not competent to question the validity of the acts of another state Understood in this way, the principle of equality is the principle of autonomy of the States as subjects of international law").

principle and smaller states investing it in the hope that it may one day deliver substantive benefits.⁹¹ What is certain is that accounts of international law-making that remain exclusively predicated upon the presumption of legislative equality are at best deceptive and at worse dangerous, politically and epistemologically. Despite a broad commitment to sovereign equality, the international legal system is indeed profoundly structured by a variety of hierarchies that affect not simply the substance of legal norms but the very processes of law-making. These hierarchies, at times, simply operate as factual hierarchies of influence. As the rest of this section will demonstrate, however, they are more often than not sanctioned or institutionalized by the legal system itself. When this happens, they become legalized hierarchies that shape the making of international law from within, and not simply from without, as a mere matter of international political economy.

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

Law is the outcome of power struggles. It is both an expansion of and a constraint on power structures, a legitimizer and a civilizer. In any legal system, powerful agents are subject to the law but are able to mobilize their resources (material, cultural, economic and otherwise) to influence the legislative process and produce favorable outcomes. This is a basic fact of juridical life to which international law is evidently not immune. In the international system, as in all legal systems in the world, dominant actors - in particular great powers - influence the law-making process and its distributive consequences.⁹²

The influence of great powers is felt at different levels of the international legislative process. In treaty-making, great powers have historically enjoyed quasi-hegemonic privileges. For three centuries following the Treaties of Westphalia, as European nations expanded their influence across the globe, they organized and formalized their relationship with polities on the periphery through treaties.⁹³ Those treaties - used to acquire territories, secure trade benefits, and protect the property rights of European citizens - were not negotiated by nations treating each other as equals but were more often than not imposed on non-European states under duress, with flawless legal validity.⁹⁴ Within Europe, treaty-making was deeply shaped by power differentials too, despite Westphalia's egalitarian promise. Nowhere was this more obvious than in the 19th century Concert system. The Congress of Vienna in 1815 heralded an era of great power management in Europe in which the four (then five) great powers of the day made decisions for the rest of Europe with little or no participation by other states. In the Concert system, the great powers decided the fate of small countries, rearranged the map of Europe and laid down rules of international law on the status of international rivers, the status of diplomatic representatives or the suppression of the slave trade. The great five acted as self-appointed law-makers and other states accepted the rules laid down by them. Agreements were signed, but these

⁹¹ For a historical account of these struggles, see generally R.P. ANAND, SOVEREIGN EQUALITY OF STATES IN INTERNATIONAL LAW 44-92 (2008).

⁹² See B.S. Chimni, *Legitimizing the international rule of law*, in THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW (James Crawford & Martti Koskeniemi eds., 2012).

⁹³ The ability to sign treaties with European powers was of course a privilege reserved to a few recognized non-European sovereigns such as China, Japan, Korea or the Ottoman Empire. Most non-European territories were denied the privilege of sovereignty and were thus managed ("civilized") through conquest and colonial rule. On the role of international law in regulating the encounter between Europe and the non-European world, the leading text remains ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2004).

⁹⁴ On "unequal treaties", see generally MICHAEL AUSLIN, NEGOTIATING WITH IMPERIALISM: THE UNEQUAL TREATIES AND THE CULTURE OF JAPANESE DIPLOMACY (2004); FARIBORZ NOZARI, UNEQUAL TREATIES IN INTERNATIONAL LAW (1971); LUCIUS CAFLISCH, *Unequal Treaties*, 35 GER. L. J'L 52 (1992).

merely endorsed the pre-determinations of the leading states. The great powers made the law, and smaller powers ratified the treaties.⁹⁵

The Concert system provided an international "learning experience" that foreshadowed many of the legislative and institution-making procedures of the twentieth-century.⁹⁶ All conferences held on matters of war, peace and security since the end of the Concert system have borne the mark of great power preponderance. The Hague Peace Conferences of 1899 and 1907 - though based on a complete equality of representation (one State - one vote) and the rule of unanimity on all material decisions - exhibited an overwhelming inequality of influence among the participants. The Conferences were convened at the initiative of Russia. The proceedings - including the agenda and procedure - were determined by dominant military powers. Treaty provisions were largely based on the US Lieber Code or framed by delegates of the great powers. And on several occasions proposals supported by large majorities were abandoned simply because of the opposition of a few of the great powers.⁹⁷ While the principle of equality was formally preserved at The Hague, great powers were able to force their views upon the Conference or by their concerted opposition to prevent the adoption of unacceptable proposals. Claims of strict equality put forward by some smaller states - most famously by Barbosa of Brazil - were derided as "theoretical", "foolish" or "exuberant" by great power delegates, who insisted that the "useful role" of smaller nations should remain "spontaneous and disinterested" and be limited to raising awareness to "just causes" or "bringing harmony into the conflicting views of the Great Powers."⁹⁸

There was little equality at the Paris Peace Conference too. Negotiations concerning the peace treaty with Germany and the League of Nations Covenant were confined to the "Council of Five" (sometimes expanded to a "Council of Ten") and were conducted in utmost secrecy, despite President Wilson's Fourteen Points and his declared commitment to "open diplomacy".⁹⁹ Decisions were made by the Allied powers behind closed doors, in gatherings where no secretaries were admitted and no official minutes were recorded. It was then left to smaller countries to ratify them. "Confidential tsarism" was pervasive during the negotiations. As one observer reported, when a Canadian delegate spoke of the "proposals" of the great powers, he was immediately corrected by Clemenceau, who intimated that these were not proposals but decisions, which were definitive and final.¹⁰⁰ The same logic presided over the drafting of the UN Charter. Great powers were not prepared for the Charter to be drafted by a conference of large and small states. A full-scale conference, it was feared, would lead to innumerable difficulties and inefficiencies, causing great delay in the setting up of the new postwar security organization. It was therefore decided that the most effective way to prepare the Charter was for the great powers to reach an agreement first among themselves, and then to subject it to smaller countries for (marginal) amendments and adoption at a plenary meeting. Although equality of

⁹⁵ Gerry Simpson, *International Law in Diplomatic History*, in *THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW* 35-6 (James Crawford & Martti Koskenniemi eds., 2012).

⁹⁶ MARK JARRETT, *THE CONGRESS OF VIENNA AND ITS LEGACY: WAR AND GREAT POWER DIPLOMACY AFTER NAPOLEON* 369-70 (2013).

⁹⁷ EDWIN D. DICKINSON, *THE EQUALITY OF STATES IN INTERNATIONAL LAW* 290-1 (1920).

⁹⁸ See the views of James Brown Scott (US delegate to the second Peace Conference) in *THE HAGUE PEACE CONFERENCES OF 1899 AND 1907* 163-73 (1909) (quoting and endorsing the views of - among others - Louis Renault, the French delegate and chairman of the drafting committee).

⁹⁹ Jan. 8, 1918, reprinted in *THE WILSON READER* 177 (Francis Farmer ed., 1956) ("The program of the world's peace ... as we see it, is this: I. Open covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind but diplomacy shall proceed always frankly and in the public view ...").

¹⁰⁰ EMILE JOSEPH DILLON, *THE INSIDE STORY OF THE PEACE CONFERENCE* 201-2 (1920).

representation and voting was maintained in San Francisco, the process was openly elitist and the main purpose of the Conference was no other than to get the smaller nations to approve a plan already worked out by the great powers (United States, Great Britain, Soviet Union, and later China) at the Dumbarton Oaks conference.¹⁰¹

Treaty-making has, since Paris and San Francisco, become more accepting of genuine participation by smaller nations and more intolerant of brute assertions of power. The dominant status of great powers remains a pervasive feature of the legislative process however. Great powers retain overwhelming influence in setting the terms of reference for international negotiations. In the field of investment law, to give but one salient example, it has become habitual for leading capital exporting countries (mostly Western countries) to draft "model investment treaties" which provide the blueprint for agreements concluded with capital exporting countries (mostly developing countries), in conditions that are often less like negotiations among equals than an imposition of asymmetrical "contracts of adhesion", reminiscent of the capitulation agreements once imposed by colonial rulers against the periphery.¹⁰² In multilateral negotiations, confessional tsarism remains an enduring, if controversial, feature of treaty-making. Recent climate talks have for instance demonstrated a return, in the name of efficiency, to 19th century legislative practices. During the 2009 Copenhagen climate summit, a small group of great and emerging powers - citing political expedience and time constraints - brokered a deal in secret in the dying hours of the conference (the so-called "leaders' agreement") and presented it as a *fait accompli* to the rest of the delegates, with President Obama publicly announcing the outlines of the accord at a press conference before the end of the proceedings, leaving little choice to other nations but to sign up to the take-it-or-leave-it agreement.¹⁰³

Great powers, to finish, are able to marshal "soft power" to influence treaty-making.¹⁰⁴ As well as the ability to apply economic and political pressures on other states, great powers possess ideational, cultural and human resources which they can mobilize to secure favorable outcomes in ways which are often not available to smaller nations. Leading states can draw upon large pools of experts, skilled negotiators and communicators to disseminate their ideas and make their claims seem legitimate in the eyes of others. Their bureaucracies possess the breadth and depth of regulatory knowledge necessary to effectively control and influence law-making in the functionally specialized institutions which now determine policies in areas such as market regulation, development, environment, transportation, public health, education and so on. Smaller states, by contrast, often experience difficulties in staffing their missions to the organizations and international gatherings where treaties and agreements are negotiated. They lack the soft co-optive and institutional power needed to

¹⁰¹ See ANAND, *supra* note 91, at 88; and Gerry Simpson, *The Great Powers, Sovereign Equality and the Making of the United Nations Charter*, 21 AUST. Y.B. INT'L L. 133 (2000).

¹⁰² See José Alvarez, *A BIT on Custom*, 42 N.Y.U. J. INT'L L. & POL. 17, 38-9 (2009) (acknowledging the unequal nature of many BIT negotiations but nevertheless stressing the validity of these agreements under the existing law of treaties). For a resolutely apologetic defense of model BITs as "facilitating negotiations" and reducing the "drafting and negotiation costs" of investment treaties, see STEPHAN SCHILL, *THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW* 91 (2009).

¹⁰³ The adoption *en force* of the Copenhagen agreement was famously criticized by the Venezuelan delegate who - during the Conference's closing session - deliberately cut her hand and drew blood, denouncing a "coup d'état against the United Nations". See *Copenhagen summit ends in blood, sweat and recrimination*, THE TELEGRAPH, Dec. 20., 2009.

¹⁰⁴ Soft power is defined by Joseph Nye as "intangible power resources such as culture, ideology, and institutions" which a state can use to set the political agenda and determine the framework of debate in a way that shapes others' preferences. See Joseph Nye, *Soft Power*, 80 FOREIGN POL. 153, 166-7 (1990).

persuade other actors to define their interests in ways consistent with their own. Diplomacy, for those reasons, is therefore skewed in favor of the more affluent and powerful countries.¹⁰⁵

The power of individual states, to be sure, can sometimes be balanced by the "power of numbers". On some occasions, smaller nations have been successful in negotiating favorable provisions by mobilizing the power of the majority, a power which the UN has to an extent entrenched in institutions such as the General Assembly. Developing countries have, for instance, secured recognition for principles such as the right to self-determination, permanent sovereignty over natural resources or the principle of common but differentiated responsibilities. These are, however, rare, moderate and often precarious successes.¹⁰⁶ More often than not, great powers are able to block proposals supported by overwhelming majorities. This is especially true given the fragmentation of the legislative process in increasingly narrow functionalist regimes, a phenomenon that limits the opportunities for weaker actors to build cross-issue coalitions and increase their bargaining power.¹⁰⁷ In the WTO context, to provide a recent example, a cycle of negotiations known as the "Doha Round" was initiated in 2001 to tackle some of the fundamental inequities of the world trading system, in light of the needs and interests of developing countries. Small and emerging powers, however, have been unable to gain enough leverage to overcome the unwillingness of a few leading economies (EU, US and Japan in particular) to make concessions on issues such as farm subsidies and tariffs, despite a united front on at least some of the policy proposals. The Doha Agenda was eventually abandoned in December 2015, having failed to achieve any meaningful reform of the trading system.¹⁰⁸

If treaty-making is the work of power, so too is the formation of customary international law (CIL).¹⁰⁹ With regards to state practice - the primary element of CIL - powerful states possess the ability to engage in practice across a far wider range of issues than smaller nations, and their actions traditionally carry much greater weight in the formation of custom. As observed once by De Visscher, if the formation of CIL is akin to the gradual formation of a road across vacant land, then "among the users are always some who mark the soil more deeply with their footprints than others, either because of their weight, which is to say their power in the world, or because their interests bring them more frequently this way."¹¹⁰ Historically, the conduct of powerful states has been treated as more decisive - i.e. as more authoritative as a source of law - than that of less powerful ones. In many areas (e.g. maritime law, space law, law of immunities), CIL has in fact developed under the influence of remarkably few states.¹¹¹ Though it is generally said that state practice must nowadays be

¹⁰⁵ BOYLE AND CHINKIN, *supra* note 4, at 30-1.

¹⁰⁶ For example, the principle of common but differentiated responsibilities has recently been the object of sustained criticism from Western governments and scholars, claiming that efficiency requires setting aside "ethical principles" in favor of swift, practical, and politically acceptable action. See, e.g., ERIC POSNER & DAVID WEISBACH, *CLIMATE CHANGE JUSTICE* (2012). For a critical analysis, see Mario Prost and Alejandra Torres Camprubi, *Against Fairness? International Environmental Law, Disciplinary Bias, and Pareto Justice*, 25 LEIDEN J. INT'L L. 379 (2012); and Benoît Mayer, *Climate Change and International Law in the Grim Days*, 24 EUR. J. INT'L L. 947 (2013).

¹⁰⁷ On the proliferation of regulatory institutions as a deliberate effort on the part of powerful states to "divide and rule", see Eyal Benvenisti and George Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595 (2007).

¹⁰⁸ See *Global Trade After the Failure of the Doha Round*, N.Y. TIMES, January 1st, 2016.

¹⁰⁹ See, generally, MICHAEL BYERS, *CUSTOM, POWER AND THE POWER OF RULES* (1999).

¹¹⁰ CHARLES DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 149 (1957).

¹¹¹ Lauterpacht, for instance, points to the overwhelming influence of the US and the UK - as the leading maritime powers of the day - on the emergence of customary rules concerning the status of marine and submarine areas, noting that their practice was treated as "authoritative almost as a matter of course from the outset". See ELIHU LAUTERPACHT, *INTERNATIONAL LAW - BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT*, VOL. 3, 163 (1977).

"widespread" and "representative"¹¹², it remains the case that the practice of the most dominant states possesses a particular force in the formation of CIL and that, conversely, a practice that is not supported by the world's major powers will not normally give rise to general customary rules.¹¹³ Great powers, to finish, exert special influence on the formation of CIL in more indirect ways, whether it be by influencing or controlling how other states behave (i.e. their practice), or through the historical role of Western lawyers in formulating CIL and their influence within bodies such as the ICJ or the ILC, which play a leading part in the identification and codification of customary law.¹¹⁴

Power hierarchies among sovereign states have always been superimposed with other, no less significant hierarchies. Chief among those are gender hierarchies. International diplomacy and law-making take place in traditionally and predominantly male spaces. International law is designed by and for states, the overwhelming majority of which are governed by men. At the time of writing, there were a mere 18 female heads of state and/or government (excluding figurehead monarchs) and only 17% of government ministers worldwide were women.¹¹⁵ Gendered states, unsurprisingly, set up gendered institutions. Major international organizations such as the UN are highly patriarchal organizations, with limited or marginalized women presence.¹¹⁶ Since 1945, UN Secretaries-General have all been men. As of 1 January 2016, all but one members of the Security Council were men and only 23 percent of all Senior UN Officials were women, with a majority working in "soft" corners, i.e. on subjects traditionally associated with "feminine" concerns (sexual violence, children's rights, refugees, education) or in positions of relatively low prestige (e.g. conference management, budget and accounts), compared with the "hard" portfolios (political affairs, economic development, or peacekeeping), all traditionally trusted by men.¹¹⁷

The invisibility of women becomes even more acute when looking at UN bodies with special functions regarding the progressive development and implementation of international law. Only four women have ever served on the International Law Commission and of the 58 Special Rapporteurs appointed since 1949, all but two were men.¹¹⁸ As for the International Court of Justice, only 4

¹¹² For a recent restatement, see International Law Commission, Second Report on Identification of Customary International Law (prepared by Special Rapporteur Michael Wood), May 22, 2014, UN. Doc. A/CN.4/673, para. 52-4 ("for a rule of general customary international law to emerge or be identified, the practice need not be unanimous (universal); but, it must be extensive or, in other words, sufficiently widespread The participation in the practice must also be broadly representative").

¹¹³ See, for a recent example, the ICJ's *Nuclear Weapons* advisory opinion, in which the Court found that the *opinio juris* of the few states possessing nuclear weapons outweighs that of the large majority of states that support their prohibition. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ REP. 1996 226, para. 64-73 (see also Declaration of Judge Shi for a criticism of the Court's approach and methodology).

¹¹⁴ On the pre-eminence of Western lawyers in the formulation of CIL (based on the practice of a limited number of Western powers), see ONUMA YASUAKI, *A TRANSCIVILIZATIONAL PERSPECTIVE ON INTERNATIONAL LAW* 135, 258-60 (2010). On the dominance of the ICJ bar by international lawyers from developed states, see Shashank Kumar and Cecily Rose, *A Study of Lawyers Appearing before the International Court of Justice, 1999-2012*, 25 EUR. J. INT'L L. 893 (2014).

¹¹⁵ See United Nations, *Women in Politics: 2015*, <http://www.unwomen.org/en/news/stories/2015/3/press-release-sluggish-progress-on-women-in-politics-will-hamper-development> (last visited August 18, 2016).

¹¹⁶ See Hilary Charlesworth, *Transforming the United Men's Club: Feminist Futures for the United Nations*, 4 TRANSNAT'L L. & CONTEMP. PROBS. 421 (1994).

¹¹⁷ See Senior Officials of the United Nations and Officers of Equivalent Rank, <https://www.un.int/protocol/sites/www.un.int/files/Protocol%20and%20Liaison%20Service/listofunseniorofficials.pdf> (last visited August 18, 2016).

¹¹⁸ See <http://legal.un.org/ilc/guide/annex3.shtml> (last visited August 18, 2016).

women have ever sat on the bench out of the 106 judges elected since 1946, the first (Rosalyn Higgins) being appointed in 1995, fifty years after the Court's establishment.¹¹⁹

The exclusion of women from law-making processes has important normative consequences. It undermines international law's democratic legitimacy, to start with, as women are prevented from participating in decisions that affect their lives.¹²⁰ But it does also bear on normative outputs. Women's issues or interests tend to be marginalized or consigned to separate spheres that are easily ignored, are typically articulated in soft language, and have weak compliance mechanisms.¹²¹ Gendered institutions produce decisions, norms and regimes that are largely constructed and defined by male experiences. The human rights regime, to give but the most obvious example, does not for instance deal in categories that fit the experiences of women. It has for instance historically reified civil and political rights at the expense of social, economic and cultural rights, with adverse consequences for women who suffer disproportionately from structural socio-economic inequalities.¹²² Individual rights, likewise, have typically been conceptualized and applied in a gendered manner. Whilst for instance women's rights are most often violated within the family, the right to family life has traditionally been interpreted as a duty of "non-interference" in the private family sphere, preventing the application and development of human rights standards in relationships between men and women.¹²³ The gendered nature of law-making, to finish, means that when engagement with women's issues does occur (for instance Security Council resolutions on sexual violence during armed conflicts), international law tends to reinforce masculinist assumptions and institutional preferences which are harmful to women (for instance the stereotypical representation of women as "victims", the UN's commitment to globalization and militarism, and the hegemonic position of the Security Council).¹²⁴

C. Legalized Hierarchies

The structure of international law-making, as the above makes clear, is one dominated by oligarchy and patriarchy. There is, it turns out, a significant discrepancy between the pragmatics of sources and the foundational principle of legislative equality. When confronted with this problem, international lawyers have traditionally deployed a variety of strategies to reconcile material hierarchies of influence and international law's formal commitment to sovereign equality. A classical posture of international lawyers in this regard is one that politely acknowledges the existence of legislative hierarchies but confines them to the political domain, outside the law, as a mere fact of international

¹¹⁹ See <http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=2> (last visited August 18, 2016).

¹²⁰ For a feminist critique of international courts and tribunals from a democratic theory perspective, see Nienke Grossman, *Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?*, 12 CHI. J. INT'L L. 647 (2012).

¹²¹ Charlesworth, *supra* note 116, at 447.

¹²² Rosa Ehrenreich Brooks, *Feminism and International Law: An Opportunity for Transformation*, 14 YALE J. L. & FEMINISM 345, 347 (2002).

¹²³ See, e.g., Hilary Charlesworth, *Worlds Apart: Public/Private Distinctions in International Law*, in PUBLIC AND PRIVATE: FEMINIST LEGAL DEBATES (Margaret Thornton ed., 1995); Donna Sullivan, *The Public/Private Distinction in International Human Rights Law*, in WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES (Julie Peters and Andrea Wolper eds., 1995); Christine Chinkin, *A Critique of the Public/Private Dimension*, 10 EUR. J. INT'L L. 387 (1999).

¹²⁴ See esp. Diane Otto, *The Exile of Inclusion: Reflections on Gender Issues in International Law Over the Last Decade*, 10 MELB. J. INT'L L. 11 (2009); and Anne Orford, *Feminism, Imperialism and the Mission of International Law*, 71 NORDIC J. INT'L L. 275 (2002).

life ("of course hierarchies exist. But these are political, not legal hierarchies"). This narrative is deceiving. It creates a false dichotomy between *de facto* and *de jure* hierarchies which neglects the manner in which hierarchies of influence are in reality internalized by the international legal order, including by its system of sources.

International law (by which I mean *actual*, positive law, and not just diplomatic practice), to start with, has historically been very accepting of deviations from the principle of legislative equality. Nowhere is this more visible perhaps than in the law of treaties and its liberal attitude towards coercion. As noted above, international law has traditionally regarded treaties procured by the threat or use of force as fully valid, save for situations involving coercion of the individual representatives of the state. From Grotius to Oppenheim, the dominant view has classically been that treaties concluded as a result of force, whilst morally questionable, are just as binding as those made willingly, if only because states ought to be able to end wars by way of treaties in the knowledge that these treaties will not subsequently be invalidated on grounds of duress.¹²⁵ As international law's position towards armed force as a legitimate means of international relations began to change, so too did its position towards imposed treaties. In the inter-war period, demands began to emerge challenging the traditional view and claiming that treaties imposed by states using illegal force ought not to be recognized as legally binding.¹²⁶ With the gradual development of the principle prohibiting the threat or use of force and the adoption of the UN Charter, the foundations of the traditional doctrine began to erode and a new rule of customary law against imposed treaties progressively crystallized in the post-1945 period. That rule was eventually codified in the 1969 Vienna Convention on the Law of Treaties, which provides that "a treaty is void if its conclusion has been procured by the threat or use of force."¹²⁷

Critically, though, the new rule of international law providing for the invalidity of imposed treaties is only concerned with the most egregious forms of coercion involving the use or threat of military violence. During the negotiations of the Vienna Convention, an amendment was submitted by Afro-Asian, Latin American and Communist states proposing that economic and political pressures be mentioned explicitly as falling within the concept of coercion, noting that the strangulation of a country's economy had become a weapon of choice of Western powers and could be equally as coercive as the threat or use of armed force.¹²⁸ The amendment was however vigorously opposed, and

¹²⁵ See, e.g., HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE - INCLUDING THE LAW OF NATURE AND OF NATIONS* 389-90 (1901) (for whom the injustice resulting from war does not affect the validity of peace treaties but only their interpretation); SAMUEL PUFENDORF, *OF THE LAW OF NATURE AND NATIONS* 849-50 (1729) (arguing that compacts made with an enemy are required to be observed, save for treaties that continue a state of war); DANIEL GARDNER, *INSTITUTES OF INTERNATIONAL LAW* 573 (1860) ("treaties made under forcible coercion are valid by the law of nations, though in all codes of municipal law the rule is otherwise as to contracts of individuals. This is a rule of necessity, as all wars would be endless if a valid treaty could not be made, and terms of pacification ratified in a binding form"); OPPENHEIM, *supra* note 45, at 525 ("circumstances of urgent distress, such as defeat in war or the menace of a strong State to a weak State, are not regarded as excluding the freedom of action of a party consenting to the terms of a treaty A State which was forced by circumstances to conclude a treaty has no right afterwards to shake off the obligations of such treaty on the ground that its freedom of action was interfered with at the time").

¹²⁶ For a historical account, see Stuart S. Malawer, *Imposed Treaties and International Law*, 7 *CAL. W. INT'L L. J.* 1 (1977).

¹²⁷ Vienna Convention on the Law of Treaties, art. 52, opened for signature May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

¹²⁸ See UN Doc. A/CONF.39/C.1/L.67/Rev.1/Corr.1 (nineteen-state amendment) and UN Doc. A/CONF.39/11, at 269-293 (in particular positions of Afghanistan, India, Bolivia, Iraq, Ecuador, Syria, Cuba, Algeria, Zambia, Ghana, Guinea, Russia and Kenya).

ultimately defeated, by the vast majority of Western states, who argued that the standard of economic pressure lacked objective content and that accepting economic duress as a ground of invalidity would prejudice the stability of treaty relations.¹²⁹ That view was also supported by the ILC Rapporteurs, most notably by Waldock, who firmly resisted the demands of postcolonial states on the ground that extending the meaning of coercion to other forms of pressure would leave the door to the evasion of treaty obligations wide open.¹³⁰ As a compromise between the two groups of states, a Declaration was attached to the Vienna Convention solemnly condemning the threat or use of pressure "in any form, whether military, political, or economic" in the conclusion of treaties. The Declaration, however, is drafted in broad political-declaratory language and does not form part of the Vienna Convention (the Convention does not refer to it). It lacks legal force and, as a result, the position today remains that coercion of states by way of economic or political constraint, though undesirable and prejudicial to good relations among states, is not under international law considered as vitiating consent.¹³¹

As the above makes clear, international law as a legal system takes a relaxed, *laissez-faire* approach to freedom of consent and is largely accommodating of the various "methods of persuasion" used by dominant powers in treaty-making.¹³² International law doesn't simply tolerate legislative hierarchies, however. In many respects, it serves to consolidate and entrench these hierarchies by giving them a legal form. The great power prerogatives of the Concert System were not, for instance, a mere matter of political domination. As noted by Simpson, the Concert order was a highly legalized structure of governance: the Congress was established through a series of treaties; the Protocols by which the great powers proposed to dominate the Congress were legal instruments; the decisions of the Congress were set out in treaty form and subsequently ratified by European states. The great powers did not, then, just impose their will on other states through raw power. They established a new, highly hierarchical regime in which their dominant position was legally organized and sanctioned, and their hegemony endowed with institutional respectability (i.e. legitimacy). A hierarchy of might was thus converted into a hierarchy of right.¹³³

In this, the Concert system was a forerunner of the international organizations of the 20th century, in particular the United Nations. In San Francisco - as in Vienna - dominant powers were successful in carving special constitutional privileges for themselves, most notably through permanent representation in the Security Council and the veto power, giving them complete immunity from the enforcement jurisdiction of the Council and overall control over its decision-making. To be sure, the legalized hierarchy of the UN never reached the same scale as that of the Concert system. Great powers, when drafting the Charter, had to account for some of the demands emanating from small and medium powers to secure their participation. As a result, the privileged position of the P5 within the Council was mediated by elements of sovereign equality, most notably the establishment of the

¹²⁹ *Id.* (positions of The Netherlands, Australia, Portugal, Sweden, Canada, United Kingdom, United States and Japan).

¹³⁰ See UN Doc. A/CN.4/156 and Add.1-3, at 52.

¹³¹ See Frédéric Mégret, *Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties*, in THE VIENNA CONVENTIONS ON THE LAW OF TREATIES - A COMMENTARY (Olivier Corten and Pierre Klein eds., 2011). On the *laissez-faire* attitude of international law towards economic coercion more generally, see Antonios Tzanakopoulos, *The Right to be Free from Economic Coercion*, 4 CAMBRIDGE J. INT'L & COMP. L. (2015, forthcoming). See also, *contra*, Olivier Corten, *Article 52*, in CORTEN & KLEIN, *id.* (arguing that the broader interpretation of coercion, not limited to military but including also economic and political coercion, has nowadays prevailed).

¹³² WADE MANSELL AND KAREN OPENSHAW, INTERNATIONAL LAW - A CRITICAL INTRODUCTION 82-3 (2013).

¹³³ SIMPSON, *supra* note 85, at 102-8 (noting that the constitutional privileges of the great powers in the concert system were combined with a strong commitment to sovereign equality among themselves).

General Assembly as an egalitarian chamber with perfect equality of representation and vote for all states.¹³⁴ The P5, however, owing to their status on the Council, enjoy unparalleled bargaining power in the UN and possess overwhelming influence over the organization, its membership, and its legislative agenda, as well as controlling appointment of key personnel, including on law-making and law-ascertaining bodies such as the International Court of Justice.¹³⁵ International organizations like the UN (or the Bretton Woods institutions in which voting rights are commensurate to economic power) therefore operate to institutionalize political dominance by giving it a formal, juridical status. This in large part explains why great powers have historically been supportive - if strategically and selectively - of institution-building.¹³⁶

Legislative hierarchies are, to finish, legalized through a variety of legal doctrines such as the doctrine of "specially affected states". According to this doctrine, which has a long history in international law, the practice of some states - because they are "most concerned" with a subject or have a greater "depth of experience" - weighs more heavily in the formation of customary law than that of others.¹³⁷ This principle has been interpreted in practice as having two possible implications. Firstly, if all major interests are represented, there is no need for a majority of states to have participated in order for custom to emerge. Participation from a narrow but politically powerful circle of states may suffice. Secondly, and conversely, if specially affected states do not accept a particular practice, the said practice cannot mature into a rule of customary international law, even when it is otherwise broadly.¹³⁸ The question of who constitutes a "specially affected state" may vary according to circumstances. In some instances, that determination may rest on objective factors such as geography or location. Coastal states have for instance been considered more "specially affected" by the legal status of the continental shelf than landlocked states.¹³⁹ Likewise, small island States may be considered "specially affected" by climate change. In practice, however, the doctrine has generally been used as a disguise for important or powerful states, which are somehow assumed to be always "specially affected" by legal developments, given the "scope of their interests", the "extent of their resources", and the "reach of their practice."¹⁴⁰

The doctrine of specially affected states therefore gives great powers considerable influence over the formation of customary international law, most notably the ability to block the emergence of customary norms, even when these are otherwise supported by large majorities. The US was for

¹³⁴ *Id.*, at 180-92.

¹³⁵ Under the ICJ Statute, members of the Court "shall be elected by the General Assembly and by the Security Council" (art. 5.1). The Court has always included judges of the nationality of the permanent members.

¹³⁶ On this point, see Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369 (2005).

¹³⁷ North Sea Continental Shelf Cases, *supra* note 29, para. 73 ("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").

¹³⁸ See INTERNATIONAL LAW ASSOCIATION, FINAL REPORT OF THE COMMITTEE ON THE FORMATION OF CUSTOMARY (GENERAL) INTERNATIONAL LAW - STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW, REPORT OF THE SIXTY-NINTH CONFERENCE (2000), principle 14 and commentary (e) thereto (hereinafter 'ILA Report').

¹³⁹ North Sea Continental Shelf Cases, *supra* note 29, Dissenting Opinion of Judge Tanaka, at 76 ("we cannot evaluate the ratification of the Convention by a large maritime country or the State practice represented by its concluding an agreement as having exactly the same importance as similar acts by a land-locked country which possesses no particular interest in the delimitation of the continental shelf").

¹⁴⁰ ILA REPORT, *supra* note 138, at 26 (noting that, although seemingly undemocratic, the importance accorded to major powers is "in the nature of things" and "in touch with political reality", given the "scope of their interests"). See also Benedict Kingsbury, *Sovereignty and Inequality*, in INEQUALITY, GLOBALIZATION, AND WORLD POLITICS 77 (Andrew Hurrell & Ngaire Woods eds., 1999) (arguing that the doctrine "operates mainly (albeit not exclusively) for the benefit of powerful states").

instance successful in arguing before the ICJ that, as a specially affected state, its opposition (with that of a few other nuclear powers) effectively blocked the development of a customary norm prohibiting the threat or use of nuclear weapons.¹⁴¹ Likewise, the tribunal in the *Texaco* arbitration found that Resolution 3281 of the UN General Assembly ("Charter of Economic Rights and Duties of States") could not be said to give rise to new principles of customary international law, despite the adoption of the Charter by an overwhelming majority of states (118 votes to 6, with 10 abstentions), because of the opposition of "developed countries with market economies which carry on the largest part of international trade".¹⁴² The doctrine of "specially affected states", as these examples demonstrate, regularizes and legalizes great power dominance. It converts political power into rightful authority by formally recognizing that the practice and opinion of dominant states carries greater legal significance in law-making than that of small and medium powers.

GENERAL CONCLUSION: OF NOBLE LIES, OPPORTUNE FALSEHOODS AND EPISTEMOLOGICAL OBSTACLES

The "no-hierarchy" thesis, this paper argues, is descriptively and normatively problematic. Descriptively, it does not accurately reflect the highly differentiated nature of the doctrine of sources and the pervasive inequalities that characterize law-making in the international community. The thesis is, from this point of view, analytically inconsistent with the "real world" of sources, a world that is replete with (more or less formalized) hierarchies of worth, status and influence. As such, the thesis amounts to what French philosopher Gaston Bachelard used to call an "epistemological obstacle", i.e. a commonly accepted conception or idea that does not add value to our existing knowledge and, worse, that obstructs and impedes scientific progress.¹⁴³ Normatively, the thesis is problematic too, in that it serves to conceal or marginalize these hierarchies, rendering them immune to critical scrutiny and challenge. As noted by Charlesworth, narrow discussions of (the lack of) formal hierarchies among international law sources "allow international lawyers to sidestep complex debates about the function of international law and the relative legitimacies of state consent and claims of justice."¹⁴⁴

¹⁴¹ Legality of the Threat or Use of Nuclear Weapons, *supra* note 113, Written Statement of the Government of the United States of America, at 9 ("with respect to the use of nuclear weapons, customary law could not be created over the objection of the nuclear-weapon States, which are the States whose interests are most specially affected"). See also Advisory Opinion para. 73 ("the desire of a very large section of the international community to prohibit the use of nuclear weapons" and the "emergence of a customary rule specifically prohibiting the use of nuclear weapons" is "hampered by the still strong adherence to the practice of deterrence"); and Dissenting Opinion of Vice President Schwebel, at 312 and 319 ("this nuclear practice is not a practice of a lone and secondary persistent objector. This is not a practice of a Pariah government crying out in the wilderness of otherwise adverse international opinion. This is the practice of five of the world's major Powers, of the permanent members of the Security Council that together represent the bulk of the world's military and economic and financial and technological power").

¹⁴² *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic*, Award on the Merits, 17 I.L.M. 1 (1978), para. 86-7 ("the legal value of the resolutions which are relevant to the present case can be determined on the basis of circumstances under which they were adopted The tribunal notes that only Resolution 1803 (XVII) of 14 December 1962 was supported by a majority of Member States representing all of the various groups. By contrast, the other Resolutions mentioned above, and in particular those referred to in the Libyan Memorandum, were supported by a majority of States but not by any of the developed countries with market economies which carry on the largest part of international trade").

¹⁴³ GASTON BACHELARD, *THE FORMATION OF THE SCIENTIFIC MIND - A CONTRIBUTION TO A PSYCHOANALYSIS OF OBJECTIVE KNOWLEDGE* 24-32 (2002).

¹⁴⁴ Charlesworth, *supra* note 26, at 189.

Engaging in debates about sources and sources hierarchies along restricted, formalistic lines serves to "postpon[e] (possibly indefinitely) discussion of the politics of the designated sources" and "obscures the fact that international law is generated by a multi-layered process of interactions, instruments, pressures and principles."¹⁴⁵

Relegating what Charlesworth calls the "politics of sources" to the periphery of the legal domain is not satisfactory. As argued above, law-making hierarchies do not operate outside the law, as a mere matter of geopolitical economy, lying within the exclusive jurisdiction of political scientists. These hierarchies are to a great extent sanctioned, organized and formalized through international legal institutions and law-making processes. Though they are often counterpoised by elements of equality and equivalence, legislative hierarchies are thus an integral part of the international legal order, and of its system of sources. In these circumstances, as Anand suggests, the mere recitation of the pious and holy principle of sovereign equality "hardly makes a difference : even after you give the squirrel a certificate which says he is quite as big as any elephant, he is still going to be smaller, and all the squirrels will know it and all the elephants will know it."¹⁴⁶ Recanting mechanically the no-hierarchy thesis among and in the sources of international law merely serves to legitimize and reproduce real-world legislative inequalities by neutralizing them. When this happens, the "noble lie" of equality and horizontality turns into an "opportune falsehood", an ideational device that justifies gross inequalities of political power and juridical authority.¹⁴⁷ This may not be a problem for system apologists or proponents of the status quo. It is, however, for anyone committed to systemic change and redistribution, and the no-hierarchy thesis must therefore be rejected as an accepted axiom of international law. For the first step in redressing inequalities is to recognize when and where they occur and challenge vocabularies that defuse and naturalize them.

¹⁴⁵ *Id.*

¹⁴⁶ ANAND, *supra* note 91, at 95 (citing Samuel Grafton).

¹⁴⁷ PHILIP ALLOTT, THE HEALTH OF NATIONS 390 (2004).