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Customary International Law

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law rules to construe treaties. For example, when determining the ownership of submerged lands, they have done so with regard to the 1958 Territorial Sea Convention; in construing the Warsaw Convention, they have applied the Vienna Convention on the Law of Treaties. And, finally, at points the U.S. Supreme Court will use international norms to construe the U.S. Constitution. For example, there is currently a split in the death penalty jurisprudence of the Supreme Court about whether international standards on the death penalty should or should not be applied in the context of determining what constitutes Eighth Amendment cruel and unusual punishment.¹¹

What the revisionists miss is that there are many subtle ways in which judicial techniques act to internalize customary norms into U.S. domestic law, even without political branch action and even outside the human rights context. So if the revisionist claim that only political branch action can authorize judicial incorporation of international law were taken seriously, it would have very damaging effects on the coherence of federal law, not to mention executive power and original intent.

I will conclude with two points. First, if the question is “What does internalization mean for contemporary conceptions of customary international law?”, I would say that we should focus less on state practice and more on *opinio juris*. How is *opinio juris* reflected in domestic law? How do we know *opinio juris* when we see it? What roles do NGOs play in promoting it? What do bureaucratic procedures do to bring about *opinio juris*? Second, if the question is, “How does legal normativity foster compliance?”, my answer would be that normativity fosters compliance through *obedience*, namely, through the transnational legal process of internalization of international norms into domestic law.

CUSTOMARY INTERNATIONAL LAW

by S. James Anaya*

In my remarks I want to address the relation between international institutions and the formation of customary international law, particularly in the field of human rights. Since the mid-twentieth century, the United Nations and other international institutions, through numerous functional agencies, have generated more and more activity within the field of human rights. This activity includes information gathering on numerous human rights-related matters, the articulation of human rights standards through the adoption of declarations and the drafting of treaties, and the adjudication of specific human rights controversies. A perennial concern of international legal scholars has been to understand the relation between such activities and the development of international law. As just noted, much of the work of international institutions in the field of human rights is connected with or gives rise to multilateral treaties. Of course, to the extent that international human rights treaties are developed and states ratify them, the treaties themselves automatically give rise to obligations within international law.

My immediate concern, however, is with understanding the activities of international institutions, not primarily in relation to treaty-based obligations but rather in relation to the development of customary international law. Under traditional theory, a rule of customary international law is deemed to arise as a result of a pattern of actual behavior on the part of states that reflects conformity with the rule. What counts fundamentally is not rhetoric, such as statements made before international bodies, but state practice in the form of actual

¹¹Compare *Thompson v. Oklahoma*, 487 U.S. 815 (1987) (plurality opinion), with *Stanford v. Kentucky*, 492 U.S. 361 (1989).

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conduct on the part of states in their international relations. Within this traditional view, customary international law exists, or “crystallizes,” when a pattern of state behavior generates a certain threshold of understanding about the content of a rule, along with widespread manifestations of consent to be bound to the rule, this sense of obligation being the so-called *opinio juris*.

For the most part, the multiple and increasingly pervasive activities of international institutions in the field of human rights do not fit neatly into the categories of state practice under the traditional conception of customary international law. Nonetheless, as many have observed, these activities are often the source of normative understandings that, like or along with those generated by traditional state practice, carry weight in the international system independently of specific treaty regimes. With this phenomenon of the contemporary international legal order, we are encouraged to look beyond the traditional concept of custom in international law. It is not my purpose here to provide a comprehensive theory of customary law. Rather, I will simply identify a number of factors that drive and inform an assessment of the multiple activities of international institutions and their contribution to the formation of human rights norms that can be understood as customary international law.

First, international human rights principles that carry weight independently of specific treaty obligations have been generated through international institutions quite apart from the actual conduct of states in particular cases. The UN processes leading to the Universal Declaration of Human Rights and other subsequent declarations have involved multilateral discussions that have had their focus on what ought to be rather than what is. Since the adoption of the Universal Declaration fifty years ago, states have convened regularly in multilateral settings, along with other authoritative actors, to discuss problems of human rights and to articulate relevant standards. Through such processes, normative understandings and expectations of behavior in compliance with the articulated standards have reached certain levels of generality, notwithstanding continuing conduct on the part of states that is at odds with the standards.

Second, there is an element of what might be called normative spillover in the activities of international institutions that are focused on human rights. That is, certain basic, already widely accepted human rights principles inevitably form the backdrop of multilateral discussions concerning human rights. These include human rights principles articulated in the UN Charter such as the basic principles of equality, nondiscrimination, and self-determination. Thus, for example, when discussion about the rights of women occurs, the basic principle of equality informs that discussion, and that basic principle has spillover into the articulation of the more particularized norms that relate to an understanding of the rights of women. When discussion about the rights of indigenous peoples occurs, the normative essence of the principle of self-determination—which is simply that people have the right to control their own lives and destinies—has certain spillover to an understanding of the rights of indigenous peoples. If it is indeed a principle of human rights that people should be able to control their own lives on an equal basis, then it follows more easily that indigenous peoples should be able to retain and develop their own cultural expressions and methods of organization.

A third factor, especially observable in the area of human rights, is a shift in the source of obligation from consent to consensus. The obligation to uphold human rights is less and less a matter of affirmative consent to human rights norms on the part of states, and more and more a matter of consensus on the part of the participants in the norm-building and norm application processes. As human rights are discussed within international institutions, what seems to be carrying the day is the consensus that emerges from the multilateral discourse. We can readily observe that the international actors in an institutional setting do not always wait for an indication of affirmative consent on the part of a state to a human rights norm

before they hold that state accountable under the norm. To the extent that there is a consensus, for example, on the right not to be tortured, the international community can be seen as willing to act upon that right independently of some affirmative act of state consent. Further, in limited instances one might observe the international community acting notwithstanding the express withholding of consent to a particular norm.

A final factor I want to note has to do with the theme of this conference. That factor is the enhanced participation of non-state actors, both in the formation of a consensus about norms and in their invocation and application. International institutions have provided individuals, independent experts, and nongovernmental organizations (NGOs) various avenues of access to international decision making in regard to human rights matters. Such non-state actors have thus participated in the development of normative consensus, often causing it to progress at a much faster pace than it might otherwise and to reflect more fully the values and perspectives of non-state actors. Again, the example of indigenous peoples is instructive. Indigenous peoples themselves have been involved in the activities of the United Nations and other international institutions concerning their rights and status in the contemporary world. The pace of the development of the emerging standards is heavily influenced by, and the content of the standards substantially reflects, indigenous peoples' own articulated aspirations and demands. Such impact of non-state actors on the norm-building process is a factor that, along with the others I have pointed out, influences how we should today understand the dynamics of customary international law.

With these factors in mind, what can we say about the activities of international institutions in the field of human rights and customary international law? For starters, even under traditional theory, the activities of the United Nations and other international institutions are capable of contributing to the development of customary international law regarding human rights. The statements and resolutions within international organizations about human rights may prompt patterns of state behavior, and in that way lead to customary international law. In other words, under traditional theory a resolution concerning the rights of women or a resolution concerning the rights of indigenous peoples is not itself customary international law, but may nonetheless prompt behavior consistent with that resolution which in turn may result in new customary international law. Also, under the traditional view, a resolution or statement by or from within an international institution may provide evidence of customary international law to the extent that such a resolution or statement reflects what states already believe their obligations to be. These are fairly noncontroversial descriptions of the significance of multilateral communications and resolutions within international institutions in terms of customary international law.

However, I believe it is not sufficient to describe the elaboration of resolutions or other communicative activities of international institutions simply as precursory to or evidence of customary international law. Rather, I think it is possible to say that such resolutions and activities themselves generate customary international law. As I have pointed out, the multiple activities of international institutions in the field of human rights themselves build understanding and consensus about norms, and they do so upon a foundation of already widely accepted principles. As consensus about the content of a human rights norm emerges among the various relevant actors in the world community, including non-state actors, so too does expectation of compliance with the norm. Consensus on the content of a rule against child abuse, for example, tends strongly to be accompanied by expectation that the rule will be followed, apart from any specific agreement to be bound by the rule. And this expectation endows the rule with an obligatory character that manifests itself and is enhanced through further deliberative activities within international institutions.

In sum, the multiple activities of international institutions not only matter in a political or sociological sense but, to the extent that they build understanding and expectations

regarding human rights norms, they also can be seen as contributing to the formation of customary international law.

THE UNBEARABLE LIGHTNESS OF CUSTOMARY INTERNATIONAL LAW

by Hilary Charlesworth*

The title of this paper is of course drawn from Milan Kundera's wonderful 1984 novel *The Unbearable Lightness of Being*. I wanted to evoke some elements of Kundera's book, especially the choice he gives to his central characters between weight and lightness—moral responsibility on the one hand, vacuousness on the other. I also wanted to evoke Kundera's playful reversal and undermining of the categories of weight and lightness.

Customary international law is a paradigm of the tension between apology and utopia that Martti Koskenniemi has diagnosed in international legal discourse.¹ The positivist account of custom is an apologetic one, in which the actions of states are simply justified by legal norms. In his stern critique of "relative normativity," Prosper Weil presented customary law as a type of Trojan horse by which the homogenous normativity of traditional international law was threatened.² For Weil, distinguishing between customary norms (through, for example, the doctrines of *jus cogens* and rights *erga omnes*) radically undermined the purposes of the international legal system, which Weil defined as securing coexistence and cooperation among the states making up the international community.³ Customary international law, then, was a dangerously manipulable, unbearably light source of international norms.

But custom also has utopian potential. Many jurists regard custom as a useful mechanism that can compensate for the rigidity of treaty law, and have argued for expansion of the category. For example, Louis Sohn has suggested (as has S. James Anaya in his panel presentation) that customary rules can emerge by virtue of the treaty negotiation process, even before the treaty is signed.⁴ Isabelle Gunning has gone further and argued that, at least in the area of human rights, the activities of nongovernmental organizations (NGOs) should be regarded as constituting relevant practice in the generation of customary norms.⁵ On such an analysis, custom is not light, but a weighty, important source of international law.

I want to consider only a fragment of this panel's ambitious agenda, linking the two perspectives we were asked to address. Will the increased participation of non-state actors in the generation of customary norms affect compliance with those norms?

For a positivist such as Weil, the answer would be straightforward. A positivist account of customary law locates its normative force in the voluntarism that gave it birth. Thus, custom, that curious (and circular⁶) amalgam of "state practice" and *opinio juris*, binds because states have agreed to be bound by it.⁷ In this sense, compliance is a precondition for custom. Custom derived from sources such as "world order values" is seen as undermining

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¹MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 363 (1989).

²Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AJIL 413 (1983).

³*Id.* at 418–19.

⁴Louis Sohn, "Generally Accepted" International Rules, 61 WASH. L. REV. 1073 (1986).

⁵Isabelle Gunning, *Modernizing Customary International Law: The Challenge of Human Rights*, 31 VA. J. INT'L L. 211 (1991).

⁶Koskenniemi, *supra* note 1.

⁷Weil, *supra* note 1, at 433.