Custom in the Age of Soft Law

Ingrid Wuerth[*]

International cooperation has entered the age of soft law. Traditional international law – custom and treaties – is increasingly displaced by informal, non-legally binding cooperation between and among states. As three prominent European scholars of international law put it recently "there is a rather broad acknowledgment that traditional forms of multilateralism are facing a deep crisis."[1] Whether measured by the decline in the generation of new treaties since the late 1990s,[2] or the rise in transnational regulatory networks and soft law agreements in many issue areas,[3] or the attention of legal scholars,[4] there is a general consensus that non-binding "soft" or "informal" law is rapidly supplanting the traditional "hard" binding forms of international law. The United States and other countries have even formally signaled a growing preference for soft rather than hard international commitments.[5]

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[*] Professor of Law, Director of International Legal Studies, Vanderbilt University Law School. Working draft. Questions, disagreement, and suggestions warmly welcomed: Ingrid.Wuerth@vanderbilt.edu. Going forward, I will be working with Larry Helfer on this project. The paper should be cited as Laurence R. Helfer & Ingrid Wuerth, *Custom in the Age of Soft Law* (working paper).

[1] Joost Pauwelyn, Ramsel A. Wessel, & Jan Wouters, *The Stagnation of International Law* 8 (Leuven Centre for Global Governance Studies, Working Paper No. 97, 2012), *available at*https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp91-100/wp-97-pauwelyn-wessel-wouters-revjp.pdf.

[2] "For each decade since the 1950s, the number of new multilateral treaties deposited with the UN Secretary General was around thirty-five. In the ten years between 2000 and 2010, this number dropped quite dramatically to twenty (in the preceding five decades it had never been below thirty-four). Between 2005 and 2010, only nine new multilateral treaties were deposited (in 2011, not a single one)." *Id*. at 4-5.

[3] ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004); *see also* Kenneth Anderson, *Squaring the Circle? Reconciling Sovereignty and Global Governance through Global Regulatory Networks,* 118 Harv. L. Rev. 1855 (2005).

[4] *See* Jean Galbraith & David Zaring, *Soft Law as Foreign Relations Law*, 99 CORNELL L. REV. (2014) (forthcoming) (documenting this development); Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 708 (2010) (describing the 'prolific amount of scholarship regarding the use of "hard" and "soft" law in international governance.').

[5] Harold Hongju Koh, *Twenty-First Century International Lawmaking*, 101 GEO. L. J. 725, 740-41, 746 (2013); U.S. NATIONAL SECURITY STRATEGY (2010), *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf. *See also,* Pauwelyen, Wessel, Wouters, *supra* note 1, at 6 (describing similar evidence from Canada and Germany).

The growth of soft law, defined here as an international commitment among government actors that is not legally binding,[6] is generally attributed to its flexibility (including lower costs of non-compliance);[7] lower contracting costs;[8] lower barriers imposed by domestic politics, including the lack of need for domestic ratification and reporting;[9] the growth of the regulatory state and the need to resolve regulatory problems on a global basis;[10] and the ability to generate international norms without state consent.[11] As a result, states often choose soft over hard commitment as a form of international cooperation[12] – this choice is extensively discussed in academic literature. But custom, one of the two forms of hard international law, actually shares many of the foregoing attributes of soft commitments. Custom is formed through state practice followed out of sense of legal obligation (*opinio juris*). As compared to treaties, custom need not go through a domestic ratification process and may receive less attention from domestic interest groups, custom may cost little to generate, it is flexible in content, and it is formed in ways not entirely consistent with state consent. Overall, custom tends to have these features in common with soft law, but not treaties.[13] Custom is also a long-standing and fundamental part of the international legal order and it is used to generate binding norms in a wide variety of areas from human rights to the law of the sea and to structural features of state to state relations like immunity, state responsibility, and the obligation to abide by treaties.[14] The same factors that have

[6] Note disagreement about definition, *see infra* Part II.

[7] Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 436-50 (2000); Andrew Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 579 (2005).

[8] Abbott & Snidal, *supra* note at 434-36.

[9] Galbraith & Zaring, *supra* note 4; Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581, 597-98 (2005).

[10] MARK A. DRUMBL, *Actors and Law-making in International Environmental Law*, *in* RESEARCH HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 3 (Malgosia Fitzmaurice, Ed. 2010).

[11] Andrew Gutzman, *Against Consent*, 52 VA. J. INT'L L. 747, 751 (2011).

[12] I use cooperation in the lay sense of the word, not to describe the solution to a prisoner's dilemma. *See* JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 29-31 (2005) (describing customary international law as a potential solution to a prisoner's dilemma).

[13] *See infra* Parts I and II.B.

[14] *See* JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 36 (2010) (explaining the significance of customary international law).

spurred a growth in soft law should apparently also lead to a growth in custom. But they have not. Custom, like treaties, is in decline.[15]

The academic literature on hard and soft law is remarkably silent on custom, although custom can be understood as existing on a continuum between treaties and soft law. Professor Abbott and Snidal's seminal work, for example, only considers one form of hard law: treaties.[16] They disregard custom but suggest that their analysis will apply to it; Professor Raustalia by contrast dismisses custom as largely irrelevant.[17] Professor Nico Krisch argues that international law itself may be displaced in emerging global legal order because it traditionally requires a high level state consent. Although he notes that custom is less consent-based than treaties, Krisch does not explore why states do not appear to choose custom as a form of cooperation in the situations he describes.[18] Almost without exception, the choice between hard and soft law is framed in terms of treaties, with little or no mention of custom.[19] As well, work on customary international law tends to focus on custom's internal definitional problems or on compliance, and says little or nothing about soft forms of commitment, their relationship to custom, and why states choose one or the other.[20] The relationship between treaties

[15] *See* Joel Trachtman, *Persistent Objectors, Cooperation, and the Utility of Customary International Law*, 21 DUKE J. COMP. & INT'L L. (2010) (noting the "increasing marginalization of custom"); Kal Raustiala, *Form and Substance in International Agreements*. 99 AM. J. INT'L. L. 581, 614 (2005). This claim is not uncontested. *See* BRIAN D. LEPARD, CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS 6 (2010). A decline in the relative use of custom might be attributed to the codification of many customary norms into treaties, *see* Timothy Meyer, *Codifying Custom*, 160 U. PA. L. REV. 995 (2012), confusion about how it is generated and ascertained, *see* LEPARD *supra*, at 8, or its poor fit with a growing share of contemporary international problems, *see infra* note 61 and accompanying text.

[16] They note merely that "[c]ustomary law is also an important element of the international legal system, but we do not address it systematically here." Abbott & Snidal, *supra* note 7, n.19.

[17] *See, e.g,* Raustiala, *supra* note 15, at 614.

[18] Nico Krisch, *The Decay of Consent: International Law in an Age of Global Public Goods*, AM J. INT'L L. (2014) (forthcoming).

[19] *See, e.g.*, Guzman, *supra* note 7, at 579.

[20] This is neglect is part of a broader focus by legal scholars on compliance with international law at the exclusion of work on why states enter into international agreements in the first place. *See* Richard McAdams, *Beyond the Prisoner's Dilemma: Coordination, Game Theory & Law*, 82 S. CAL. L. REV. 209, 236-37 (2009); James D. Fearon, *Bargaining, Enforcement, and International Cooperation* 52 INTERNATIONAL ORGANIZATION (1998) ; Alex Geisinger & Michael Ashley Stein, *Rational Choice, Reputation, and Human Rights Treaties*, 106 MICH. L. REV. 1129, 1130, 1135-37 (2008).

and custom has received growing attention from scholars over the past few years,[21] but the relationship between custom and soft law, as well as the dynamics amoung the three, remains unexamined.

Why has soft law proliferated, but not custom? Some have suggested that because of their similarities, soft law may have rendered custom irrelevant.[22] This paper offers an answer based on their differences: custom, at least as an ideal type, is a form of international cooperation used to generate legally binding norms that are unwritten, non-negotiated and universal. Customary norms generated in this way provide, in turn, the basic, universal principles of the international legal order. Soft law and treaties are usually produced through negotiation in which states seek (at least in part) to maximize their preferences and extract concessions from other states.[23] Custom, by contrast is produced through a decentralized, largely non-negotiated process. As a result, custom tends to impose vague and general obligation. Because of its non-negotiated and universal character, custom also lacks variation in terms of design features. Unlike many treaties and some soft agreements, custom does not provide rules that can be tailored such as those dealing with exit, conditional acceptance, monitoring or compliance. Custom is, in these respects, a blunt, flat, take-it-or leave it proposition worked out by the entire community of states. On the other hand, it is often unclear when custom has actually crystalized into law, and even once it has, its application and potential changes in its content remain contested, in a flexible and on-going process in which custom as law fixes certain focal points that anchor or frame the international legal order.

[21] *See, e.g.*, Meyer, *Codifying Custom*, *supra* note 15; Curtis A. Bradley & Mitu Gulati, *Customary International Law and Withdrawal Rights in an Age of Treaties*, 21 DUKE J. COMP. & INT'L L. (2010); Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L. J. 202 (2010); Trachtman, *supra* note 15.

[22] Andrew Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 119 (2005) ("In more pragmatic terms, one might ask whether the impact of CIL, whatever it may have been in the past, has faded to the point of irrelevance. After all, modern international relations have made the treaty a more important tool, relative to CIL, than it has been in the past, and there are myriad ways for states to cooperate through soft law instruments that fall short of treaties."); Ed ward T. Swaine, *Rational Custom*, 52 DUKE L. J. 559, 621 (2002) ("Customary international law, like informal agreements, may allow states a relatively moderate means of credibly committing themselves, while at the same time permitting less costly escape when the circumstances demand it.").

[23] If a customary practice is formally agreed upon as legally binding and written down, it is not custom but instead a treaty. *See* Vienna Convention on the Law of Treaties art. 1 (a), May 23, 1969, 1761 U.N.T.S. 316 (defining "treaty" as an international agreement concluded between States in written form and governed by international law).

Viewed in this way, it is obvious that custom will have a limited domain. Custom forms when wide-spread, non-written agreement[24] is possible with little or no formalized give and take, which is most likely if agreement does not involve distributional consequences among states. In terms of power, custom is often said to reflect the desires of strong states, but the non-negotiated nature of custom, as well as its universality, suggest that powerful states may be constrained in the formation of custom in ways that they are not in the treaty context. Custom tends to be more detailed and specific when it facilitates state-to-state interaction and when it imposes few distributional costs among differently situated states. In other areas, like human rights and public goods, custom is vague, perhaps best serving more as a focal point for further development than a rule of decision capable of application by courts or a specific solution to a regulatory problem. Much of soft law is the product of negotiation and bargaining in its design features and content, and it often sets precise rules governing future conduct, allowing for distributional trade-offs. Custom generally does not.

Analyzing custom as an unwritten, universal, non-negotiated form of cooperation may also give new purchase on some of the traditional doctrinal problems for which custom is known. In particular, I argue that for custom to serve as an important tool of international cooperation in an increasingly soft law world, the doctrinal rules that govern its formation should enhance the unique features of custom: its non-negotiated, universal character and its quality as binding (meaning it is a credible commitment, with power to shape expectations of appropriate behavior). Viewed from this perspective, individual state consent, and the ability of individual states to opt out of customary norms, is less important because no states engaged in quid pro quo bargaining from which others were excluded, and the flexible nature of custom allows for its changed and development without exit. As well, for custom to remain the distinct tool that it is – something other than a variation of soft law -- evidence of its formation should show its non-negotiated quality. This perspective helps clarify how and when United Nations General Assembly Resolutions and treaties should be used as evidence of custom. Drawing custom from certain parts of treaties, for example, is an effort to determine whether the principles reached through a negotiated process can be generally accepted by states even without the trade-offs and linkages potentially embodied in a treaty. Custom is a way of de-negotiating treaties, if you will. Consistent with my argument, custom may be more likely to be derived piece-meal from treaties that allow reservations, because these treaties already allow states to pick and choose among their

[24] Unless otherwise specified, I use "agreement" to mean the general agreement of states, not the implicit or explicit consent of each state. Unlike unilateral promises (which are also non-negotiated), custom binds a group of states to a particular norm and in this sense, too, it represents an agreement rather than a promise.

provisions, and are not part of a negotiated settlement – human rights treaties are an example.[25] This effort is less likely to be successful, and should be treated with greater skepticism (although not foreclosed entirely) when the treaty generates distributional effects and does not permit reservations.[26]

Part I lays the groundwork for the argument by defining and describing customary international law. It includes the commonly-accepted doctrinal framework, but develops in far more detail the process and design features of custom that are almost always neglected in both legal scholarship and international relations scholarship (which tends to say little about custom). Part I devotes substantial attention to the claim that custom is not "negotiated," because this claim is central to the argument that follows and can be contested. Custom may, for example, be negotiated in effect through repeated interaction of states, and custom is in some senses negotiated through the sources used to prove its existence such as UN General Assembly Resolutions, treaties, the work of the International Law Commission. These objections have some force, and negotiation is best understood as a continuum, based on the formality of the exchanges, the extent to which they are designed to generate an agreement that binds, and the amount of bargaining that occurs. Customary law is unquestionably situated at the lower end of the "negotiation" continuum.

Part II asks the "legalization" question about custom: why do states choose this form of cooperation? To answer this question, Part II draws on tools generated by IR/IL scholars in other contexts: legalization, regime design, rational choice, as well as constitutional theory. Because custom -- unlike treaties and soft law – is universal and non-negotiated, it exhibits little variation in design features and little variation in the form of obligation. States thus generally lack the ability to steer the specific content and design features of custom in ways that benefit them individually. It can also serve as an inexpensive and flexible method of cooperation that imposes low domestic ratification costs and may help overcome problems with state consent. As compared to treaties and soft law, it also tends to be relatively entrenched: the details may be subject to negotiation because the norms are vague, but

[25] Not all commentators agree. *See, e.g.*, Gary L. Scott & Craig L. Carr, *Multilateral Treaties and the Formation of Customary International Law*, 25 DENV. J. INT'L L. & POL'Y, 71 (1996) (only treaties that prohibit reservations can form the basis of custom). For a treaty that permits reservations from some terms but not others, the terms for which reservations are prohibited may be more likely to reflect customary international law, especially if the treaty otherwise suggests that this is the case. *See* North Sea Continental Shelf, Judgment, 1969 I.C.J. 3, ¶ 63-66 (Feb. 20). Whether it is permissible to make a reservation to a treaty term that reflects customary international law is unsettled. *See* Edward T. Swain, *Reserving*, 31 YALE J. INT'L L. 307, 351-52 (2006). Reservations inconsistent with the object and purpose of a treaty are prohibited. Vienna Convention on the Law of Treaties art. 19, May 23, 1969, 1761 U.N.T.S. 316.

[26] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

the obligation itself does not allow for exit and even binds new states.[27] As a result of these factors, I argue that custom is most likely to be useful for norms that: have low distribution effects (or for which custom can be phrased generally enough to avoid them); are favored by powerful states willing to make a visible (and hence costly) commitment; and for norms that are "constitutional" in the sense that the community of states wishes to entrench them, and in the sense that they reflect basic structural or normative values. Part III argues that this understanding of custom should inform some of the long-standing debates about how to define custom. In short, soft law shows us what is unique about custom: If states want an alternative to treaties that provides a cheaper, quicker way of generating a bargained for exchange, that avoids domestic ratification costs, and is less costly to violate, they do not need custom: soft law fits the bill. What makes custom an extremely valuable tool are those things that distinguish it from soft law: a universal but low level of formal negotiation, with very low distributional effects, and a more credible commitment with high(er) costs of non-compliance, formed around the basic principles of the international legal order.

I. Custom

This section briefly sets out the doctrinal features of custom. It then turns to other characteristics of custom, particularly its design features and process of formation, which IR/IL theory suggest may be relevant to understanding how and when states use custom. Because these characteristics have received little attention from scholars, they are discussed at some length here.

As an initial matter, custom was once the dominant form of international law. It traditionally governed many aspects of state to state interaction including immunity, jurisdiction, the law of war, the obligation to abide by treaties, and some aspects of the law of the sea. In the second half of the twentieth century, customary international law grew to include human rights, environmental protection, and the use of force.[28] At the same time, many of the traditional customary rules of international law have been codified into treaties that provide more detailed rules than bare custom is generally able to do. Today, many topics of international law are governed by a mixture of treaties and custom.

[27] *See* Bradley & Gulati, *Withdrawing from International Custom*, *supra* note 21 (describing and partially criticizing custom for its failure to permit withdrawal).

[28] *See* LEPARD, *supra* note 15, at 3-6. On codification, See HUGH THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION (1972).

Doctrinally, customary international law has two components: state practice and *opinio juris*. State practice must be widespread and consistent. *Opinio juris* refers to a subjective belief that the practice results from a "sense of legal obligation." Not all consistent practice is legally binding; *opinio juris* divides mere practice – which might be generated by habit or convenience – from legally binding norms. As the International Court of Justice explained in the *North Sea Continental Shelf* Case,

> Not only must the acts concerned amount to settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, ie, the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitats*.[29]

This test is well-settled, but applying it has proven very difficult. There are circularity problems with the requirement that states must act out of a sense of legal obligation in order to give rise to that obligation.[30] As well, it is unclear what exactly counts as state practice; how much state practice and by which states is necessary. Nor is it clear how uniform the practice must be. Similar uncertainty attends *opinio juris*. It is also unclear whether strong evidence of *opinio juris* in the form of declarations by states, can compensate for conflicting or lacking state practice.[31] Doctrinal confusion is sometimes cited as a reason for the decline in custom. The International Law Association attempted to resolve some of these problems through a *Statement of Principles Applicable to the Formation of General Customary International Law* issued in 2000, but the uncertainty persists. The International Law Commission has undertaken a project on the formation of customary international law, again in the hopes of reducing uncertainty around the customary international law's secondary rules. The first report by Sir Michael Wood, Special Rapporteur, was issued in 2013.[32]

Custom has other important features that are often mentioned in passing, but which have not been analyzed in detail. In particular, custom applies universally, it is non-negotiated, and it is unwritten. The literature on treaty design, discussed below, suggests that these factors are important in

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[29] North Sea Continental Shelf, *supra* note 25, ¶ 77

[30] ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 53 (1971)

[31] *See* Anthea Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 772 (2001).

[32] First report on formation and evidence of customary international law, by Michael Wood, Special Rapporteur, International Law Commission (17 May 2013), available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N13/340/75/PDF/N1334075.pdf?OpenElement

understanding international agreements. The most significant of these claims is that custom is a non-negotiated form of agreement of cooperation. Scholars frequently describe custom as involving at most implicit or tacit negotiation, but not express or explicit negotiation.[33] This claim has not been defended, and its implications have not been explored.

A. Custom Based on State Practice and *Opinio Juris*

Custom is generally defined as repeated state practice, which is eventually understood as legally binding. The state practice that produces custom has been described as "informal, haphazard, not deliberate, even partly unintentional and fortuitous" as well as "unstructured and slow."[34] Over time, and for a wide variety of potential reasons, the behavior of states begins to converge – ships pass on the left, or fishing vessels are not captured in war – and eventually the practice is understood as socially desirable, again for a wide variety of potential reasons. In this way it acquires a binding character. Its generation through "spontaneous practice" and its basis in "deeds rather than words" are sometimes said to make traditional custom superior to treaties in that it reflects "a deeply felt community of law" and it produces rules that are likely to be good predictors of future behavior.[35]

Custom generated by practice is often described as unwritten.[36] It is also not negotiated, or is subject to only a low-level of negotiation. Negotiation defined here as a "formal discussion between

[33] Bradley & Gulati, *Withdrawing from International Custom*, *supra* note 21 at 204; Meyer, *Codifying Custom*, *supra* note 15 at 1023; DANIEL BODANSKY, THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW 192, 203 (2010) (customary law is "not created through purposeful acts of law-making and [does] not have canonical form", "the decentralized and uncoordinated nature of customary lawmaking makes it ill-suited" to the "elaboration of specific rules of behavior.).

[34] *See, e.g.*, L. HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 34 (2d. ed. 1979). *See also* GOLDSMITH & POSNER, *supra* note 12 at 37 (describing customary international law as "informal, unstructured, and decentralized").

[35] *See, e.g.*, C. DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 155 (P. E. Corbett, trans.. Princeton University Press 1957) ("What gives international custom its special value and its superiority over conventional institutions, is the fact that, developing by spontaneous practice, it reflects a deeply felt community of law."); B. Simma and P. Alston, at 88-89; HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 441 (2d ed. 1966)

[36] *See, e.g.*, Roy M. Mersky & Jonathan Pratter, *A Comment on the Ways and Means of Researching Customary International Law A Half-Century After the International Law Commission's Work*, 24 INT'L J. LEGAL INFO. 302, 303–04 (1996) (translating Serge Sur, "Sources du Droit International—La Coutume," 1 JURIS-CLASSEUR DU DROIT INTERNATIONAL, Fascicule 13, p. 4 (1989)); INTERNATIONAL LAW ASSOCIATION COMMITTEE ON FORMATION OF CUSTOMARY (GENERAL) INTERNATIONAL LAW, STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW 63 (2000) ("[T]he essence of customary law is that it is the unwritten manifestation of the will of the international community as a whole…"); Inter-Agency Standing Comm. Task Force on Humanitarian Action and Hum. Rts., *Frequently Asked Questions on International Humanitarian, Human Rights and Refugee Law in the Context of Armed Conflict*, INT'L COMM. OF THE RED CROSS, http://www.icrc.org/eng/assets/files/other/faqs.pdf (last

people who are trying to reach an agreement."[37] Traditional custom is not a formal discussion, and the practice that serves as its basis is not necessarily motivated by the desire to reach an agreement, at least initially. Many legal negotiations involve another element as well: bargaining. Negotiation to form treaties, like contract negotiation, often involves a set of demands and concessions, and frequently parties may trade off various aspects of the agreement – a party may compensate for a less favorable substantive outcome, for example, by insisting that the treaty provides for exit, or that the unfavorable terms are phrased as broadly as possible.[38] Traditional custom arises without any of this. It is formed through state-to-state interaction, and acquiescence by states in the behavior of others, but this is not formal, and does not include clear bargaining.

The extent to which an agreement or commitment is negotiated exists on a continuum. Formal discussions that involve bargaining to reach an agreement are highly negotiated, but relaxing either element reduces its character as negotiated. An example of a unilateral, binding declaration illustrates the point. The Ihlen Declaration was an oral statement made outside the context of a formal discussion, in which the Norwegian Minister of Foreign Affairs told the Danish Minister that the "Norwegian Government would not make any difficulty in the settlement of this question" – meaning the ownership of Eastern Greenland. There was "an element" of *quid pro* in this statement, because Denmark had made a similar statement in Norway's favor about other territory that both parties wanted – the Spitzbergen.[39] Although the statement was legally binding,[40] and some have characterized it as an "international agreement,"[41] it involved a low level of negotiation.

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visited Apr. 7, 2014); Kai Ambos & Anina Timmerman, *Terrorism and Customary International Law* (Apr. 7, 2014) (unpublished manuscript), *available at* http://ssrn.com/abstract=2400446 (noting with respect to custom "the inevitable vagueness of unwritten law.").

[37] *Negotiation Definition*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/negotiation (last visited Jan. 3, 2014).

[38] *See* Helfer, *supra* note at 71 (describing treaties "package deals that embody hard-fought compromises among government negotiators.").

[39] *See* Alain Pellet, *Article 38*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 731 (Andreas Zimmermann et al. eds.,2d ed. 2012).

[40] Legal Status of Eastern Greenland (Nor. v. Den.), 1933 P.C.I.J. (ser. A/B) No. 53, at 71 (Apr. 5). The International Court of Justice has occasionally held unilateral acts legally binding even if have "nothing in the nature of a quid pro quo" -- the critical factor is whether the State had the "intention of being bound."

[41] *See* Pellet, *supra* note 37, at 731.

Traditional custom has been described at times in ways that might suggest that it is the product of negotiation, at least in a weak sense. Positivist writers from the beginning of the twentieth century, but also others, viewed custom as an unwritten, but contractual form of agreement. Emphasizing that the consent of states must be express – or as close thereto as possible -- these authors posited the need for an *exchange* of practice.[42] One state acts, and then another responds through reciprocal practice, with the mutual understanding that each regards the other as bound.[43] If this is a form of negotiation, it is a limited one because it does not involve bargaining around terms and it arises through an informal process. More fundamentally, custom today is not understood in bilateral terms, and the consent of individual states can be implied rather than express, if it is necessary at all.[44]

Custom is also formed through a process that puts more emphasis on statements of *opinio juris*, and less on state practice. This form is sometimes called "modern customary international law."[45] As an example, President Harry Truman issued an executive order in 1945 claiming for the United States the resources on the continental shelf adjacent to its coast. A departure from past understandings, the Proclamation nonetheless generated no public opposition. Within a few years many coastal states had claimed their own continental shelves or (like the United States) the right to exploit the resources on them.[46] Although formed in a different way, this custom also reflects little or no negotiation. It is possible, as suggested to a limited extent for the Truman Proclamation,[47] that states could work behind

[42] Lauterpacht, *supra* note at 83 ("[I]t is to a large extent the theory, prevalent on the Continent, of international custom as based on contract or agreement (Vereinbarung) which is responsible for this tendency to limit the scope of implied consent as the basis of custom.").

[43] PAUL HEILBRON, GRUNDBEGRIFFE DES VÖLKERRECHTS 38 (1912); H. Lauterpacht, *Decisions of Municipal Courts as a Source of International Law*, 10 BRIT. Y.B. INT'L L. 65, 78 (1929) (describing the view that "it is not sufficient for the creation of a rule of international law that the manifestations of the will of states should be of an identical content. These manifestations must be reciprocal, i. e. deliberately made to correspond to each other with a view to creating an, obligatory norm in respect of the conduct in question.").

[44] Charney, *Universal Custom, supra* note; Bradley & Gulati, *Withdrawing from International Custom*, *supra* note 21 at 214 (explaining that customary international law "binds new states regardless of their consent")

[45] *See generally* Roberts, *supra* note 30 (explaining modern custom).

[46] *See* Jonathan I. Charney, *The Power of the Executive Branch of the United States Government to Violate Customary International Law*, 80 AM. J. INT'L L. 913, 915 (1986) (explaining the history of continental shelf rights).

[47] There is some suggestion that the Proclamation was preceded by diplomatic consultation with a few states. *See* D.P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 31-32 n.58 (1983). Although this could arguably be characterized as weak form of negotiation, it did not produce any sort of agreement, and it was limited to few states. Note that if the Proclamation had reflected an agreement among the relevant states, it would be a treaty.

the scenes to generate agreement before announcing what they hope will become new customary international norm, although it is very difficult to do so in situations involving many countries – and recall that most custom is considered universal.[48] For the Truman Proclamation, the informal diplomatic consultations involved only a few states. Nevertheless, the example illustrates that the "negotiated" quality of custom exists on a continuum.

B. U.N. General Assembly Resolutions & Other Soft Law as Evidence of Custom

A more serious objection to custom as non-negotiated arises from the use of U.N. General Assembly resolutions and other forms of soft law as evidence of modern custom. General Assembly resolutions – a form of soft, non-binding law -- are sometimes highly negotiated. They can involve formal discussions, bargaining, and often an effort to reach agreement on precise language. For example, the General Assembly passed a 2013 resolution on data privacy that reflected negotiations about its specific language. States that engage in wide-spread data collection successfully sought, nor surprisingly, to weaken the language.[49] Compared to treaties and much soft law, however, the generation of General Assembly Resolutions has structural limitations that make it less negotiated. The General Assembly and its Main Committee include all members of the United Nations. Negotiation on this scale is unwieldy, likely reducing the ability of individual states to control the outcome at least as compared to some treaty negotiations. Indeed, for some resolutions, states may care little about what they say. [50]

More fundamentally, however, U.N. General Assembly resolutions, like other forms of soft law, are only evidence of custom. They do not constitute custom themselves. Instead, they are usually considered as one factor among many in determining the existence and content of customary law. They are accorded more weight when they are unanimous, and they are frequently cited as evidence of

[48] *But see* Asylum Case (Colom./Peru), 1950 I.C.J. 266, 276 (Nov. 20) (discussing regional custom).

[49] G.A. Res. 68/167, U.N. Doc. A/RES/68/167 (Dec. 18, 2013). *See also* Dominic Rushe, *UN Advances Surveillance Resolution Reaffirming "human right to privacy,"* THE GUARDIAN (Nov. 26, 2013, 3:00 PM), http://www.theguardian.com/world/2013/nov/26/un-surveillance-resolution-human-right-privacy.

[50] Stephen M. Schwebel, *The Effect of Resolutions of the U.N. General Assembly on Customary International Law*, 73 AM. SOC'Y INT'L L. PROC. 301, 302 (1979) ("[N]oting that U.N. General Assembly votes are often cast "casually" and without the intention that the "resolution is law.").

custom for the general propositions that they embody, both of which suggest a less negotiated outcome.

C. Treaties as Evidence of Custom

Treaties and custom have a complex relationship. Some treaties are designed to codify pre-existing custom, rendering it less vague in part by putting it in written form. Other treaties facilitate the development of new customary norms, and are cited as strong evidence that a customary rule exists, which binds those who are not parties to the treaty and prevents withdrawal from the customary norm, if not from the treaty itself. Many treaties both restate existing norms of customary international law, and also include provisions that are not yet customary law, but may crystalize into customary international law in part through inclusion in the treaty. The Vienna Convention on the Law of Treaties, with 113 state parties, is widely understood as including many rules that reflect customary law, which are binding on states that have not ratified it, as evidenced by the decisions of national courts, international tribunals, international organizations, and the pronouncements of states themselves.[51] The VCLT included some norms that were already customary law, and facilitated the development of others.

The derivation of custom from treaties may undercut the distinction between custom as non-negotiated on the one hand, and treaties as a negotiated source of international obligation on the other. Professor Alvarez argues, for example that many multilateral treaty-making exercises are turned into "conscious stratagems for reaffirming, modifying, or elaborating codified custom," and "states are increasingly aware that codification conference engage in both treaty-making and the elaboration of codified custom. Such conferences are, to this extent, international law-making fora for the purposes of not one but two potential sources of international obligation."[52] Compared to traditional custom, this

[51] *See* MALCOLM N. SHAW, INTERNATIONAL LAW 811 (5th ed. 2003) (explaining that VCLT reflects customary international law of interpretation, material breach, and fundamental change of circumstances); Evan Criddle*, The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT'L L. 431, 444-448 (2004) (discussing the evidence that articles 31-33 reflect custom); *Vienna Convention on the Law of Treaties*, U.S. DEPT. OF STATE, http://www.state.gov/s/l/treaty/faqs/70139.htm ("The United States considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties.").

[52] JOSÉ ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 390 (2005). *See also* Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529 (1993).

new form of custom "responds to states' contemporary needs for a more rapid, less vague, and deliberative process for the establishment of preferably written and clear global rules."[53]

The relationship between treaties and custom is multifaceted, however, and does not render customary norms negotiated in the way that treaties are. Most significantly, treaty norms do not automatically become custom. The argument that treaty provisions reflect pre-existing or subsequently formed norms of customary international law is often rejected, and rarely, if ever includes all the provisions of any particular treaty. The VCLT, for example, is well-known and important example of a treaty whose provisions largely reflect customary international law – but only some of them do, and for some provisions, the issue remains contested.[54] The purported duty to prevent transboundary pollution, as another example, is based in part on treaties, but also rests on a variety of soft law instruments such as recommendations of the Organization for Economic Cooperation and Development, the Stockholm and Rio Declarations, and U.N. General Assembly Resolutions, among other sources. Whether customary international law imposes such a duty remains contested.[55]

To the extent treaties do articulate customary norms, it is often because they reflect pre-existing norms of customary law – like pacta sunt servada. Moreover, the kinds of treaties that are generally cited as evidence of custom tend to have a somewhat less negotiated character. Many are drafted or negotiated under the auspices of an international organization such as United Nations General Assembly (through a referral to the International Law Commission). The involvement of international organizations tends to expand the number of states involved,[56] increase the presence of NGOs, involve high levels of openness, and increase the importance of experts such as those that make up the International Law Commission or the personnel from the international organization personnel, all

[53] ALVAREZ, *supra* note 50, at 387.

[54] VCLT, art. 56 (on exit default rules for treaties that include no provisions for termination, withdrawal or denunciation) may or may not reflect customary international law. *See* Laurence R. Helfer, *Terminating Treaties*, *in* THE OXFORD GUIDE TO TREATIES 634, 637 n.18 (Duncan Hollis, ed. 2012). Article 66, which allows parties to refer some disputes to the International Court of Justice, does not reflect customary international law. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda), 2006 I.C.J. 6, ¶ 12 (Feb. 3). The VCLT approach to reservations may not reflect custom. *See* Anthony Aust, *Vienna Convention on the Law of Treaties*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2006).

[55] Daniel Bodansky, *Customary (and not so Customary) International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 105, 110-111 (1995).

[56] ALVAREZ, *supra* note 50 at 276 ("Invitations to join in multilateral treaty-making efforts [by international organzations] are today regarded as matters of sovereign right, unless the treaty is intended to be of merely regional interest").

of which tend to reduce the ability of particular states to control the outcome. Nevertheless, some of the treaties that emerge from this process are highly negotiated, including the U.N. Convention on the Law of Sea and the Rome Statute establishing the International Criminal Court. Consistent with their negotiated character, neither permits reservations, and both have proven to be especially controversial evidence of customary international law.[57]

D. No Strong Negotiation, Ongoing Weak Negotiation

Custom is not the product of strong negotiation that involves bargaining which culminates in a formal agreement. But it is the product of what we might call low-level negotiation – an informal ad hoc effort (of sorts) to reach universal agreement on a broad, general proposition. Unlike treaties and soft agreements, this low-level of negotiation has no obvious end point. It is usually unclear when custom has "crystalized" into a binding norm, and even when it has, the focus turns to applying a vague and unwritten norm to particular circumstances, or whether such application or other developments have generated a new customary norm that clarifies or changes the old one. Dan Bodansky has described the customary principles governing international environmental law, such as the obligation to avoid significant transboundary pollution as so general that "virtually any behavior that a state might wish to engage in" could be reconciled with it -- meaningful rules of behavior are not provided by the customary rule, but are left instead for "subsequent elaboration."[58] These features characterize both traditional and modern custom, and they are part of what makes custom a softer form of obligation.

In this sense, custom is best described perhaps as a focal point or baseline for future conduct. In the environmental context, Bodansky argues that the "development of a common ethical framework" that sets "boundary conditions for the development of more precise rules."[59] Yet what makes it

[57] *See, e.g.*, David Sheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute*, 29 BERK. J. INT'L L. 334, 348-353 (2011). The Rome Statute is a negotiated treaty of considerable complexity designed to govern only the ICC. The Rome Statute in its entirety was never intended to reflect customary international law. Relatively few of the provisions of the Rome Statute merit that rigorous categorization and they do not include Article 25(3)(c). Article 25(3)(c) was a negotiated compromise among primarily common law and civil law governments after years of talks leading to the Rome Statute and was not finalized to express a rule of customary law. There is no international consensus reflected in Article 25(3)(c), which in any event must be read in conjunction with the mens rea provision of the Rome Statute, which is Article 30.

[58] BODANSKY, THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 32, at 202.

[59] *Id.* at 203-04.

customary *law* is states' desire (often shared by non-state actors) to entrench these focal points, to make them stronger predictors of future behavior than mere horatory language or well-meaning proclamations, but do so outside the mechanism of a formal treaty.

II. Why States Choose Custom

The foregoing section described the doctrinal uncertainties around custom, as well as other features that distinguish it from treaties and soft law agreements: it is universal, unwritten, and non-negotiated. Under what circumstances will states use this form of cooperation? In this section I consider the possible answers based on literature that focuses on legalization and the choice between hard and soft law, design features of international agreements, rational choice, and constitutional theory. This work offers helpful insights, but like other international law/international relations scholarship, it entirely neglects custom, or focuses primarily on compliance.

A. Custom as Soft Law

Soft or non-binding law, although not entirely new, has grown dramatically in significance over the past two decades. In this paper, soft law is defined as a non-binding international agreement between government actors. The definition is limited to international agreements because they are more likely to serve as alternatives to treaties and custom than other arguable forms of soft law, such as the decisions of international tribunals.[60] The definition of soft law has generated extensive debate. International lawyers generally distinguish hard and soft law based on whether the norm is binding as a matter of law (treaties and custom are hard law) and norms that are designed to have some kind of law-like compliance effect but are not binding (soft law).[61] This distinction is often viewed in binary terms, and sometimes leads to the claim that there is no such thing as "soft" *law*.[62] Doctrine aside, if law is understood in terms of its power to shape expectations of appropriate behavior, hard and soft law operate on a continuum, not as binary choice. Soft law shapes expectations of future behavior more strongly than mere political or social obligations, but less strongly than hard law. The continuum

[60] Meyer, *Codifying Custom*, *supra* note 15, at 1009. *See* Galbraith & Zaring, *supra* note 4, at 5, n.17 ("[W]e have chosen to use the term "soft law" to refer to non-binding transnational agreements between executive branch actors because the term is both convenient and frequently used in this context.")

[61] *See, e.g.*, Raustiala, *supra* note 15 at 586-87.

[62] *Id*; *see also* Jan Klabbers, *The Redundancy of Soft Law*, 65 NORDIC J. INT'L L. 167 (1996).

between hard and soft law is commonly said to rest on three overall factors: obligation, precision, and its delegation to a third party decision-maker for enforcement.[63] This approach recognizes that as functional matter obligations that doctrinally binding under international law may actually be soft: an extremely vague treaty, for example, is soft in one respect. Conversely, non-binding law may have features that enhance compliance, such as precision, that tend to make it hard, rather than soft. Despite the differences, even those who view the distinction in binary terms accept that states' choices between hard and soft law as a form of cooperation is informed by many of the factors on the continuum.[64]

Taking the doctrinal approach to hard and soft law, custom is binding, hard law. There are many uncertainties about custom,[65] but its binding character is uncontested. Viewed on a continuum, custom has features that tend to situate it toward the soft end, or between soft agreements and treaties.[66] Indeed, some authors characterize custom as soft law.[67] On the first measure, obligation, although legally binding like treaties, custom is often viewed as a less credible commitment because it does not go through the domestic ratification process often required for treaties, making it softer in some sense.[68] Like treaties, however, custom can be applied as a rule of decision in the context of dispute resolution, for example by the International Court of Justice, in investor state and other arbitration contexts, and by the ad hoc criminal tribunals.[69] The capacity for enforcement is thus higher, along with

[63] Abbot & Snidal, *supra* note 7, at 422.

[64] Andrew Guzman & Timothy Meyer, *International Soft Law*, 2 J. of Legal Analysis 171, 173-74 (2010).

[65] *See infra* text at notes 29-31.

[66] *See generally*, 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, 379 (2005) ("Thus the constraining effect of customary law is, because of the imprecision of customary norms, usually less severe than that of treaties, especially if the latter establish mechanisms of supervision and enforcement. Even less constraining are informal norms, such as standards and soft law.").

[67] *See supra* note 21; *see also* Hiram Chodosh, *An Interpretive Theory of International Law: The Distinction Between Treaty and Customary Law*, 28 VAND. J. TRANSNAT'L. L. 973, 1012 (1995) (discussing this view).

[68] *See* Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment, and International Law*, 38 N.Y.U. J. INT'L L. 707, 745-48 (2006); John K. Setear, *Treaty, Custom, Iteration and Public Choice*, 5 CHI. J. INT'L L. 715 (2005).

[69] *See, e.g., The Case of the SS 'Lotus' (France v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 10; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14, at p. 97, para. 183; *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment,3 February 2012, para. 55; Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, 15 July 1999, paras. 287-292; S. Mohd Zin and A. H. Sarah Kazi, *The Role of Customary International Law in the World Trade Organisation (WTO) Disputes*

the reptutational costs of violations.[70] Custom does not allow for withdrawal, also making it harder in terms of obligation.[71] The costs of violations also rise because custom, like treaties, can become part of domestic legal systems and enforced through domestic courts. The law of state responsibility, which creates consequences for violations, applies to both treaties and custom. [72]

Customary law often lacks precision, however – it is general and vague, not specific and precise,[73] reducing its ability to shape expectations of future appropriate behavior. Custom also lacks clarity because it can be hard to determine when it has actually formed, reducing the credibility of customary commitments and making it more difficult to enforce – hallmarks of softer law.[74] Custom is rendered even less certain by the lack of agreement as to the density, duration, and frequency of state practice necessary for its formation or change.[75] Custom also involves a relatively low-level of delegation to third parties for monitoring. The International Court of Justice might be said to play this role to a very limited extent, but its jurisdiction is confined to states which consent to it on an ongoing basis, and that consent is not linked to the acceptance of particular customary norms. In most respects, custom appears at the middle or the low end of the spectrum between hard and soft law.[76]

Custom is also easily understood in terms of the factors often thought to underlie the *choice* between hard and soft norms: the level of flexibility that each offers, the domestic legal and political

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Settlement Mechanism, 2 INTERNATIONAL JOURNAL OF PUBLIC LAW AND POLICY 229 (2012); Kaunda and Others v.President of the Republic of South Africa and Others, Case CCT 34/04 (4 August 2004), paras. 25-29. (2004)

[70] *See* Abbott & Snidal, *supra* note 7, at 426-427 ("[L]egalization enhances (albeit modestly) the capacity for enforcement. First, hard legal commitments are interpreted and applied by arbitral or judicial institutions...[b]ecause legal review allows allegations and defenses to be tested under accepted standards and procedures,it increases reputational costs if a violation is found.").

[71] *Id.* at 436.

[72] *Id.* at 427-28.

[73] *See, e.g.*, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 50 (5th ed. 1998) (explaining that many customary international laws "do not provide precise guidance for their application on the national plane."); Hersch Lauterpacht, *Codification and Development of International Law*, 49 AM. J. INT'L L. 16, 19 (1955).

[74] Setear, *supra* note 67, at __.

[75] *See* Roberts, *supra* note 30, at 784-85.

[76] To use Abbott and Snidal's terminology, custom would generally be designated as [O,p,d] or [O, -, -].

costs of different forms of agreements as well as other sovereignty costs,[77] contracting costs, the desired level of monitoring and enforcement, and the level of credible commitment that each generates.[78] Custom is generally situated between treaties and soft law agreements in all of these respects. Because it is vague and leaves much to interpretation on a case-by-case or issue-specific basis, the content of custom is generally more flexible than treaties, allowing for adaptation to changed circumstances. Soft law can be flexible in the same way, and in fact may provide more flexibility because it involves the lowest level of credible commitment, and thus provides the lowest obstacles to change through non-compliance. Custom is less expensive than treaties to generate, and incurs lower costs domestically.[79] Although in practice particular examples of custom, treaties, and soft law may of course depart from these ideal types, the point here is that custom can be easily understood with reference to the same choice-of-instrument analysis generally applied to hard and soft law. In this literature, however, custom is generally relegated to a footnote or is only mentioned as an aside, lumped together with treaties, or dismissed as irrelevant.

It thus goes unrecognized in the legalization literature that custom is fundamentally different from both treaties and soft law. Consider an example. The proposed charter of the International Trade Organization originally was intended to include "legally binding commitments with constraints on the right of withdrawal and significant institutionalization."[80] In Abbott and Snidal's framework, this means strong obligation, high precision, and moderate delegation.[81] But this agreement proved difficult to negotiate and controversial within the United States. Thus the contracting states adopted instead the "the 1947 General Agreement on Tariffs and Trade (GATT) as a low-cost, interim framework for tariff reductions. Compared to the draft charter of the International Trade Organization, GATT 1947 was relatively soft: it was adopted only ''provisionally,'' included a lenient withdrawal clause, and created only skeletal institutions, meaning low levels of obligation and precision, and no delegation.[82] Fitting

[77] Abbott & Snidal, *supra* note 7, at 436-37 (defining "sovereignty costs" as "[t]he potential for inferior outcomes, loss of authority, and diminution of sovereignty").

[78] *See* Abbott & Snidal, *supra* note 7, at 421; Kal Raustiala, *supra* note 15.

[79] Any agreement entails some negotiating costs—coming together, learning about the issue, bargaining, and so forth.

[80] Abbott & Snidal, *supra* note 7, at 436.

[81] [O,P,d]

[82] Abbott & Snidal, *supra* note 7, at 436. In their terminology, this agreement is characterized as [o,p,-].

custom into this analysis, one would conclude that it, too, would have been a good choice for the 1947 agreement, because custom also offers a lower level of obligation than the originally proposed treaty, it has low levels of precision and little or no delegation. But of course that borders on the silly, as GATT's negotiated give and take among a small group of states designed to have immediate legal effect was fundamentally ill-suited to formation through custom.[83] Soft law analysis may also suggest that environmental framework arrangements and national security may be amenable to customary law making, because they can take the form of moderate to high obligation, with low precision and delegation.[84]

Because custom does not result from negotiation, it does not function as a "harder" alternative to soft law in the situations described above. The literature on legalization does not capture this important aspect of custom, which accordingly cannot be characterized as simply a "softer" form of hard law, or a "harder" form of soft law. The legalization literature does, however, include some important insights relevant to how and when states are likely to use custom. For example, although the features of custom cannot be tailored to fit specific circumstances – a point developed more below – precision is more variable than either obligation or delegation. Abbot and Snidal predict that for issues with strong distributional consequences, and for issues with high sovereignty costs, we should expect to see a preference for softer commitments.[85] This observation may not help much in determining when custom will develop (because of custom's other important design features), but it may make sense of variations within custom. Customary norms of human rights (high sovereignty costs) and environmental protection (high distributional effects) generally tend to lack precision – in other words, they are "softer" as the legalization literature would suggest. Similarly, variations within custom may be explained in part by the preferences of powerful states, which benefit from "legally binding and relatively precise rules" without delegation, and with low transaction costs.[86] The Truman Proclamation may provide an example here. That powerful states backed it was unquestionably important, yet the

[83] Custom could be described as [O, -, -] or [o,-,-] because its levels of precision and delegation are so low. Abbott and Snidal give no examples illustrating when states would choose these two kinds of legalization. More significantly, however, this description does not account for what makes custom distinct from treaties and soft law agreements: lack of negotiation, rigidity in terms of design features, and universality.

[84] Abbott & Snidal, *supra* note 7, at 440, 442.

[85] Abbott & Snidal, *supra* note 7, at 436, 437.

[86] *Id.* at 448.

content was also attractive enough to encourage broad participation by similarly-interested states. Powerful states have an interest in legalizing the relationship in "settled rules" because the "continual, overt exercise of power is costly."[87]

B. Custom & Its Design Features

The non-negotiated nature of custom has broad implications for the process of generating custom, as well as the design features and form of legal obligations that customary obligations assume. With respect to process, treaty negotiations allow states to use specific procedures to reach an outcome they favor, such as agenda setting and voting rules, or the exclusion of particular states.[88] Conditional membership and expulsion from treaty regime can be calibrated to maximize compliance.[89] These mechanisms are unavailable for custom, which is universal and is generated through an informal, open, inclusive, and non-negotiated process. With respect to design features and legal obligation, Professor Larry Helfer observes that

> countries negotiating treaties prospectively evaluate how different design features (such as tribunals or monitoring mechanisms) and different legal obligations (for example, the depth or precision of treaty commitments) will affect treaty compliance. A key implication of linking treaty form and substance to the treaty participation and compliance decisions of states is that changing any one of these variables necessarily affects the others. For example, agreements that include strong enforcement mechanisms are less likely to receive a large number of ratifications.

Or, as Professors Guzman and Meyer explain, "[w]hen states enter into agreements, of course, they have almost complete freedom over both the form and content of the instrument."[90] As a non-negotiated form of agreement, custom by contrast, affords countries few opportunities to weigh different design features against different legal obligations – they have very little freedom over the form of the instrument.

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[87] *Id.*

[88] Meyer, *Codifying Custom*, *supra* note 15, at 1034-1035; Krasner.

[89] Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L. J. 621, 656-69 (2004).

[90] Guzman & Meyer, *supra* note 63, at 179.

There is little variation in custom's design features and form. States are bound to customary norms unless they persistently object while those norms are forming, which is rare.[91] Except for "regional custom," custom is binding on all states, and even regional custom applies to all states within the region. When new states come into existence they are bound by all pre-existing rules of customary international law. Custom has no termination or withdrawal clauses; it is changed through the clumsy process of breach and then widespread acceptance that a new norm has formed.[92] Custom can also be overridden by subsequent treaties, except for *jus cogens* or peremptory norms, which permit no derogation or exception.[93] Custom lacks dispute settlement procedures, and monitoring mechanisms, and delegation. These design features are, by and large, fixed.

The substance of custom also tends to be flat in terms of the form of obligation: it is binding (but is a less credible commitment than most treaties), but also vague and general, not precise.[94] Treaty negotiations often result in finely tuned language that reflects compromises among states and groups of states that have conflicting interests.[95] States can use treaties to link various issues in which they have conflicting interests, and to pair public goods with club goods in an effort to overcome collective action problems.[96] Faced with distributional effects, treaty negotiators can offer wealth transfers to induce agreement, or they can offer technical assistance or benefits in the form of membership in other treaty regimes.[97] In some ways, custom is quite flexible, especially because its vague language allows for various interpretations and the overall lower costs of non-compliance permit flexibility through breach and re-negotiation. The point here, however, is that these design features and form of legal obligation

[91] *See* Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT'L L. 1 (1985).

[92] Michael J. Glennon, *How International Rules Die*, 93 GEO. L. J. 939, 957 (2005).

[93] Evan Criddle & Evan Fox-Decent, *A Fiduciary Theory of* Jus Cogens, 34 YALE J. INT'L L. 331, 335-339 (2009).

[94] KAROL WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW xiii (2d ed. 1993).

[95] *See, e.g.*, Michael Scharf, *Universal Jurisdiction and the Crime of Aggression*, 53 HARV. J. INT'L L. 357, 362-63 (2012) (describing the adoption of language defining "the crime of aggression" for prosecutions by the International Criminal as a consensus reached as a "result of four delicate compromises").

[96] Laurence R. Helfer, *Non-Consensual International Law-Making*, 2008 UNIV. ILL. L. REV. 71; Krasner (powerful states use issue linkage to generate favorable outcomes).

[97] Laurence R. Helfer*, Flexibiilty in International Agreements*, *in* INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: TAKING STOCK 175 (Jeffrey Dunoff & Mark A. Pollack eds., Cambridge University Press 2012).

are set by the nature of custom itself. Custom cannot be fine-tuned by trading form against substance. Precision is one of the few aspects of custom that can be varied, but not through a negotiated process or by trading-off form and substance. Custom is, from a design or choice-of-instrument perspective, a very rigid tool, akin to a one-size fits all arrangement. This suggests that custom's utility will be extremely limited, in ways that both hard and soft agreements are not. As negotiation and bargaining may be especially useful for reaching an agreement with high distributional costs, this analysis suggests that custom may be least useful or most contested for norms around which there is distributional conflict.

C. Custom as a Compliance Problem: Rational Choice

In general, IL/IR scholarship has neglected custom. It has also neglected the process of forming agreements, while focusing heavily on compliance issues. As Professors Guzman & Meyer write: "..we abstract away from []bargaining problems and focus on compliance after a distribution (a focal point) has been agreed upon. Where states have a high degree of certainty that their incentives will not change in the future, soft law can be used to agree upon a focal point and thereby generate high levels of future compliance."[98] As a whole, legal scholarship has been criticized for focusing on prisoner's dilemma type problems, where the key concern is compliance, but neglecting the problem of reaching an agreement to resolve coordination problems especially where the terms of the agreement have distributional consequences.[99] As Fearon writes "virtually all efforts at international cooperation must begin by resolving [a bargaining problem]. Regardless of whether the specific domain is arms control, trade talks, exchange- rate coordination, or environmental regulation, there will almost invariably be many possible ways of writing the treaty or agreement that defines the terms of cooperation, and the

[98] Guzman & Meyer, *supra* note.

[99] *See supra* note 20; *see also* Gregory C. Shaffer & Mark A. Pollack*, Hard vs. Soft Law: Alternatives, Complements & Antagonists in International Governance*, 94 MINN. L. REV. 706, 732 (2010) ("The classic PD model assumes that states share a common interest in reaching a cooperative outcome, and that the primary impediment to successful cooperation is the fear that other states will cheat on their agreements." "… states face not only the challenge of monitoring and enforcing compliance [], as in the PD model, but also of deciding on the terms of cooperation…"). An exception is Ed Swaine, *Rational Custom*, 52 DUKE L. J. 559 (2002) discussed *infra* at notes 99-01.

states involved will surely have conflicting preferences over some subset of these various possibilities."[100]

So when and how is custom useful – given that states will almost always disagree about the substance of an agreement? If all states prefer an agreement over no agreement, although they disagree about the terms (a battle of the sexes game, or a cooperation problem embedded in prisoner's dilemma game), even a take-it-or leave arrangement may be successful if the parties think they are unlikely to reach a better agreement through a treaty or soft agreement. Perhaps, for example, distributional differences and other substantive barriers to agreement are low (or non-existent), which is more likely when language is vague and lacks precision, meaning that states have less (or no) incentive to try for a better deal through treaty drafting. Cooperation must bring some benefits over non-cooperation, but if it does, agreement might be possible on these terms. Even if distributional effects are stronger, cooperation may bring significant enough benefits to generate agreement, and custom provides one way to produce an equilibria.

Specifically with respect to battle of the sexes games, Ed Swaine has argued for example, that "it is at these early stages where credible commitments, backed by reputational investment in the customary international law regime, may usefully diminish uncertainty and allow coordination to be attained more rapidly and with less friction."[101] Announcing a customary rule "permits a state to commit to one of the equilibria and to have its representation regarded as binding. Customary international law, then, facilitates a choice not just between norms and anarchy, but also between norms in circumstances where states may be well disposed toward binding obligations." As well, custom is both relatively cheap to generate, and universal, again making it an attractive vehicle for agreement when distributional and other substantive differences are low or non-existent, or (as in the battle of the sexes game) when parties prefer cooperation, even if not on their terms. Finally, if powerful states support a customary norm, weaker states may have little reason to try to improve the deal through a treaty-making process in which powerful states may have an even stronger hand. In Swaine's example – the development of the three mile rule for national jurisdiction over the territorial sea – the rule that developed was backed by two powerful countries: England and the United States.[102]

[100] Fearon, *supra* note 20.
[101] Swaine, *supra* note 97 at 599-604.

[102] *Id.* at 601-02.

D. Custom as Constitution

Custom also varies from treaties and soft law in terms of its entrenchment. It does not permit exit, but instead states must breach the norm and seek the development of a new customary norm.[103] States that come into existence after a customary rule has developed are bound by it, whether or not they consent. Some customary rules have attained the status of *jus cogens* – meaning that they are overriding principles of international law, which cannot be changed through treaties.

These entrenchment features suggest that custom may be useful to states in the same way that constitutional norms are used domestically. Customary international law is often understood as setting "the ground rules for the international system."[104] Like constitutions, custom binds the entire community of states, even those states that join the community after custom has formed. Entrenchment is a core feature of constitutionalism, and it is an important attribute of custom.[105] As Anthea Roberts has described with respect to custom that is derived from treaties: "Where the treaty precedes the custom, the movement to custom often reflects recognition of, or a desire to recognize, the core commitments as non-revocable and binding on all states, thereby increasing their obligatory nature or scope."[106] Many rules of customary international law create structural features of the international legal system, or they reflect basic, shared normative values – both are characteristics shared with constitutions.[107] As noted above, the secondary rules of customary international law are famously unsettled; the secondary rules of domestic constitutional law also tend to be contested as compared to other forms of domestic law.[108]

Although custom is unwritten and vague, which might seem inconsistent with its status as "constitutional" in some sense, constitutional provisions are often vague. Like custom, they leave

[103] See Jacob Katz Cogan, *Noncompliance and the International Rule of Law*, 31 YALE J. OF INT'L LAW 189 (2006).

[104] *See* Anthea Roberts, *Who Killed Article 38(1)(b)? A Response to Bradley & Gulati*, 21 DUKE J. INT'L & COMP. L. 173 (2010).

[105] Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1082 (2013).

[106] Roberts, *Who Killed Article 38(1)(b)?*, *supra* note 103 at 175.

[107] Primus, *supra* note 104 at 1129-30, 1132-33.

[108] *See* Jack Goldsmith & *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791 (2009) (discussing international law in general, not custom in particular, but noting that the problem of uncertainty is most severe with respect to custom).

difficult interpretive questions to future decision-makers.[109] Constitutional interpretation in the United States has at times rejected the view that "law must be derived from some authoritative source" and finds it "instead in understandings that evolve over time."[110] As well, recent academic work has focused on "small-c" constitutionalism, defined as the "web of documents, practices, institutions, norms, and traditions that structure American government."[111] This literature emphasizes the constitutionalism need not taken written form, again suggesting that custom can be viewed in constitutional terms.

E. Custom's Domain

What can states universally agree upon without negotiating? The foregoing discussion suggests that this form of cooperation is most likely when: distributional impacts of the norm are low; powerful states are willing to make visible strong commitment in order to generate a settled rule that lowers their costs going forward, to facilitate agreement on a norm in a coordination situation (where states have less incentive to cheat after agreement is reached), and where states seek to entrench structural and normative features of the international legal system as a whole.

1. *State to State Interaction*.

Much traditional customary law governs state-to state-relations, facilitating their interaction in ways that will benefit all states, at least from an ex ante perspective. The most straightforward examples include the laws governing immunity, the respect of national boundaries, diplomatic protection, rules related to embassies, the obligation to observe treaty commitments and some other aspects of treaty formation, and rules on state responsibility. States' lack of ability to negotiate does not prevent these norms from developing, because so long as they are stated generally enough, they inure to the general benefit of all states.[112] Some *actors* are disadvantaged by the development of these norms – like the private individuals that would like to sue the state or the diplomat – but states themselves benefit from

[109] *See* Rosalind Dixon & Tom Ginsburg, *Deciding not to Decide: Deferral in Constitutional Design*, 9 INT'L J. CONST. L. 936, 638-39 (2013).

[110] David Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996).

[111] Richard Primus, *supra* note 104 at 1082 (2013).

[112] D'AMATO, *supra* note 29, at 30-31 (arguing that many rules of international law "help reinforce the territorial sovereignty of states" and that "the validity of the entire body of international rules is reinforced by the consensus that the rules are in the subjects' best interests").

the rule, even if individuals do not. These kinds of rules, may, have some distributional consequences among states but as long as they are low, the lack of ability to negotiate could facilitate agreement because it prevents states from using negotiating tactics to steer the content of custom in ways that benefit them. Note that custom becomes more difficult to generate as distributional costs increase. The shift from absolute to restrictive immunity, and growing disagreement around the international law of war illustrate the point.

2. Human Rights & Jus Cogens

Human rights is apparently also an area in which all states perceive themselves as benefiting in some sense from a generally formulated norm, so that customary international law develops – although the reasons for this development seem less clear, at least purely from the perspective of states' interest. Indeed, human rights are so significant that *jus cogens* norms, which are fundamental, overriding principles of international law, from which no derogation is permitted are heavily skewed toward human rights. The short (and contested) list of *jus cogens* norms include the prohibitions on torture, genocide, slavery, and slave trade. These norms, which protect individuals, are not structural, and they do not enhance states' interaction with each other. They reduce, rather than strengthen traditional notions of sovereignty because they impose obligations on states toward individuals. They are also based on statements of *opinio juris* rather than state practice -- many states torture, for example, yet it is well accepted that the prohibition on torture is customary international law. Moreover, there are distributional effects, as the prohibition on torture, for example, is much more costly for some states than for others.[113] Human rights can be protected through domestic mechanisms; cooperation is not necessary as it is for state-to-state interaction and global public goods.[114]

It is difficult to generate compliance with international human rights norms – which may make it easier form agreement around them (although the "no exit" feature should make agreement more difficult) – but the question remains as to why states attempt international cooperation at all. There are many potential answers: states may believe that the protection of human rights in other countries

[113] Human rights cannot be modeled as coordination games, because states have incentives to violate them even after agreement is reached, and compliance cannot be explained by a prisoner's dilemma game. *See* Geisinger & Stein, *supra* note 20, at 1134.

[114] Barbara Koremenos, *Institutionalism and International Law*, *in* INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: TAKING STOCK, *supra* note 95, at 64 ("[H]uman rights agreements are typically are characterized by distribution problems in the absence of coordination.").

enhances their own security, domestic interest groups may effectively pressure states to pursue these goals, human rights may reflect the normative values of those who make decisions about state behavior, states may gain esteem from being part of human rights regimes. Although some authors have focused on the reputational benefits that states receive from joining human rights treaty regimes,[115] and on treaty regimes as pre-commitment strategy,[116] I am aware of no literature that considers the choice between treaties and custom, or explains why states seek to draw customary norms from treaties.[117]

Understanding custom as some form of international "small c" constitutionalism may be most useful in this context. Human rights norms that have the status of *jus cogens* are the most entrenched rules of international legal order and they clearly reflect the normative values or "ethos" function of constitutionalism.[118] A desire for constitutional-style entrenchment may lead states to choose custom, with its binding, no exit, and somewhat-non-consensual nature, over (or in addition to) treaties. The non-negotiated character of custom distinguishes it from most traditional constitutions, which take written form and are the product of intense negotiation, but it is consistent with a broader view of constitutionalism. Non-negotiation and universality may help convince states that its content is the product of basic normative values and structural features that benefit all states, rather than an effort for some states to benefit at the expense of others. Constitutions reflect the values and needs of the people who create and sustain them; so, too, with customary international law, which will develop in part around norms that states view as especially significant and in need of entrenchment. Thus we cannot necessarily predict what issue areas will be entrenched in this way -- much will depend on the events and developments that determine what individuals and states view as fundamental to the international legal order.[119]

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[115] Alex Geisinger & Michael Ashley Stein, *Rational Choice, Reputation, and Human Rights Treaties*, 106 MICH. L. REV. 1129, 1130, 1135-37 (2008).

[116] Steven R. Ratner, *Overcoming Temptations to Violate Human Dignity in Times of Crises: On the Possibility for Meaningful Self-Restraint*, 5 THEORETICAL INQUIRIES IN LAW 81 (2004).

[117] Add a section here on investment, trade, the environment, and international humanitarian law. Key point: these norms of customary international law tend to be very vague and open ended, consistent with the argument that custom will have an especially difficult time dealing with unequal distributional effects.

[118] Primus, *supra* note 104 at 1133-34.

[119] Id. ("Constitutional rules arising from ethos tend to be tied to narratives of American history, usually heroic ones"). *See* MICHAEL P. SCHARF, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE (2013).

III. Conclusion: Addressing Custom's Doctrinal Uncertainties

The foregoing sections argued that custom is an unwritten, non-negotiated form of international cooperation that governs state to state interaction and otherwise provides basic principles or focal points of the international legal order. Custom is not generally helpful in solving problems with distributional consequences, except at a very high level or generality. Here I argue that this understanding of custom has implications for the much debated doctrinal questions around custom's formation. In particular, for custom to serve these functions effectively it needs to maintain its character as non-negotiated, entrenched, and binding.

Consent poses one of the central problems of customary law – individual states often consent to customary norms tacitly. These states may not know that a customary norm is forming, and they may lack the interests or resources to contest it.[120] Moreover, states are bound by customary international law that is formed before they even become states, as well as to *jus cogens* norms, whether or not they have consented to them. Yet without state consent, it is unclear what makes custom a legitimate form of law-making.[121] Although they don't solve the problem of consent, custom's lacks of distributional effect and its character as non-negotiated, help justify custom as based on the consent of the community of states rather than each individual state (as required for treaties). No states were involved in a bargained-for exchange, so binding new states is not forcing them into a quid pro quo agreement on terms with which they disagree. Moreover, if an agreement lacks distributional effects among the group of states as a whole, it is unlike to impose high costs on newly-formed individual state. Finally, some non-consensual aspects of custom are necessary if it is to serve a constitutional function. This analysis does not provide a detailed answer to all questions about the formation of custom, but it does suggest that a purely-consensual understanding of custom will limit its utility.

As well, for custom to function as a method of cooperation distinct from treaties and soft law, the doctrinal rules around its formation should protect its non-negotiated character. Looking for overlapping consensus – that is, a norm that is embraced in a variety of instruments agreed upon in a variety of contexts, helps ensure that custom retains this quality. Features of treaties that reflect bargained for exchange, such as a prohibition on reservations as a whole, limit treaties' utility for the

[120] See Andrew Guzman, *Against Consent*, supra.

[121] *Cf.* John O. McGinnis, *The Comparative Disadvantage of Customary International Law*, 30 HARV. J. L. & PUB. POL'Y (2007). Much of the criticisms of customary international focus on its role in domestic law within the United States, an issue that I do not address.

development of custom.[122] Similarly, efforts to tailor the design features of custom to bring them in line with treaties should be rejected.[123]

The limited view of custom advanced in this paper suggests that it will never, by itself, generate solutions to global public goods problems or even detailed prescriptions in the area of human rights. In the age of soft law, custom has a limited role. But limited as it is, that role should not be underestimated. Providing basic rules of state-to-state interaction enhances stability and predictability, while perhaps laying the groundwork for more extensive cooperation. Entrenching normative positions that help frame and shape future, more detailed agreement, allows custom to play a weak constitutional role in the international legal order. Again, these forms of cooperation are limited, but they are also unique to custom. Making hard law softer and soft law harder does not generate the features that custom offers. These features should be preserved, not undermined, through the doctrinal rules that determine what qualifies as custom. In a multipolar, perhaps increasingly destabilized, world in which states may come to eschew law altogether, the quiet almost Burkean values of custom may continue to serve an important function.

[122] *Cf.* Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L L. 1 (1988).

[123] *See* Bradley & Gulati, *supra* note 21 (arguing for the right to withdraw from custom).