Positivism Regained, Nihilism Postponed

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Don’t be fooled by the innocuous title of this book. Notwithstanding the author’s claim to open-ended, scholarly inquiry, this book, the latest in the prestigious *Developments in International Law* series by Martinus Nijhoff,¹ is best read as a brief for positivism — and a well-written, provocative one at that. This book is a polemic disguised as a hornbook. The author, a positivist in the classic mode,² is waging a war against the powers of darkness, be they represented in the form of such old enemies as natural lawyers, or Yale policy-school adherents, or newer enemies, like the Crits. His battle is a familiar one: he wants to rescue the positivist doctrine of the sources of international law from the threats

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2. While there are as many definitions of positivism as there are positivists, among the classic descriptions is H.L.A. Hart’s. Hart identified five meanings of positivism:

   (1) the contention that laws are commands of human beings,
   (2) the contention that there is no necessary connection between law and morals, or law as it is and ought to be,
   (3) the contention that the analysis (or study of the meaning) of legal concepts is (a) worth pursuing and (b) to be distinguished from historical inquiries into the causes or origins of laws, from sociological inquiries into the relation of law and other social phenomena, and from the criticism or appraisal of law whether in terms of morals, social aims, “functions,” or otherwise,
   (4) the contention that a legal system is a “closed logical system” in which correct legal decisions can be deduced by logical means from predetermined legal rules without reference to social aims, policies, moral standards, and
   (5) the contention that moral judgments cannot be established or defended, as statements of facts can, by rational argument, evidence, or proof (“noncognitivism” in ethics).

H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593, 601–02 n.25 (1958) (citations omitted). As will become evident, Danilenko’s views generally adhere to these tenets, suitably altered for international realities (e.g., replace “human beings” with “States” in (1) above). But see Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* 106–30 (1989) (surveying other definitions of “positivism” and suggesting that its “deep structure” is not altogether different from what is sometimes assumed to be its polar opposite, natural law).
posed by relative normativity.\(^3\) The totem he worships is article 38 of the Statute of the International Court of Justice (ICJ), and his book is nothing less than a holy crusade to save the sources of law enshrined in article 38 and consequently, from the author’s perspective, the rule of law itself.

Danilenko’s avowed aim, to “assess to what extent the transformations in the social and legal infrastructures of the international community have affected the traditional rules of determining how international law is to be made or changed,”\(^4\) appears modern, but his analysis is decidedly old fashioned. Danilenko’s overall conclusion, that, but for the possible exception of the concept of \textit{jus cogens} and other uncertainties which have emerged, the traditional sources of international law retain their exclusive validity and explanatory power, was never in doubt. The viability of article 38 is the starting premise and the forced conclusion of every question raised.

Danilenko takes up, first, the origin and development of the concept of formal sources. He then reviews the sources themselves through chapters on treaties, custom, and general principles of law. In the final four chapters, the book deals with proposals to reform these sources, \textit{jus cogens}, the role of the ICJ, and “some issues of procedure and law-making policy.” Throughout, Danilenko offers answers in a no-nonsense style, as sure of the answers (for the most part) as of the places where the answers are to be found (that is, the evidentiary sources suggested in article 38 itself). Even though the conclusions are singularly predictable, stemming from a clear point of departure, students and scholars will find this book valuable — even if only as a argumentative foil. While Russia has long provided fertile soil for positivistic approaches to international law,\(^5\) it is still ironic that such a concise defense of what some might regard as Western “legalism”\(^6\) has been written by a post-Cold War Russian.

Danilenko acknowledges, both at the beginning of his book and at its end, that current profound changes in the world, including the “institutionalization of the World community” call for innovative approaches to lawmaking and that strong pressures exist to modify traditional

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methods of lawmaking in order to be able to generate new norms rapidly. He spends the rest of his book denying this reality, however, demonstrating that notwithstanding attempts by proponents of "radical reform," the existing sources of law in article 38 still remain the only truly accepted sources of law. In doing so, Danilenko, like his intellectual forebears (including Austin, Bentham, Hart, and Kelsen), seeks to maintain the distinction between law and politics. He fears that the ramparts of law will crumble, that "international law will become just a loose collection of vague precepts used as a disguise for conflicting political claims couched in legal or quasi-legal language." Though Danilenko defines his task as the clarification of the "existing community consensus concerning the authoritative methods of law-making," he finds that consensus unchanged from what it was in 1945; for him, it is still reflected in the sources identified in article 38. Neither is Danilenko reticent about extolling the virtues of his article 38 totem: he contends that it is nothing less than the Kelsian "constitution" of the modern international community that is capable of "transform[ing] a society into a community governed by law."

Part I of this review briefly surveys the major points of Law-Making in the International Community. Part II critiques Danilenko's traditional conception of the sources of international law. Finally, Part III concludes that Law-Making in the International Community, though mired in the past and blind to revolutionary developments within the field, serves as an important reminder that the doctrine of sources remains an important mainstay of international law and needs critical attention.

I. POSITIVISM SYNTHESIZED

Danilenko outlines his concept of lawmaking in the first chapter. Opting for a functionalist explanation for the growth of law, he argues that the progressive expansion of international law into new fields is the result of increasing interdependence, technological innovation, and mounting

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7. DANILENKO, supra note 4, at xiii, 302.
8. See, e.g., Hart, supra note 2, at 594–600 (including a discussion of Bentham); JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832); HANS KELSEN, GENERAL THEORY OF LAW AND STATE (Anders Wedberg trans., 1945); see also DANILENKO, supra note 4, at 17–22.
9. DANILENKO, supra note 4, at xiv.
10. Id.
11. Id. at xv, 14–15.
12. Id. at 15, quoting HERMANN MOSLER, THE INTERNATIONAL SOCIETY AS A LEGAL COMMUNITY 16 (1980); see also KELSEN, supra note 8, at 110–36, 175–77 (indicating that "legal norms" arise when created by a constitutionally recognized authority).
needs for cooperation. These needs, he says, require "continuous" lawmaking, including ever more specific rules.\textsuperscript{13} While he accepts that economic, social, and political processes "ultimately determine the content of the law," Danilenko, true to Hart's definition of a good positivist,\textsuperscript{14} quickly dispatches these "non-legal" phenomena as "too broad for a close legal analysis of technical aspects of law-making."\textsuperscript{15} His concept of lawmaking is of a closed logical system, namely the "normative mechanisms and procedures established within a given legal system for authoritative creation of legal principles and rules" — that is, the procedures specified in the traditional concept of formal sources of international law.\textsuperscript{16} His concept of lawmaking is predictably consent-driven and State-centric. From the outset, Danilenko rejects the view that international lawmaking constitutes "legislation," as international lawmaking processes are based on the "consent of sovereign states."\textsuperscript{17} He stresses that his inquiry is directed at the creation of "general" international law, not its application, and that the rules he is examining are created by and govern an "international legal community," consisting neither of individuals nor non-governmental organizations but of States and international organizations.\textsuperscript{18}

Ever the faithful positivist, Danilenko uses the concept of formal sources of law to distinguish the "legal" from the "non-legal."\textsuperscript{19} He quickly dismisses critics of traditional sources, such as natural lawyers and adherents of the McDougal-Laswell policy-oriented school, for seeking to "blur the borderline between law and policy, between legal rules and other norms of behavior . . . ," suggesting that such efforts, consciously or not, are part of a larger phenomenon in which the law is manipulated

\begin{itemize}
  \item [13.] DANILENKO, supra note 4, at 1-5.
  \item [14.] See supra note 2.
  \item [15.] DANILENKO, supra note 4, at 5. This goes against the grain of at least some modern legal scholarship whose interdisciplinary objectives are very much contrary to Danilenko's approach. Compare, for example, the article by Kenneth W. Abbott, Modern International Relations Theory: A Prospectus for International Lawyers, 14 YALE J. INT'L L. 335 (1989) (seeking to integrate political science approaches with positivist legal theory).
  \item [16.] DANILENKO, supra note 4, at 5.
  \item [17.] Id. at 7.
  \item [18.] Id. at 12-13. But Danilenko does not suggest that international organizations have become independent actors or a new "source of law." For him, States remain at the fulcrum of all sources of law. Even though he recognizes that States have agreed, via treaty, to give certain international organizations the power to make binding decisions over "internal organizational matters" and to adopt rules (sometimes by majority vote) in certain "technical" fields, Danilenko sees these instances as "exceptional arrangements" authorized within the established treaty source of law and binding only on parties to those treaties, not a new formal source of "general" law. Id. at 192.
  \item [19.] Id. at 23, 301. Thus, Danilenko worries that in the "absence of clearly defined procedures for the creation of peremptory norms," \textit{jus cogens} will become a political plaything, misused to reflect "political preferences." Id. at 214.
\end{itemize}
on the grounds of "power politics," as by the former Soviet Union upon
the invasion of Czechoslovakia, or by developing world States trying to
use their numerical majority to alter existing law.\textsuperscript{20} Danilenko is equally
hard on those apologists for "soft law" who seek "unprecedented expan-
sion of the concept of law into areas of normative regulation which have
never been considered as belonging to the law proper."\textsuperscript{21} Citing to
instances in which the World Court has distinguished "political" or
"moral" duties from binding legal obligations, Danilenko stresses the
importance of legal form and a firm distinction between \textit{lex lata} and \textit{lege
ferenda}.\textsuperscript{22} He warns that failure to adhere to these tenets of legal
positivism risks "normative confusion and uncertainty" which would
"erode the concept of legal obligation and weaken the authority of law
within the international community."\textsuperscript{23}

Danilenko indicates that he sees no need to explain the ultimate reason
for the authority of the international legal system; he is not seeking
Kelsen's \textit{Grundnorm} or Hart's ultimate rule of recognition.\textsuperscript{24} Rather, he
emphasizes that States and other members of the international community
accept the authority of the law and "generally comply with those com-
munity rules which have been created in accordance with legitimate
procedures prescribed by constitutional principles."\textsuperscript{25} To him, the
legitimacy of international rules depends on the authoritativeness of the
process by which they are created, and he believes that these processes
have now crystallized into the nonstatic, article 38 sources of law. While
he accepts the theoretical possibility that States might add to the existing
sources of law, he argues that the needs for stability and certainty create
a "strong presumption" that article 38 contains a "complete list of sources."

\textsuperscript{20} \textit{Id.} at 17–18.

\textsuperscript{21} \textit{Id.} at 20. By "soft law," Danilenko apparently means norms which do not proceed from
the recognized article 38 sources of law. \textit{Id.} at 21. It is not clear whether Danilenko would also
include as "soft" those rules which might emerge from treaty or custom but which are simply
inherently vague in terms of intended obligation. \textit{See, e.g.,} Stephen Zamora, \textit{Is There Customary
International Economic Law?}, 32 \textit{German Y.B. Int'l L.} 9 (1989) (noting one example of such
"soft law": the principle that States not "disrupt" the international monetary system).

\textsuperscript{22} D\textit{ANILENKO, supra note 4, at 22.}

\textsuperscript{23} \textit{Id.} at 21–22.

\textsuperscript{24} \textit{Id.} at 27–29. Nor does Danilenko spend any time with alternative explanations for the
concept of "obligation" in international law — other than the consent of States — whether a
sense of "rightness," natural law, social necessity, sanctions, "systemic" goals, and so on. \textit{See,
\textit{e.g.,}} Oscar Schachter, \textit{Towards a Theory of International Obligation, in The Effectiveness
of International Decisions: Papers and Proceedings of a Conference of the American
Society of International Law} 9 (Steven M. Schwebel ed., 1971). Like the "pragmatically-
inclined" international lawyers, whom Schachter describes, Danilenko does not regard the
ultimate source of obligation as important so long as it can be identified as one of the so-called
formal sources of law in article 38 to which States have consented.

\textsuperscript{25} \textit{DANILENKO, supra note 4, at 24 n.26.}
He finds that the absence of any serious attempt to revise article 38 can "only mean that states parties to the I.C.J. Statute continue to believe that the 1920 text, as amended in 1945, encompasses all the available sources of law." 26 He therefore concludes that any new sources of law must today be created, at least initially, through the accepted processes identified in article 38. 27

Danilenko rejects one alternative "rule of recognition" which has been suggested for the international system — that international "law" emerges whenever there is international consensus. He argues that while law-making processes are "essentially based on consent," certain of them dispense with the "actual consent of states" and that in such cases, recourse to a concept of "right process" is necessary. 28 Danilenko critiques other proposed new sources of law based on "community-based methods of law-making," including General Assembly resolutions. 29 He concludes that there is "no serious evidence . . . that the community of States has abandoned the idea of the 'preordained' formal categories of sources and accepted consensus, whatever its particular interpretation, as an independent method of law-making." 30 While he accepts that there is a growing recognition of the concept of jus cogens, he denies that this implies acceptance of a new nonconsensual source of law based on majority rule. 31 Danilenko highlights the "tenuous ground" for the existence of jus cogens and warns that "lack of consensus as regards the basic parameters of the law-making process for peremptory rules inevitably opens the door to the political misuse of the concept." 32 He suggests that if jus cogens is a valid concept, it developed (or is developing) through the usual customary law process. 33 His overall conclusion is that the existing sources of law in article 38 remain grounded in a horizontal order of sovereign States and

26. Id. at 40, 202.
27. Id. at 191.
28. Id. at 32.
29. Id. at 199–210. He categorically denies that General Assembly resolutions can make or unmake law. Id. at 203–10.
30. Id. at 200.
31. See, e.g., id. at 235. On this, Danilenko joins, of course, a long line of positivists who have emphasized the singular importance of State consent to any proposed rule. See, e.g., Alfred Verdross, Jus Dispositivum and Jus Cogens in International Law, 60 AM. J. INT’L L. 55, 56 (1966).
33. DANILENKO, supra note 4, at 219–38.
that new community-based sources may become a reality only if States "abandon the idea of sovereignty . . . "34

Danilenko's positivist premises and his belief that the international legal system needs, above all else, unity, stability, and certainty,35 make many of his particular conclusions predictable. With respect to treaties, Danilenko concludes that only general multilateral treaties supported by a large number of States can lead to rules of general application, and, if so, only through the requisites of custom;36 that formalities for the entry into force of a treaty specified in that treaty cannot be dispensed with through conduct;37 that treaties do not impose obligations on third parties without the consent of those third parties — assertions of the creation of "objective regimes," "global treaties," and article 2(6) of the U.N. Charter notwithstanding;38 and that there is no real example of "legislation by reference," meaning the transmutation of "soft law" into binding obligation through incorporation in a treaty.39

34. Id. at 304.
35. See, e.g., id. at 202.
36. Id. at 51, 53. Compare id., with Jonathan I. Charney, International Agreements and the Development of Customary International Law, 61 WASH. L. REV. 971, 983 (1986) (taking a multifactor approach to the same question which would consider the treaty's subject matter, negotiating history, type of obligation, and nature of rule).
37. DANILENKO, supra note 4, at 55-57.
38. Danilenko explains article 2(6) of the U.N. Charter, often read to impose obligations on non-U.N. members this way:

Article 2(6) is addressed to the United Nations and its members. While members of the organization may be under a Charter obligation to ensure that all states act in accordance with the Charter, as a treaty provision this rule still remains res inter alios acta for the third states which are under no legal duty to comply with it. Indeed, the practice of non-member states shows that they do not consider themselves as legally bound by the Charter of the United Nations.

Id. at 60. Danilenko also casts doubt on the idea that certain regimes, such as that allegedly created around the Antarctic Treaty, creates a regime binding on all States since rights and obligations erga omnes arise only in accordance with articles 34-35 of the Vienna Convention on the Law of Treaties, i.e., through the creation of customary law. Id. at 62-63. He also rejects arguments that the deep seabed regime in the Law of the Sea Convention can be imposed on nonparties to that convention. Id. at 67-68.
39. Danilenko refutes the most cited purported examples, the Law of the Sea Convention and U.N. Convention on Conditions for Registrations of Ships, largely through reference to the negotiating histories of these treaties. DANILENKO, supra note 4, at 69-74. On the possibility of incorporation by reference, Danilenko's emphatic conclusion is that there is no general agreement among states which would allow for the imposition upon contracting parties of a new broad convention of those rules which had not been accepted by them prior to the ratification of this convention. It follows that there is no such thing as legislation by reference or shortcuts towards generally binding rules through the technique of incorporation.

Id. at 74.
For Danilenko, customary international law usually emerges gradually, through constant bilateral negotiations between States, requiring both sufficiently general State practice and acceptance of the practice as law (opinio juris).\textsuperscript{40} States consciously create custom, through their reactions to other States' acts.\textsuperscript{41} "Practice," which includes deeds and "other persuasive manifestations of State legal policy, including official statements," encompasses the practice of international organizations and international tribunals, but not the actions of individuals as such, since these are not "subjects" of international law.\textsuperscript{42} National court decisions play only an "auxiliary" role in the creation of custom because these reflect only the views of the States in which they operate, and such courts are not independent actors in foreign relations.\textsuperscript{43} Despite claims to the contrary, neither General Assembly resolutions nor "other purely verbal descriptions of preferred norms of conduct" suffice in and of themselves to constitute State practice.\textsuperscript{44} New developments have not seriously eroded the traditional requirements of practice, i.e., the need for generality, uniformity, and continuity over a certain period of time.\textsuperscript{45} Although modern international negotiations may facilitate the creation of custom within a "very short period of time," there is "no such thing as 'instant' custom."\textsuperscript{46} While opinio juris need not be limited to verbal acts and may include "supportive behavior or abstention from protests evincing tacit consent or acquiescence,"\textsuperscript{47} it must, however, include an inquiry into whether the particular State against which the custom is sought to be applied has acquiesced, since there is no such thing as majority custom-making, and custom does not bind those who persistently object.\textsuperscript{48} For much the same reasons, General Assembly resolutions do not express opinio juris; these are purely precatory under the U.N. Charter.\textsuperscript{49}

A chapter on the interrelations between treaty and custom yields more tentative conclusions and fewer black letter rules. Danilenko argues that the individualistic and gradual nature of the custom-generating process, along with custom's often vague and uncertain scope, leads to a preference for treaties as the most suitable source for progressive (and more rapid)

\textsuperscript{40} Id. at 75–76, 79.
\textsuperscript{41} Id. at 78–82.
\textsuperscript{42} Id. at 83–84, 87.
\textsuperscript{43} Id. at 85.
\textsuperscript{44} Id. at 88–91.
\textsuperscript{45} Id. at 94–98.
\textsuperscript{46} Id. at 97 n.74, 98.
\textsuperscript{47} Id. at 101.
\textsuperscript{48} Id. at 103–11.
\textsuperscript{49} Id. at 121–22.
development.\textsuperscript{50} He suggests that since custom tends to "reflect the preferences of the most powerful states," many States favor the more democratic multilateral treaty source.\textsuperscript{51} Nonetheless, because treaties only bind parties, he contends that the need to establish universally applicable rules in some areas has helped custom retain its role as a modern form of rulemaking.\textsuperscript{52}

Danilenko also acknowledges that the codification process has introduced a new dimension because different negotiating proposals, drafts, and statements of governments during such a process are increasingly seen as "important forms of state practice" affecting the development of custom "parallel to the elaboration of treaty instruments."\textsuperscript{53} However, he resists the idea that a customary rule may be developed on the basis of acts relating to the process of codification such that the drafting of such a treaty may "crystallize" custom since he finds this merging of the conditions for the creation of treaty and customary rules destabilizing.\textsuperscript{54} For Danilenko, it would "better serve the stability of international legal relations" if the focus were kept on the "actual practice of states."\textsuperscript{55}

Danilenko's chapter on general principles of law surveys the differing and contradictory approaches to this third source of law, namely explanations grounded in natural law, or based on a comparative study of principles of procedure and process operative within individual domestic legal systems, or looking to principles common to certain representative legal systems of the world, or choosing principles validated through international custom. Danilenko even considers the view that "general principles of law" are not a general source of law at all but are merely applicable in the judicial context as a kind of "renvoi" to domestic law permitted ICJ judges.\textsuperscript{56} Given the obvious uncertainties and (to Danilenko) the disturbing possibility that this source may license judges to undertake a "quasi-legislative" role, he repeatedly stresses that general principles are necessarily few in number, with "rare" judicial invocations.\textsuperscript{57} Danilenko even suggests that despite the wording of article 38, general principles

\begin{itemize}
\item 50. \textit{Id.} at 130–32. Danilenko also states that custom is also unsatisfactory to legal reformers because it "cannot generate anticipatory, forward-looking legal regimes." \textit{Id.} at 131.
\item 51. \textit{Id.} at 133.
\item 52. \textit{Id.} at 135.
\item 53. \textit{Id.} at 143.
\item 54. \textit{Id.} at 156.
\item 55. \textit{Id.}
\item 56. \textit{Id.} at 171–81.
\item 57. \textit{Id.} at 180–81, 182, 184, 186. He also contends that the World Court has not developed a coherent concept of this third source of law even where it has applied it. \textit{Id.} at 183.
\end{itemize}
may "retain only the status of a subsidiary source of law." As might be expected, he rejects modern attempts to breathe life into this source of law, such as suggestions that certain multilateral conventions, not yet supported by State practice and opinio juris or yet binding qua treaty, might still obligate States as general principles of law, or suggestions that General Assembly resolutions be seen in this light.

In a separate chapter on the role of the ICJ, Danilenko concludes that the Court does not adhere to the concept of stare decisis and contends that the Court's role is limited, as it itself has often indicated, to "law application" and not law creation. While he accepts that the Court's pronouncements may affect the rights and interests of nonparties and that it "has authoritatively confirmed the existence of a number of generally applicable principles and norms which, although based on the practice of States, were not sufficiently articulated," he contends that "effective law-making power still remains in the hands of states who may always reject a particular interpretation of their rights and duties, or, more generally, may refuse to participate in the work of an institution which seriously encroaches on their sovereign rights as law-givers." Danilenko thus confirms what article 38 states: the Court is not itself a source of law.

In a final chapter, Danilenko discusses issues he apparently regards as subsidiary "policy" or "procedural" questions, not central to the doctrine of sources, including the potential impact of different types of negotiating forums (especially as between universal diplomatic forums and more restricted arenas), the value of consensus as a negotiating technique, the choice between regulation via comprehensive treaty-making (and their inevitable "package deals") as compared to more limited arrangements, as well as the risks adhering to "anticipatory regulation."

Danilenko would have readers draw some broad generalizations and many of these can be briefly stated. Despite some brief allusions to their

58. Id. at 186.
59. Id. at 187–89. Regarding General Assembly resolutions, here, as elsewhere, Danilenko argues that the international community is not ready to change the traditional nature of the third source of law . . . by accepting the idea of direct recognition of new rules through an international instrument of a recommendatory nature. In fact, such a development is highly unlikely since it would accord the UN General Assembly, which clearly lacks formal legislative competence, a de facto legislative power in the guise of one of the formally established sources of international law.

Id. at 189.
60. Id. at 253–60.
61. Id. at 256, 258.
62. Id. at 261.
63. Id. at 266–300.
activities, international organizations — although involved in the negotiation and promulgation of some 200 multilateral treaties since 1945\(^6\) — are not the heart of international lawmaking, States are.\(^5\) Despite its natural law origins, international law is separable from morality; whether something is morally desirable has nothing to do with whether something is or is not a source of binding obligation — Nuremberg and modern variants such as the *ad hoc* War Crimes Tribunal for the Former Yugoslavia\(^6\) notwithstanding. Although States admittedly do not give their “actual consent”\(^6\) to many international obligations, lawyers need to rely on consent (“tacit,” “implicit,” or whatever) because the sources of law plainly assume that this is so, and absolute sovereignty would have it no other way. Although article 38 identifies three sources of law — a necessary limit intended to promote uniformity, certainty, and stability — the third source, general principles of law, is nearly void for vagueness and contains so few examples that it probably can be ignored or reduced to mere subsidiary evidence of law, like the writings of scholars. Moreover, of the two real sources left, treaties and custom, treaties are more important for the development of the law since within them consent is clearly expressed, and the norms can be precise and instantly effective, unlike the episodic and gradual customary process. As for the subsidiary sources of law identified in article 38, even though the actual term used in article 38, “judicial decisions,” might include national courts, these can usually be ignored; the real focus should be on the decisions of international tribunals, especially those by the ICJ in contentious cases\(^6\) — except when these, such as the opinion on the merits in the *Nicaragua Case*, misuse or misunderstand the sacred nature of these sources of law.\(^6\)

Finally, the reasons for this parsimonious view of international law sources and the reasons for the strict demarcation between law and politics have, paradoxically enough, everything to do with *realpolitik*: States simply will not accept rules unless they individually have consented to them, and no rule of general application can really be said to exist unless it has received

\(^64\). *Id.* at 2 n.1.

\(^65\). *See supra* text accompanying notes 28–34.


\(^67\). DANILENKO, *supra* note 4, at 32.

\(^68\). Such cases are, in Danilenko’s view, an “important part of community practice” especially because “contesting states are under an obligation to comply with them” and implementation is “ultimately guaranteed by the UN Security Council.” *Id.* at 83 n.29, and accompanying text.

\(^69\). *See, e.g.*, Danilenko’s critique of the *Nicaragua Court’s* incautious attitude towards the use of General Assembly resolutions. *Id.* at 207–08.
the blessing of those States with the most general of interests, that is, specially-affected (or powerful) States.

II. THE VIRTUES OF BEING NEGATIVE

Modern international lawyers will find much to criticize in this doctrinaire book. This is a book which still battles yesterday’s jurisprudential battles (such as whether natural law or positive law justifies *jus cogens*), still argues over whether judges make or apply law, still believes that firm distinctions can generally be made between “application” and “generation” of law, still adheres to a formalistic view of State “practice” which does not even mention the possibility that paper ratifications to treaties may not mean actual adherence, and still adopts semantical definitions of “law” and “legal process” which render irrelevant insights drawn from international relations or other “non-legal” fields. And, despite the occasional resort to realpolitik, the heirs of legal realism would scarcely be pleased. Here is a book so long on doctrine and so short on reality that it purports to address “international law-making” in 1993 with scarcely a mention of the Security Council and with only a dismissive nod to international organizations generally.

But Danilenko should not be blamed for weaknesses in the current state of the teaching of international law. He has merely put — in unusually stark, mechanistic, and rigid terms — material and arguments at the heart of many an international law survey course, at least as taught in the United States. Article 38’s sources are still, after all, the organizing theme for many U.S. international law casebooks, and the questions Danilenko asks and answers are still the ones asked in those books. Rather, Danilenko has done us all a favor. Rather than ignore his book, it should be appreciated for illustrating the strains in the doctrine of sources. Danilenko’s book aptly demonstrates the need to reformulate international legal doctrine to modern realities. If instinctive reaction to this book is negative, this is, nonetheless, negativity from which we can learn.

Danilenko admits that his inquiry may yield only a “partial picture of the law-making process as it is accepted in the actual practice of the international community.” But “partial” does not begin to capture the inadequacy of the picture of “law-making” which results when one uses article 38 as the lens through which to see reality.

70. Most of these issues echo debates dating to the time of Grotius, Pufendorf, and Bynkershoek. See, e.g., JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 14–18 (1954).

71. See, e.g., BARRY E. CARTER & PHILIP R. TRIMBLE, INTERNATIONAL LAW (1991) (organized around the article 38 sources of law).

72. DANILENKO, supra note 4, at 6.
Unanswered questions emerge from the outset with Danilenko’s premises. Danilenko’s functionalist explanation for the explosion of international regulatory activity, based on the “increasing economic interdependence” between sovereign States, seems an inadequate explanation for such diverse phenomena as: the explosion in human rights promulgation and enforcement; post-Uruguay Round improvements in GATT dispute settlement; the reactivation of the Security Council; or the manifold harmonization efforts of UNCITRAL within commercial law. The assumption that all, or most, of this law-making activity results solely from the acts of rational, interest-maximizing States remains empirically unverifiable and has been of course challenged, most prominently by critics of rational-actor models in international relations.7 Similarly challengeable is Danilenko’s implied assumption that the actions of international organizations are merely those of States writ large — that is, that such organizations are merely the vessels for the aspirations of States and not significant independent actors in their own right with their own agendas.74 Danilenko’s dismissal of the study of “economic, social and political processes” in favor of “close, legal analysis” leaves little room for alternative or supplementary explanations for the growth of the new international law. Yet it is as likely that “irrational” revulsion towards certain recent historical events or bureaucratic developments flowing from the intense commitment of certain “epistemic communities” within States or the work of international organizations75 — to name but three alternatives — may explain certain legal developments, such as: the establishment of a new U.N. High Commissioner for Human Rights;76 the gradual strengthening of the position of the individual


74. Cf. ERNST B. HAAS, WHEN KNOWLEDGE IS POWER (1990) (examining how international organizations “learn”); Ernst B. Haas, Words can hurt you; or who said what to whom about regimes, in INTERNATIONAL REGIMES, supra note 73, at 23; Stephan D. Krasner, Regimes and the limits of realism: regimes as autonomous variables, in INTERNATIONAL REGIMES, supra note 73, at 355; Finnemore, supra note 73.

75. Epistemic communities are defined by social scientists as groups of individuals sharing a particular expertise and a social agenda. See, e.g., Special Issue, Knowledge, Power, and International Policy Coordination, 46 INT’L ORG. (Winter 1992) (issue devoted to studies of epistemic communities in different international settings).

within the European Court of Human Rights;\textsuperscript{77} the proclamation of the Nuremberg Principles;\textsuperscript{78} the new War Crimes Tribunal for the Former Yugoslavia;\textsuperscript{79} and the United State’s recent adherence to the International Civil and Political Covenant.\textsuperscript{80}

For much the same reasons, Danilenko’s state-centric perspective leads to a grossly incomplete picture of international lawmaking. Danilenko is too quick to dismiss the role of individuals, nongovernmental organizations, and national courts in international lawmaking. Even if all international legal developments could, at bottom, be explained in terms of the promotion of States’ long-term interests, such generalities may be less interesting or useful than consideration of the actors more immediately responsible. These actors are often \textit{not} States or even international organizations, but rather nongovernmental organizations and even individuals.\textsuperscript{81} Merely to say that a planetary community of individuals is unrealistic, or that both individuals and nongovernmental institutions lack formal status at the international level\textsuperscript{82} says nothing about these actors’ relevance to international lawmaking. It says nothing about the individual whose action under the Alien Tort Claims Act\textsuperscript{83} helps to establish the degree of damage cognizable under international law for violation of the law of nations; nothing about the growing powers of the Secretary-General, and not only under peacekeeping;\textsuperscript{84} nothing about the labor or business representative to the International Labor Organization whose

\textsuperscript{77} See, e.g., DeWilde, Ooms, and Versyp Cases, 12 Eur. Ct. H.R. (ser.A) at 6 (1971) (permitting counsel to be designated for applicants).


\textsuperscript{79} See supra note 66.

\textsuperscript{80} See 138 CONG. REC. S4781-84 (daily ed. Apr. 2, 1992).

\textsuperscript{81} For one example of the myriad insights provided when international texts are studied as the outcome of bargains between these various groups, see Abram Chayes & Antonia Handler Chayes, \textit{On Compliance}, 47 INT’L ORG. 175 (1993).

\textsuperscript{82} DANILENKO, supra note 4, at 11–12, 13 n.50. Danilenko’s state-centrism, along with his assumption that national courts make decisions based on internal, not international, rules, see supra at note 43, have an honored pedigree in the positivist canon: the writings of Jeremy Bentham. See, e.g., Mark Janis, \textit{Jeremy Bentham and the Fashioning of International Law}, 78 AM. J. INT’L L. 405 (1984).


initiative leads to a new international labor right.\textsuperscript{85} None of these individuals necessarily represent the interests of States and yet all may have had a greater and more direct role in international lawmaking, the subject of this book, than the all too abstract "States" which Danilenko repeatedly invokes. Most notably absent from this book is any examination of the role of "sovereignty" in modern lawmaking. Yet a book published in 1993, amidst abundant scholarship questioning the very foundations of the Westphalian system, can hardly afford to be sanguine about the continued centrality of States to lawmaking.\textsuperscript{86}

Danilenko is also entirely too restrained and constrained by his article 38 totem to realistically assess the ICJ's and other international tribunals' considerable contribution to the making of general law. Danilenko's all too brief look at the role of the ICJ ignores that court's own recent history,\textsuperscript{87} along with its role in the interpretation of the U.N. Charter.\textsuperscript{88} Having declared that general sources of law must necessarily be an insignificant, not to say subsidiary source of law,\textsuperscript{89} for example, Danilenko does not examine the very real contribution that the ICJ and other international tribunals have made regarding that source of law.\textsuperscript{90}


86. The ever-increasing literature reconsidering the viability of "sovereignty" and its impact on many different areas of international law includes, \textsc{Joseph A. Camilleri} \& \textsc{James Falk}, \textit{The End of Sovereignty?} (1992); \textsc{David B. Hunter}, \textit{Toward Global Citizenship in International Environmental Law}, 28 \textit{Williamette L. Rev.} 547 (1992) (discussing the impact of the "democratization" of the international legal system); \textsc{Neil MacCormick}, \textit{Beyond the Sovereign State}, 56 \textit{Mod. L. Rev.} 1 (1993). Nor do these insights necessarily stem from post-Cold War developments. \textit{See, e.g.}, \textsc{Ingrid Detter De Lupis}, \textit{The Concept of International Law} (1987) (describing the "drift away from the exclusive state paradigm" and the relevance of a variety of nonstate actors); \textsc{Kabir Ur-Rahman Khan}, \textit{International Law of Development at Edinburgh: Methodology, Content and Salient Issues}, 1986 \textit{Third World Legal Stud.} 15, 16–18 (arguing that article 38 sources are no longer the exclusive sources since international law-creating processes are now "shared" amongst nonstate actors and "quasi-legislative" international organizations); \textsc{Mary Ellen Turpel} \& \textsc{Philippe Sands}, \textit{Preemptory International Law and Sovereignty: Some Questions}, 3 \textit{Conn. J. Int'l L.} 364, 365–66 (1988) (warning that any analysis of \textit{jus cogens} which fails to undertake a "sustained and wholehearted challenge to the traditional notion of sovereignty" is bound to be disappointing).

87. Cf. \textsc{McWhinney}, \textit{supra} note 85, at 105–32 (1984) (seeing both "judicial restraint" and "judicial activism" reflected at different periods).

88. Consider, for example, the teleological rulings in prominent advisory opinions, discussed in Ervin P. Hexner, \textit{Teleological Interpretations of Basic Instruments of Public International Organizations, in Law, State, and International Legal Order} 119 (Salo Engel ed., 1964).

89. \textit{See supra} at notes 56–58.

90. \textit{See, e.g.}, \textsc{Richard B. Lillich}, \textit{Fact-Finding Before International Tribunals} (1992) (\textit{lex evidentia} as applied in a variety of international adjudicative and arbitral settings); \textsc{Durward Sandifer}, \textit{Evidence Before International Tribunals} (rev. ed. 1975) (also discussing \textit{lex evidentia} as applied in various settings); \textsc{Keith Higet}, \textit{Evidence, the Court and
readers will find Danilenko’s description of what the ICJ judges do in deciding cases reminiscent of Robert Bork’s writings on “neutral principles.”

Similarly, Danilenko’s disparaging view of national courts as non-independent conduits for the policies of the sovereign executive branch, is both simplistic and inaccurate. Notwithstanding the doctrines deployed to ensure that U.S. courts and the Executive speak with “one voice” regarding foreign policy — most especially the act of state doctrine — the fact remains that U.S. courts do participate in international lawmaking, sometimes in ways neither pleasing to, nor predicted by, the Executive branch. U.S. court pronouncements on a variety of subjects — from human rights to sovereign immunity to the privileges of diplomats — have contributed to the development of international law in ways that are scarcely distinguishable from (and perhaps in some instances even more significant than) the pronouncements of international tribunals. And in these areas, U.S. courts have not always deferred to the Executive’s view of the substance of the international legal rules under discussion regardless of the disposition of the case. Certainly from Paquette Habana’s view of the legality of seizure as prize, to Sabbatino’s view of international rules governing expropriation, from Rauscher’s view of the need for speciality in extradition to the Ninth Circuit’s rulings on extraterritorial application of U.S. law and on the legality of certain exchange controls, it cannot be said that U.S. courts have invariably served as the Executive’s rubber stamp or that they have served merely to uphold all of the Executive’s claims. Nor is, of course, the role of U.S. national courts

the Nicaragua Case, 81 Am. J. Int’l L. 1 (1987) (summarizing evidentiary principles applied in that case); see also Christopher R. Rossi, Equity and International Law: A Legal Realist Approach to International Decisionmaking (1993) (describing the ICJ’s and other international tribunals’ development of “equitable principles”).

91. Robert Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1 (1971). But while Bork reproved domestic courts and expressed iconoclastic aspirations, Danilenko is purportedly attempting to provide readers with a description of international tribunals’ actual contribution to lawmaking. His description, however, does not correspond to reality.

92. The Paquette Habana, 175 U.S. 677 (1900).


95. Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976); West v. Multibanco Comermex, 807 F.2d 820, 831 (9th Cir. 1987).

96. Decisions such as Sale v. Haitian Ctrs. Council, 113 S. Ct. 2549 (1993), and U.S. v. Humberto Alvarez-Machain, 112 S. Ct. 2188 (1992) notwithstanding, U.S. court judgments which deal with international legal issues, at the Supreme Court and state and lower federal...
unique. It would be a brave scholar indeed who would suggest that national court opinions are less significant to the international law-making process than even a decision rendered by a sole arbitrator or self-serving pronouncements by a foreign office.

Recognition that national courts have a say in international lawmaking illustrates, more broadly, that Danilenko's traditional elevation of "the State" as a monolithic entity is not sufficiently nuanced. While Danilenko is doubtlessly focusing on the State actors involved in traditional lawmaking processes, e.g., the Executive and the legislature insofar as both become engaged in adhering to a treaty, a more complete and complex picture of international lawmaking would also consider the impact of court levels, cannot be reduced to the truism: the Executive always wins. Note that even those cases which might support Danilenko's position, such as Alvarez-Machain, do not necessarily produce a judicial opinion which is, on all points, identical with the position of the Executive branch. Moreover, the point is larger than the number of cases which might be marshalled either in opposition or in support. The judiciary in the United States, as in many countries, is constitutionally a separate branch. See, e.g., Harold H. Koh, The National Security Constitution (1990).

97. See the multitude of cases discussed in Benedetto Confotti, International Law and the Role of Domestic Legal Systems (1993); see, e.g., Antonio Cassesse, Remarks on Scelle's Theory of "Role-Splitting" (dedoublement fonctionnel) in International Law, 1 European J. Int'l L. 210, 228–31 (1990) (noting increased role for domestic courts in international lawmaking, particularly given the number of treaties conferring "quasi-universal" jurisdiction over international crimes and the increased willingness of domestic courts to act on "behalf of the international community"); Pieter VerLoren van Themaat, The Impact of the Case Law of the Court of Justice of the European Communities on the Economic World Order, 82 Mich. L. Rev. 1422, 1425 (1984) (concluding that "the development of public international case law in its present state mainly results from decentralized judgements by national courts and only rarely results from compulsory jurisdiction or arbitration").

98. Cf. Danilenko, supra note 4, at 23 n.22 (citing International Arbitral Tribunal: Award on Merits in Dispute Between Texaco Overseas Petroleum Company/California Asiatic Oil Company and the Government of the Libyan Arab Republic, Jan. 19, 1977, 17 I.L.M. 1 (Dupuy, sole arbitrator)), passim (relying on the formal pronouncements of States). By comparison, Danilenko's table of case authorities does not cite to a single judgment by a domestic court. Danilenko, supra note 4, at 305–09. What is most puzzling about Danilenko's failure to address domestic judicial opinions is that, even by his own account, at a minimum, these are probably evidence of State practice. See, e.g., Karl Dohring, The Participation of International and National Courts in the Law-Creating Process, 17 S. Afr. Y.B. Int'l L. 1 (1991/92). Michael Reisman has bemoaned the ironies of the positivists' circumscribed view of "State practice":

A tribunal established by one party, in the absence of the other, and composed of a single person, let us say a professor of international law, is treated by other scholars as an authoritative oracle of international law. At the same time, commentators who defer to such an award will insist that a contrary General Assembly vote, supported by virtually every member state, is not indicative of international law but is only a "recommendation."

different governmental actors within States, including consideration of, for example, unilateral acts taken by the U.S. Congress intended to have international effects. Such an analysis might also consider whether certain of these actors, including legislators, government officials, and diplomats, resort to different types of international rules, including "soft law," more so than judges.99

Danilenko's rejection of the possibility of "true" international "legislation," except with respect to the power of certain international organizations to enact, by less than unanimous consent, particular "technical" regulation, or to adopt "internal" rules, particularly his suggestion that consent drives international law creation in a way fundamentally different from the role it plays with respect to domestic law, merits far more discussion.100 Ever since the post-Cold War rejuvenation of the Security Council, when the votes of a handful of U.N. members have purported to establish binding decisions on all members and nonmembers alike on issues central to national sovereignty — including the resort to the use of force — the idea that international organizations take binding action only with respect to mundane matters and/or on the basis of the unanimous consent of members seems strikingly out of date.101 Moreover, the Security Council is only the most prominent example. What constitutes "technical" or "internal" regulation is debatable. Are the ICAO Council's condemnatory actions, with respect to the Korean Airlines and Iran Air shootdowns by the then U.S.S.R. and the United States respectively — which have helped to establish the legality of force in these types of incidents — merely "technical?"102 Do they have no impact on the use of force by

99. Concerning the possibility of who is more likely to resort to "hard" versus "soft" law, see Zamora, supra note 21, at 41–42 (contending that nonjudicial actors resort to "soft" international economic norms while that source is relatively unimportant on the judicial level).

100. DANILENKO, supra note 4, at 7; see also id. at 192. Danilenko's narrow focus leads to an exclusion of many acts by international organizations with normative effect. Thus today, the right of a State to have rights, a consequence of statehood, seems very much tied to the symbolic validation conferred by membership within an international organization — a point which, though lost in Danilenko's account of lawmaking, has been very much present in the actions of entities as diverse as Bosnia-Herzegovina and the Palestine Liberation Organization. See also Franck's suggestion that an emerging human right to "democracy" may come to be enforced, in part through the United Nation's symbolic validation. Thomas M. Franck, The Emerging Right to Democratic Governance, 86 Am. J. Int'l L. 46 (1992).

101. For one survey of the increasing significance of international organizations to international lawmaking, see Daniel Vignes, The Impact of International Organizations on the Development and Application of Public International Law, in Structure and Process, supra note 1, at 809. For an argument that these multilateral processes differ fundamentally from traditional customary lawmaking, see Jonathan Charney, Universal International Law, 87 Am. J. Int'l L. 529 (1993).

non-ICAO members? What about recent OAS action with respect to the restoration of the elected government in Haiti? What about the GATT panel decision regarding the regulation of fishing for tuna? (Or, is this last example not pertinent because, at least according to Danilenko, adjudicative processes only "interpret" and do not "make" law?)

In all these instances, Danilenko would answer that to the extent "general" international law gets made through these acts by international organizations, it does so through the all-purpose mechanism of custom. If, for example, the Security Council's determinations in Resolutions 731 and 748, addressing Libya's failure to extradite alleged terrorists, creates a general rule that either the underlying terrorist act or the failure to subsequently extradite constitutes an illegal use of force or aggression, this may become so only gradually, as States, both U.N. members and nonmembers, protest or accept the alleged rule. This response, though, presumes that law generated by international organizations must be made to fit the article 38 sources of law. It does not necessarily reflect how relevant actors today perceive what is going on — or, more importantly, how they act. But quite apart from perceptions, when the Security Council purports to take a legally-binding decision like the one in Resolution 748 (imposing economic sanctions on Libya), that decision's legal impact is instantaneous. Further, when the texts of such decisions purport to bind nonmembers, as many have, all

103. See, e.g., Note on OAS Resolution 1080, in UNITED STATES ECONOMIC MEASURES AGAINST CUBA 287-301 (Michael Krinsky & David Golove eds., 1993) (summarizing Organization of American States (OAS) actions on Haiti and interpretative statements by OAS members).


105. DANILENKO, supra note 4, at 83. In a later chapter Danilenko acknowledges that multilateral negotiations and consensus approaches — both within international organizations and outside of them — may have a law-making impact by shaping participants’ expectations. Id. at 266-94.


108. It is striking that Danilenko, the faithful positivist, does not spend any time addressing the Security Council, the nearest thing to an Austrian sovereign that the international system has yet produced. Cf. AUSTIN, supra note 8, at 1-3, 9-33 (1832) (discussing, among other things, the powers of the superior to enforce compliance with a wish).

relevant actors assume, (pace Danilenko)\(^{110}\) that nonmembers are legally bound to comply — presumably at the risk of sanctions for noncompliance. Whatever effect these resolutions have on general rules such as the use of force, these resolutions have an impact independent from individual States’ acceptance of any underlying rules as custom. The Security Council’s recent actions — such as authorizing force against Iraq — constitute that organ’s interpretations of its power under the Charter and no body, including the ICJ, has yet assumed the power to question the Council. At a minimum, a State acting in conformity with a Security Council decision, as with respect to sanctions against the former Yugoslavia or with respect to Libya, appears to have a strong \textit{prima facie} case against any challenge to the legality of its action.\(^{111}\)

Because Danilenko omits analysis of the role of the Security Council, he also fails to address issues raised by those who criticize the Security Council’s all too easily exercised “powers of appreciation.”\(^{112}\) Along with its authorization to use force with respect to the Gulf War, the Council, after all, also purported to: delegitimize an occupying power,\(^{113}\) make authoritative findings with respect to violations of diplomatic immunity or human rights,\(^{114}\) interpret humanitarian law,\(^{115}\) make various determinations of State responsibility for damages,\(^{116}\) establish a repartitions

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110. DANILENKO, supra note 4, at 60. Recent Security Council activity also casts doubt on Danilenko’s broad assertion that “in the contemporary international community no group of states is in a position to impose particular principles and norms on other groups within the framework of either treaty or customary law-making.” Id. at 111. Cf. Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, 1992 I.C.J. 114 (Interim Measures Order of April 14) [hereinafter Lockerbie Case] (finding S.C. Res. 748 binding on Libya). The danger that the permanent members of the Council are in a position to do just that is precisely the fear that has driven at least some U.N. members to propose reforms to Council membership to ameliorate the risks. See generally \textit{Question of Equitable Representation on and Increase in the Membership of the Security Council: Report of the Secretary-General}, U.N. GAOR, 48th Sess., Agenda Item 33, U.N. Doc. A/48/264 (1993) (reporting U.N. members reform proposals) [hereinafter \textit{Report of Secretary-General}].


tribunal, interpret and enforce the provisions of a bilateral boundary treaty, require the acceptance of fact-finders with respect to boundary demarcation, and weapons inspection, compel the renouncement of terrorism, and determine legal title to property. Since the Charter requires members to accept and carry out decisions of the Security Council, presumably Danilenko would regard State obligations pursuant to these Resolutions as binding treaty obligations derived from members' initial consent to the Charter. Obviously, this does not address many thorny issues about normative effect, including questions about judicial review or, more broadly, questions relating to the legitimacy of such quasi-judicial determinations by a preeminently political body (or delegated subentities). That Danilenko's analysis provides little ammunition for those who would find some Security Council decisions ultra vires, as against members, should not be altogether surprising. The good positivist would applaud the words of Captain Vere, the commanding officer of the court martial in Billy Budd: "[H]owever pitilessly . . . law may operate, we nevertheless adhere to it and administer it."
Danilenko’s reliance on “consent” as the driving force behind international lawmaking also prompts more questions than answers. Danilenko relies on State consent throughout his book — in order, among other things, to argue against alternative sources of law not identified in article 38, to disparage the law-making quality of General Assembly resolutions, and to cast doubt on aspects of *jus cogens* — as if the notion of consent is both noncontroversial and self-explanatory. As the manifold critics of the concept of consent have shown, however, it is neither. Danilenko does not address the many objections to consent-based theories raised by such scholars as Martti Koskenniemi (although he cites Koskenniemi’s major work, *From Apology to Utopia*).  

Readers do not get an explanation as to why State consent, tacit or express, is a principle worth respecting or why that principle itself is immutable. The difficulties of ascertaining consent are scarcely addressed, nor are philosophical dilemmas of the type raised by critical legal scholars.

Danilenko’s strained attempts to fit the traditional sources of law into a “consent” framework are particularly evident with respect to general principles of law. Having shown the wide diversity of possible candidates for this source of law, it is strikingly inadequate to suggest, as Danilenko does, that the simple word “recognized” in the article 38 definition of “general principles” sufficiently demonstrates that source’s grounding in the consent of States.  

Danilenko’s rigid adherence to consent also leads him to some controversial conclusions: readers of this book will find that “preemptory norms” are not preemptory at all, at least not to France and other States who have objected to the concept, and further, that countries displeased by Security Council measures, such as Iraq or Libya, are in principle free to disregard such binding decisions, provided they cease being members of the United Nations.  

Danilenko’s rigid consensualism also leads him to demur on one principle on which most (Western) lawyers agree: new States are bound to existing custom.

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127. *Cf. Koskenniemi*, supra note 2, at 270–83. For Koskenniemi, the consent principle is either a “fully apologist” doctrine incapable of securing a truly objective binding law or a “utopian” concept ultimately derivable from some nonconsensual source of obligation, such as natural law.


130. *Id.* at 60–61; *supra* note 38.

131. *Id.* at 116. For a summary of the views of scholars on the issue, see *Koskenniemi*, supra note 2, at 272–73. Danilenko presumably sidesteps the issue because it poses an awkward choice between his two most treasured premises: the need for State consent and the need for unity, stability, and certainty.
Moreover, for all its reliance on the principle of consent, surprisingly little is actually said in this book about what "consent" means. If international "legislation" does not exist because it is not based on consent as Danilenko suggests,\textsuperscript{132} how is a State's consent to be ruled by an international organization conceptually different from, for example, the "consent of the governed," the basis for congressional power given in the U.S. Constitution? Moreover, is the original "consent" of the State when it adhered to the treaty or the original understanding of the "international community" at the time the treaty was concluded, the same or analytically distinct from original "intent"? What relative weight should be accorded to evidence of original intent/consent, treaty text, or institutional practice when, for example, it is alleged that an international organization is acting in derogation of \textit{jus cogens}? To these questions, Danilenko's general lodestars — certainty, stability, and predictability — do not yield clear answers.\textsuperscript{133} Despite repeated reliance on the negotiating histories of many

\footnotesize{\textsuperscript{132} See supra note 17. But note that Danilenko is far from alone in dismissing the notion of international "legislation." See, e.g., W. Michael Reisman, \textit{The Cult of Custom in the Late 20th Century}, 17 \textit{Cal. W. Int'l L.J.} 133, 136, 144–45 (1987) (arguing that in the absence of an international legislature, what is produced is "semantic law," the "caricature of legislation;" Reisman also condemns "voodoo" jurisprudential approaches unconnected to the realities of power politics).

\textsuperscript{133} More specifically, why should the United States' consent, given in 1945 to the U.N. Charter, or the interpretation attached to that consent at the time by all the relevant actors, bind the United States or anyone else in 1994, in a vastly different world with a vastly different organization? For example, the Clinton Administration was faced in 1994 with the prospect of continuing to abide by an arms embargo on Bosnia, pursuant to a binding Security Council decision, or acting in breach of that decision in order to permit Bosnia to have the wherewithal to exercise its "inherent" right of self-defense. The "consent" of the United States given in 1945 might arguably be said to be as irrelevant (or relevant) to that decision as any "consent" given by the constitutional framers in 1789 for purposes of a decision as to the constitutionality of a domestic law enacted last year. If differences exist between the U.N. Charter and U.S. Constitution for these purposes, as they undoubtedly do, the difference might be better captured by focusing on the different type of legal communities (or "interpretative communities") created since 1945 within the United Nations, and since 1789 within the United States. See Ian Johnston, \textit{Treaty Interpretation: The Authority of Interpretative Communities}, 12 \textit{Mich. J. Int'l L.} 371 (1991). In other words, if it is true that today the Security Council is not as free to enact "generally applicable" law as is the U.S. Congress on the domestic plane, this may be due to the fact that the latter's power has expanded (or contracted) through community consensus on such issues as, for example, the scope of the Commerce Clause and the Bill of Rights. That the U.S. Congress always had, according to the text of the U.S. Constitution, a plenary legislative capacity which the Security Council plainly lacks (based on the text of the U.N. Charter), is only one part of the equation, particularly given the decidedly elastic terms of both the Security Council's chapter VI and VII powers and much of the U.S. Constitution. If, on the other hand, U.N. institutional developments have proceeded (as perhaps they now have) to the point that the Security Council has a wide license to interpret the vague terms of article 39 and 33 broadly, then maybe the fact that the Charter framers in 1945 would never have acquiesced in a resolution such as Resolution 748, S.C. Res. 748, supra note 109, (Libyan economic sanctions) or resolution 827, supra note 66 (establishment of an \textit{ad hoc} War Crimes Tribunal for the Former Yugoslavia), is unimportant either to the legitimacy or the effectiveness of any such Council act. The point is that original intent or consent arguments are, at least in principle, no more or no less theoretically possible for purposes of the interpretation of the U.N. Charter as they are for purposes of the interpretation of the U.S. Constitution.}.
of the multilateral treaties cited, Danilenko gives no reasons in this book to privilege original intent arguments, particularly in the case of treaties creating an institution like the United Nations.134

As to the evidentiary sources demonstrative of "consent," although it appears, at least initially, that Danilenko is attempting through his book to prove that States continue to rely on article 38 sources, it becomes clear quite early that Danilenko is using article 38 itself to determine what types of manifestations of State behavior are legally relevant. For Danilenko, State "consent" (at least for lawyers) is presumptively evinced by only certain types of evidence of State action — such as memorials filed before the ICJ, formal diplomatic pronouncements made in connection with adherence to a treaty, or the views of prominent scholars. Apparently, the only evidence of legally relevant "consent" worth paying attention to are those expressly mentioned in article 38(d) or directly derivable from its listing of sources. Even assuming that Danilenko is right to focus on the behavior of States as such, his rigid adherence to article 38 leads him to ignore other evidence of State behavior, such as would be contained in press accounts.135

His fidelity to article 38 also leads Danilenko to ignore evidence of "consent" by nonstate actors. Even the institutional practice of international organizations, hardly a novel form of evidence of law, gets filtered through a State-centric lens, despite the risk of oversimplification or misrepresentation. Thus, readers are informed that the ICJ's Advisory Opinion in the Namibia Case stands for the general proposition that a minority of States can modify any multilateral treaty "if there is general acceptance by other parties."136 While Danilenko might be correct that


135. See, e.g., Reisman, supra note 98, at 1, 4 (1984) (stressing the need for reliance on nonformal sources more "congruent with expectations of authority and control held by effective elites"). It is, for example, hardly convincing to point to the high number of ratifications to the Convention on Discrimination against Women without considering, not only the formal reservations filed with respect to that Convention, but also the level of implementation by signatories. The lack of such empirical curiosity is yet another reason why Law-Making in the International Community describes only partially (if at all) existing reality. But see Anthony D'Amato, A Seminar on Custom, in INTERNATIONAL LAW ANTHOLOGY 73 (Anthony D'Amato ed., 1994) (criticizing international lawyers' tendency to be "loose and muddled in our sources of law" and praising domestic lawyers for their rigor in confining themselves to "statutes and cases") [hereinafter ANTHOLOGY].

136. DANILENKO, supra note 4, at 167–71. In that case the Court affirmed the validity of a Security Council decision adopted with the abstentions of two permanent members, despite article 27(3) of the Charter requiring "an affirmative vote of nine members including the conccurring votes of the permanent members." Legal Consequences of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16, 22 (June 21) [hereinafter Namibia Case].
such a general rule of treaty interpretation exists, the Namibia opinion might more accurately be seen in light of established institutional law — as support for the proposition that, at least within the United Nations, each organ is presumptively entitled to determine the legality of its acts and is also entitled to a presumption of legality.\textsuperscript{137} That case is also an example of the relevance of institutional practice to the interpretation of an organization's constitutive instrument, an issue of no small import in terms of prior ICJ cases.\textsuperscript{138} The case hardly stands for the proposition that any modification by a minority of treaty parties outside the institutional context of the United Nations is acceptable. Moreover, as at least one of the concurring opinions in that case suggested, even within the U.N. context, absent Charter amendment, subsequent \textit{de facto} modifications might be possible only when the language of the Charter so permits; that is, when the Charter language is vague enough to permit the change.\textsuperscript{139}

Similarly, Danilenko's suggestion that since only States may bring a contentious case before the ICJ and since article 38 refers only to conventions between "States," other agreements, such as those between international organizations, do not enjoy "judicial" recognition\textsuperscript{140} is at best misleading. Such agreements have been the subject of judicial attention — within domestic courts\textsuperscript{141} and in the ICJ\textsuperscript{142} — and, pursuant to existing treaties, may even be the subject of a binding decision in the ICJ or international arbitral tribunals.\textsuperscript{143}

\begin{itemize}
\item \textsuperscript{137} See, e.g., Expenses Case, 1962 I.C.J. 161.
\item \textsuperscript{138} For varying views on the value of institutional practice to Charter interpretation, consider the views of Sir Percy Spender's, separate opinion in \textit{id.} at 184–97; Competence of the General Assembly for the Admission of a State to the United Nations, 1950 I.C.J. 4, 15–19, 23–24 (Mar. 3) (dissenting opinion of Judge Alvarez); South West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.) 1966 I.C.J. 6, 352–53 (July 18) (dissenting opinion of Judge Jessup).
\item \textsuperscript{139} See, e.g., Namibia Case, 1971 I.C.J. at 153–54 (separate opinion of Judge Dillard). Thus, most commentators would probably assume that no amount of institutional practice could permit the Security Council to adopt a purportedly binding decision over the veto of a permanent member in defiance of article 27.
\item \textsuperscript{140} Danilenko, \textit{supra} note 4, at 45.
\item \textsuperscript{142} Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, 1988 I.C.J. 12 (Apr. 26).
Many established principles of international law are difficult to explain in terms of either the formal sources identified in article 38 or the law-making processes (and evidence) discussed in this book. Danilenko notes, in passing, for example, that the "international legal personality of international organizations was recognized by the I.C.J. in 1949."144 The 1949 Reparations Case did far more than "recognize" that principle. It essentially created that rule out of whole cloth and gave it specific content.

In that case, the General Assembly asked the Court whether the United Nations could bring a claim, both against a member of the organization and against a nonmember, and receive money damages for the harm incurred both by the organization and its agents. It was the Court, not the General Assembly, which decided that the answers to these separate questions turned on the organization's possession of "international personality."145 Yet as the Court itself indicated,146 the text of the Charter, though reasonably clear on the legal capacity of the organization within the territory of each of the member States, says nothing about international personality.147 Nor was the issue clearly resolved during negotiations on the Charter, and the Court's majority does not even mention the negotiating record.148 Instead, the majority turned to the "requirements of international life," as informed by the practice of the organization (including its entry into treaty relations), for its conclusion that the organization possesses "a large measure of international personality."149 Further, in giving an affirmative answer to the question regarding capacity to bring a claim for an agent's own damages, the Court candidly admitted that it faced a "new situation" which it answered by "implying" a "necessary" power because, as the General Assembly had recognized, the organization "needed" to

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144. DANILENKO, supra note 4, at 12 n.49.
146. Id.
148. A Belgian proposal, which would have recognized "that the Organization . . . possesses international status . . ." was rejected, in part because it was unclear to what extent such status was to be the same or distinct from the status of sovereign States. At least one delegate suggested that the issue, or at least its particular implications, should be resolved later by the General Assembly. See LOUIS SOHN, CASES ON UNITED NATIONS LAW 32-33 (2d ed. 1967) (citing materials from the Committee IV/2, May 32, 1945). As often happens, the delegates evidently decided to agree to disagree on the issue, with the drafting committee concluding that the Belgian proposal was "superfluous" since "it will be determined implicitly from the provisions of the Charter taken as a whole." Id.
protect its agents.\footnote{150} Finally, even though the Court had earlier argued that international personality cannot be equated with the right to bring a claim, when faced with the need to resolve the question of whether the United Nations could bring claims against nonmembers, the Court retreated to the proposition that "fifty states, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims."\footnote{151} Just why this is so, the Court did not explain, nor did it explain how, other than by "good will and common sense," these newly-authorized U.N. claims on behalf of its agents' damages were to be reconciled with traditional espousal claims by the agents' home States.\footnote{152}

Despite the logical flaws in the opinion and despite the accusation from dissenting Judges Hackworth and Krylov that the majority was, on many issues, legislating from the bench,\footnote{153} the majority's view in the \textit{Reparations Case} produced nearly instantaneous results. At the next session of the General Assembly, the Secretary General requested and received General Assembly approval of a resolution affirming that the Court's opinion was an "authoritative expression of international law on the questions considered" and accepting the Secretary General's detailed procedure for the presentation of U.N. claims (which incidentally gave the Secretary General substantial discretion in the determination, negotiation, and acceptance of such claims).\footnote{154}

Thus, the proposition that the United Nations, as well as other comparable institutions, is a "person" with the general capacity to engage in at least some acts, like other international persons, such as the bringing of claims and treaty-making, achieved nearly instant status as international law. This is at least partly the result of processes which Danilenko either fails to discuss or affirmatively disparages, namely, a nonbinding but

\footnote{150. \textit{Id.} at 182–83.}

\footnote{151. \textit{Id.} at 185, \textit{quoted in} DANILENKO, \textit{supra} note 4, at 62 n.81. Danilenko does not tell readers how the 50 original U.N. members were able to "impose" this international personality on others, nor how the establishment in 1949 of this principle was consistent with his view that the U.N. Charter does not impose obligations on nonmembers. \textit{Id.} at 208–09.}

\footnote{152. \textit{Reparation Case}, 1949 I.C.J. at 185–86.}

\footnote{153. \textit{Id.} at 198, 219 (dissenting opinions of Judges Krylov and Hackworth).}

\footnote{154. G.A. Res. 365 (IV), U.N. GAOR, 4th Sess., U.N. Doc. A/RES/365 (1949). In doing so, the General Assembly's action produced other incidental legal effects. It obviously expanded the legal authority of the Secretary General vis-à-vis members and nonmembers and helped to establish principles which would subsequently be cited in the context of principles of State responsibility (such as the inappropriateness of "exemplary" or punitive damages). \textit{See} SOHN, \textit{supra} note 148, at 47–54.}
teleological judicial opinion which relies on such nontraditional sources of law as the "principle of effectiveness," coupled with other institutional processes (including a General Assembly resolution and the initiative of an individual, the Secretary General). Such is the way one set of international rules came to fruition in 1949 and such is the way many of them emerge today — not packaged in the neat article 38 boxes Danilenko describes, but through community processes, most especially involving the General Assembly.155

That old arguments about the status of General Assembly resolutions need to be rehashed at this late date is a testament to the remarkable staying power of positivist dogma in the face of reality. Can anyone today afford to ignore the General Assembly's role in norm creation, especially in the areas of human rights and outer space?156 Where is the widespread evidence of State practice and community consensus, quite apart from General Assembly's actions, with respect to the prohibition on national appropriation of the moon, the principle of free exploration of space, or the use of nuclear weapons in space?157 If not through a process like "instant customary law" created via General Assembly action, how exactly did these and other rules of international law, like the Nuremberg Principles, achieve legal status?158 Are courts such as

155. Compare Ronald Dworkin's famous discussion of the interplay between guiding "principles," judicial discretion, and final judge-made rule, in particular his argument that the judicial resolutions of hard cases are difficult to explain based on positivist premises. See Ronald Dworkin, Is Law a System of Rules?, in The PHILOSOPHY OF LAW, quoted in W. MICHAEL REISMAN, JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW (1987) 294–305. But see Koskenniemi, supra note 2, at 20–51 (illustrating contradictions inherent to approaches based on "relative indeterminacy").

156. For an exhaustive survey of the various types of Assembly resolutions and their different types of legal effect, which concludes with a three-fold typology (distinguishing Assembly decisions, recommendations, and declarations), see Blaine Sloan, General Assembly Resolutions Revisited (Forty Years Later), 58 BROOK. Y.B. INT'L L. 39 (1987).


158. Compare Riggs' strained attempts to explain the Assembly's nonlaw-making role with respect to the Nuremberg Principles in Robert Riggs, The United Nations and the Development of International Law, 2 B.Y.U. L. REV. 411, 431–32 (1985). For the arguably "instant" effects on custom brought on through the work of the International Law Commission or other multilateral negotiations, see, e.g., Charles De Visscher, Stages in the Codification of International Law, in TRANSNATIONAL LAW IN A CHANGING SOCIETY 17 (Wolfgang Friedmann et al. eds., 1972); R. Y. Jennings, Recent Developments in the International Law Commission: Its Relations to the Sources of International Law, 13 INT'L & COMP. L. Q. 385 (1964); Ian Sinclair, The Impact of the Unratified Codification Convention, in REALISM IN LAW-MAKing (Adriaan Bos & Hugo Siblesz eds., 1986).
Filartiga v. Pena-Irala\textsuperscript{159} as wrong as the World Court in the Nicaragua Case when they resort to General Assembly resolutions to determine the normative content of international human rights?\textsuperscript{160} To the extent international law is determined by what States and their component parts do and say, as Danilenko repeatedly avers, it seems odd to say that when they rely on General Assembly resolutions to establish the scope of their or others’ legal rights and duties, that they are “wrong.” Moreover, Danilenko’s attempt to distinguish General Assembly resolutions with binding “internal” effect — presumably including legally-binding decisions under article 22 (creation of subsidiary bodies) and article 17 (approval of the budget) — from resolutions with only purportedly general or “external” effects, does not gain credence from the fact that this distinction has been made by others.\textsuperscript{161} Given the tangled web which the Charter now weaves between treaty and custom,\textsuperscript{162} “internal” interpretations of the Charter by responsible organs often generate “general” international law, even if “only” to determine, for example, that a discussion about a State’s human rights policies towards its own people does not constitute unlawful interference in a State’s internal affairs.\textsuperscript{163} And, the consequences of General Assembly action outside the scope of its recommendatory powers may not be limited to U.N. members. The contribution that the U.N. Administrative Tribunal has made to international law is not any less because the Tribunal was created by the Assembly under article 22; nor

\begin{itemize}
  \item \textsuperscript{159} Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980).
  \item \textsuperscript{161} See, e.g., Jochen A. Frowein, The Internal and External Effects of Resolutions by International Organizations, 49 ZEITSCHRIFT FÜR AUSLANDISCHES ÖFFENTLICHES REICHT UND VÖLKERRECHT (ZAORV) 778–87 (1989); Stephen M. Schwebel, The Effects of Resolutions of the UN General Assembly on Customary International Law, PROCEEDINGS OF THE 73RD ANNUAL MEETING OF ASIL, 197, at 301–03.
  \item \textsuperscript{162} See, e.g., Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 93–97 (June 27) (particularly at ¶ 174–82).
  \item \textsuperscript{163} Even as early as 1962, Louis Henkin recognized that [i]nternational organizations also make law in less formal ways. In the UN every organ interprets the Charter to determine its own prerogatives and sometimes those of other organs. The General Assembly, in particular, has repeatedly overridden claims that it was exceeding its Charter authority: It has successfully claimed the power to discuss and make recommendations on issues of war and peace (Korea), on self-determination (French Algeria), on human rights (South Africa); it has purported to make binding assessments for contributions to various UN programs, e.g., the United Nations Emergency Force (UNEF).
\end{itemize}

Henkin, supra note 157, at 660.
is the General Assembly's potential power to tax under article 17 and its consequent possible effects on basic principles, such as the scope of peacekeeping, necessarily of interest only to members of the organization.164 Similarly, nonmembers can scarcely afford to ignore, certainly not after the ICJ's Advisory Opinion in the Namibia Case, the legal effects of the Assembly's termination of South Africa's mandate over that territory.165 While Danilenko's citations to many of those who hold contrary views with respect to General Assembly resolutions suggest that he is aware of these developments, his refusal to wade beyond the water's edge of article 10 of the Charter is a grave flaw in a work which repeatedly denigrates the role of the Assembly in lawmaking.166

Quite apart from the work of international governmental organizations as such, there are many other examples of international lawmaking not captured by Danilenko's analysis. Persons interested in the issue of whether international legal rules exist which govern corporate conduct, including, for example, the specific question of whether legal rules exist to govern the marketing of breast-milk substitutes, must consider the World Health Organization's (WHO) Code on the subject.167 Today, the vast majority of States adhere to rules on this subject,168 yet the formal legal status of the Code from the perspective of article 38 sources is dubious at best. The Code is not a treaty, nor was it adopted pursuant to

165. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16 (June 21) (finding that Assembly had implicit power to terminate South Africa's mandate and implicitly finding this termination effective even as against nonmembers of the United Nations). Indeed, even powers as supposedly "internal" as the power to suspend or expel members (articles 4 and 5), may have substantial "external" legal effects. Will, for example, the Assembly's and the Council's actions with respect to the voting rights of the former Yugoslavia constitute precedents for future human rights violators? See, e.g., S.C. Res. 777, U.N. SCOR, 47th Sess., 3116th mtg., U.N. Doc. S/RES/777 (1992); Recommendation of the Security Council of 19 September 1992, U.N GAOR, 47th Sess., Agenda Item 8, U.N. Doc. A/47/L.1 (1992). At a minimum, the Assembly's articulation of a proposed rule presents an advocate of that rule with the argument that the international community has been thereby put on notice that such a rule has emerged or is emerging and permits adverse inferences if a State fails to object.


an international organization's charter permitting binding rulemaking; the Code itself was merely incorporated as part of a de facto contract between certain nongovernmental organizations and the leading corporate seller of the product, Nestle. It is, in short, that example of nonlaw most disparaged in this book: "soft law." If the Code (or the rules contained therein) has any legal status at all under the traditional article 38 sources, it must be as customary law or perhaps, since the Code has been incorporated by many States as domestic law, as general principles of law.

Yet any "evidence" of "State" consent, such as it is, must be sought in the types of sources which Danilenko does his utmost to disparage — domestic laws, regulations, or national court decisions which incorporate in substance or by reference the provisions of the WHO Code. Moreover, a focus solely on the actions of States says little about how the WHO Code was promulgated and made effective — certainly essential elements of "law-making" under anyone's analysis. As Kathryn Sikkink has made quite clear, the Code's promulgation and effectiveness stems more from the actions of certain epistemic communities both within international organizations and within nongovernmental organizations than from States themselves — a phenomenon singularly ill-suited to Danilenko's state-centric, article 38 perspective on lawmaking. One would conclude, on the basis of a positivistic analysis, that the WHO Code — as well as an ever proliferating body of norms such as those considered under the rubric "international sports law" and many within international economic and environmental law — are not rules of international law. Such a conclusion is faithful to article 38 at the expense of being seriously misleading. Indeed, a corporate client given this positivistic answer might be

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169. *Id.* This is not a phenomenon unique to the WHO Code. Industry, for example, has sometimes assumed the role of "first mover" on environmental issues, thereby helping to promote the hardening of "soft law." See, e.g., Craig N. Murphy, *The United Nations' Capacity to Promote Sustainable Development: The Lessons of a Year that "Eludes All Facile Judgment"*, in *Albert Legault et. al, The State of the United Nations: 1992, ACUNS Reports and Papers* No.3, at 49, 61 (1992).

170. *See, e.g., James A.R. Naefziger, International Sports Law* (1988). Doubtless, Danilenko would consider this an example of an attempt to illegitimately expand "the concept of law" into "areas of normative regulation which have never been considered as belonging to the law proper." *Danilenko, supra* note 4, at 20. Danilenko does not explain, however, what "properly" belongs to the domain of law.

entitled to damages for malpractice — and not merely if the client was intending to do business in a State which had explicitly adopted the WHO Code as domestic law. "Law" of this type, however "soft," might yet have a "bite" — and certainly a bite no different than many "harder" forms of international law.\(^\text{172}\) Moreover, Danilenko does not address the further possibility of "law" arising — whether "hard" or "soft" — without any clear "bite" at all, that is, simply through a "reward" scheme totally lacking in Austinian sanctions or the possibility of adjudication.\(^\text{173}\)

Danilenko's book is designed to convince that no such continuum of binding force exists or ought to exist; that "soft" and "hard" rules exist in separate compartments. But the permeability of the black letter rules Danilenko describes undermine his efforts to secure determinacy. Though he states that custom cannot be instant, he is forced to admit that it has arisen "within a very short period of time" in some cases.\(^\text{174}\) Though he extols the importance of the practice of specifically-affected States in helping to distinguish "real" rules of custom, he argues that not all specially-affected States are equal: since there are some "areas of law calling for general solutions," the position of the equatorial countries on the geostationary orbit of international power probably cannot generate

\(^{172}\) Danilenko, like most international positivists, ignores the difficulty of differentiating between "hard" and "soft" norms at the level of enforcement. Since most international norms are not subject to binding dispute settlement or other forms of enforcement analogous to those available under domestic law, such distinctions may be artificial and difficult to make. Indeed, both "soft" and "hard" law might be subject to the same mechanism for enforcement — such as a requirement that the parties exchange certain information. For an example, see the procedures established under the Conference on Security and Cooperation in Europe (CSCE), Document of the Moscow Meeting on the Human Dimension, Emphasizing Respect for Human Rights, Pluralistic Democracy, the Rule of Law, and Procedures for Fact-Finding, Oct. 3, 1991, 30 I.L.M. 1670, compared to the information exchange provided for in the ORGANIZATION FOR ECONOMIC DEVELOPMENT, CODE OF LIBERALIZATION OF CAPITAL MOVEMENTS (1986). A client, when told that she faces the prospect of reporting lack of compliance to either a body of experts within the CSCE or a body of experts within the OECD, might be understandably impatient with an explanation that only the OECD rules constitute "law." (While the Moscow Document omits words of legal obligation, the Code of Capital Movements explicitly states that is adopted pursuant to the OECD Council’s power to adopt legally binding decisions. See id. at 11.)

\(^{173}\) Compare the standards and recommended practices adopted in the International Civil Aviation Organization, as described in Thomas Buergenthal, LAW-MAKING IN THE INTERNATIONAL CIVIL AVIATION ORGANIZATION 119–22 (1969) (concluding that the noncompulsory nature of ICAO regulation has made the organization more, not less, effective). The critique that positivists usually ignore factors such as trust, fairness, credibility, and affiliation is, of course, time-honored. See, e.g., Reisman, supra note 155, at 281.

\(^{174}\) Compare Danilenko, supra note 4, at 97 n.74, with id. at 98. Given the speed of modern communications and the possibility of nearly instantaneous reactions by States, including through their reaction to a proposed resolution in the General Assembly, the need for the passage of time as such appears irrelevant. For a review of the variety of approaches taken on this question, see Anthony D’Amato, Customary Law Doctrine, in ANTHOLOGY, supra note 135, at 63–64.
"general" custom. Though much of his analysis turns on a firm distinction between *lex lata* and *lex ferenda*, he ultimately concedes that such line-drawing is difficult, if not impossible. Although he proclaims that to be bound by custom, there must be evidence of both practice and *opinio juris* and that individual States must be shown to have consented with respect to each proposed rule of custom, it soon emerges not only that “different areas of the law” require different types of scrutiny on these issues, but also that sometimes practice and *opinio juris* may merge.

Given the uncertainties with respect to the rules which he purports to find, it is ironic that Danilenko suggests that States which advocate new sources of law, such as developing States, are motivated by a “desire to avoid the specific requirements for law-making” required of article 38 sources. Whether the use of, for example, General Assembly resolutions as evidence of either individual State’s *opinio juris* or as evidence of community consensus, represents a less rigorous or more “relaxed” attitude towards lawmaking than the (often contradictory) rules Danilenko advocates is disputable. Moreover, given the United States’s and other powerful

175. DANILENKO, supra note 4, at 127–28. Compare with ANTHOLOGY, supra note 135, at 96, 236.

176. See, e.g., Danilenko’s derision of “soft law.” DANILENKO, supra note 4, at 20; see also id. at 16.

177. Id. at 22, 133–34.

178. Id. at 103–09, 118–123 (as when the absence of protests might be taken to imply “acquiescence” or when certain practice is taken as evidence of *opinio juris* as well). Nor does “acquiescence” require proof that the State in question was affirmatively aware of the legal claims advanced. Because it is “assumed that states carefully watch all legal developments within the international community, the requirement of knowledge does not presuppose any official notifications of relevant legal claims.” Id. at 108. Thus, Danilenko’s supposedly determinate elements of custom evaporate upon close inspection, and even he admits that “many issues relating to custom formation remain controversial.” Id. at 128. Given Danilenko’s adamant views concerning General Assembly resolutions (i.e., that they absolutely do not form a constitutive part of custom and cannot be used as evidence of a change in custom), the following oddity appears to emerge: a “nothing” or nonaction which can (however artificially) be attributed to one State as constituting “tacit acquiescence” constitutes greater evidence of a custom than the consensus views of the entire international community expressed in an Assembly resolution. Danilenko also takes his analysis to the logical conclusion: since unilateral statements evince State practice, he indicates that a State’s statements regarding an Assembly resolution (but of course not the resolution itself) might have a “greater relevance.” Id. at 122 n.158. It is particularly at such times that Danilenko’s analysis evokes D’Amato’s description of positivism as “equivalent to a program installed on a computer: the computer literally follows the commands, whether or not they make sense.” Anthony D’Amato, *Human Rights and Natural Law, in Anthology*, supra note 135, at 24.

179. DANILENKO, supra note 4, at 19, 189. Similarly, given the uncertainties which Danilenko himself uncovers with respect to the three accepted sources of law, it is odd that he rejects community consensus as a mechanism for law generation because it is “lacking in objectively determinable forms of manifestation.” Id. at 202. One would have thought that a concrete Assembly resolution adapted by consensus or by overwhelming recorded vote would be far more determinate than "tacit acquiescence" based on a State’s inaction over a legal claim of which it may never have heard. See supra note 178.
States' increasing resort to the Security Council and other institutionalized mechanisms for lawmaking,¹⁸⁰ it is not clear today, if it ever was, that only developing States favor a more "relaxed attitude towards questions of legal form."¹⁸¹ Danilenko ignores the possibility that resort to the Security Council for the formation of rules, especially increasing resort to its delegated power and its "powers of appreciation," may in the end present greater strains on traditional notions of consent and traditional sources of law than resort to the General Assembly.¹⁸²

More generally, a critical problem with Danilenko's entire approach to the subject of lawmaking is that, as has been said of Prosper Weil,¹⁸³ he ignores that what States do "and not what we want them to do — constitutes international law."¹⁸⁴ Reality, however ill-suited to preconceived theory, should not be ignored. There is little point in bemoaning "soft law" if States want to make it.¹⁸⁵ General principles of law, if actually used by States and courts, cannot be minimized as a source of law because we have disagreements about its content, nor can law generated by international and domestic courts be ignored if it occurs. Nor perhaps need we adhere to doctrines such as "persistent objector," however appealing from the perspective of consensual theory, in the face of little evidence that such objectors actually exist.¹⁸⁶ If States, contrary to Danilenko's

¹⁸⁰. See supra note 124.
¹⁸¹. Danilenko, supra note 4, at 19. Nor is it still the case, if it ever was, that developing States "favor universal approaches to all major community problems." Id. at 273.
¹⁸². Thus, developing States, in particular, are casting doubt on the legitimacy and legality of the Security Council's acts and especially on its representative nature. Some of these States would no doubt favor a return to Danilenko's world where the rules are generated only through treaty and custom and not through the supranational powers of international organizations. See Report of Secretary General, supra note 110 (reporting on Security Council size).
¹⁸⁶. Danilenko affirms the existence of the persistent doctrine on the basis of apparent endorsement of the principle in the Fisheries Case. DANILENKO, supra note 4, at 112. But see Jonathan I. Charney, The Persistent Objector Rule and the Development of Customary International Law, 56 BRIT. Y.B. INT'L L. 1 (1985). He gets around the inconvenient absence of actual examples of the use of such a doctrine by States by arguing that "political realities . . . inevitably affect its practice." DANILENKO, supra note 4, at 112. Yet the point of other portions of his book are precisely that mere affirmations of a principle by the ICJ are worthless unless the rules enunciated are supported by the actual actions of States, i.e., political reality. See, e.g., id. at 122–23 (criticizing ICJ's view that certain acts leading to the adoption of treaties can express opinio juris), 188–89 (criticizing views that the General Assembly can recognize general principles of law).
preferences, decide to promulgate rules of general custom through networks of bilateral treaties or through multilateral agreements which do not originally indicate a codification intent, lawyers may need to reform their concept of treaties and custom to accommodate changing needs.\(^{187}\) Despite the inelegance of today's multifarious and sometimes inconsistent modes for international lawmaking, lawyers have to adapt theory to changing realities; otherwise, their unreal conception of the law risks discrediting the very notion of law.\(^{188}\) While Danilenko may be correct to worry about the resulting normative confusion and uncertainty, his summary of preferred rules governing sources of law does not promote confidence that these rules are any less imprecise, inconsistent, or uncertain.\(^{189}\) Danilenko might well consider, as Oscar Schachter has noted, that "international law is more appropriately viewed as an institution than as a set of rules," that is, that international lawmaking is less a code than a process.\(^{190}\)

III. THE VIRTUES OF BEING POSITIVE

Critics of traditional international law, such as Martti Koskenniemi, would not be surprised by the flaws in this book. As Koskenniemi has written, the doctrine of sources has always had a fundamentally inconsistent dual agenda.

On the one hand, it tries to provide for the concreteness of the law by refusing to accept any norms as simply given, either by virtue of statehood or some anterior normative code. It tells the lawyer where


\(^{188}\) Reisman, International Incidents, in ANTHOLOGY, supra note 135, at 56.

\(^{189}\) For a recent attempt to canvass the inadequacies of article 38, see G. H. Gutta, Sources of International Law: Contemporary Trends, in INTERNATIONAL LAW IN TRANSITION (R.S. Pathak & R.P. Dhokalia eds., 1992). Cf. Zamora, supra note 21, at 42 ("the law/non-law dichotomy may be too simple to explain the role of international economic law in a post-Bretton Woods world").

he can find the law in an objective fashion. On the other hand, sources doctrine also attempts to provide for the law's objectivity by detaching it from the momentary views and interpretations which states might hold of its content. The doctrine of sources includes an attempt to reconcile the law's concreteness with its normativity.  

From Koskenniemi's perspective, Danilenko is trying, by defending his article 38 totem, to reconcile the irreconcilable: he is at one and the same time: (1) telling us what States actually accept as lawmaking processes; and (2) using the article 38 processes as an "independent methodology which can produce normatively constraining results." Thus, Danilenko tells us, for example, not only that States in fact do not accept Assembly resolutions as independent sources of law, but also that any examples to the contrary are dangerously consistent with the accepted sources of article 38 and therefore should not "count." From Koskenniemi's critical perspective then, the above critiques of Danilenko's approach are obvious, if not beside the point. An argument that Danilenko's view of lawmaking is terribly incomplete is a critique based on the contrary evidence of what States and other actors are actually doing in the real world. It is essentially an attack on Danilenko's utopianism. On the other hand, the attacks on the vagueness and inconsistencies of Danilenko's proposed rules for lawmaking are attacks on the apologist strands of his analysis; Danilenko's attempt to take into account the actual inconsistencies in the practice of States exposes him to the charge.

The central message of Martti Koskenniemi's analysis of sources doctrine — which can be taken as the polar opposite of Danilenko's — is that the doctrine of sources, like all other fundamental notions of modern international law, is based on the false notion that law need be and can be made separate from politics. On the contrary, argues Koskenniemi, the doctrine of sources, like all of international law, is subjective and manipulable along the spectrum from apologism for State action to utopianism. From his perspective, both Danilenko's analysis and the above critique are pious frauds: the fruitlessness of the underlying task — to give certainty and stability to a doctrine which is fundamentally uncertain and unstable — serves only to make clearer those basic strains which always existed within international law.

191. Koskenniemi, supra note 2, at 264.
192. Id. at 266; see also Martti Koskenniemi, The Politics of International Law, 1 EUR. J. INT'L L. 4, 20–27 (1990) [hereinafter Koskenniemi, Politics of International Law].
One can accept Koskenniemi’s view, embarking on an approach to
international law which does not rely on any doctrine of sources of law
whatsoever — a concept of law not premised on “false objectivity,” that
does not seek to make the law relatively autonomous from politics.\(^\text{194}\) It
is clear, however, even from Koskenniemi’s own work, that that millen-
nium has not yet arrived.\(^\text{195}\) Further, it is not clear what the role of lawyers
would be were we to cease our “flight from politics.”\(^\text{196}\) As Koskenniemi
has himself indicated, and despite the progress of regulation by interna-
tional organizations, sovereign States remain key actors in international
lawmaking and, notwithstanding the criticisms suggested previously, their
“consent” (however ill-defined) remains important to the legitimacy and
efficacy of international law.\(^\text{197}\)

To that extent then, Danilenko’s work is an honest\(^\text{198}\) attempt to deal
with these realities, which have not fundamentally changed since 1945
despite the end of the Cold War. Danilenko’s sole indirect reference to
the critical theorists who have posed the most thorough critique to the
entire positivist framework deployed in his book is revealing. “It is
submitted,” Danilenko writes, “that the acknowledgment of the problem
of indeterminacy of legal norms in certain areas of law should result not
in the total destruction of the traditional tests of validity, but in their
further refinement and elaboration.”\(^\text{199}\) Koskenniemi’s description of the
dual role of sources might be accurate, yet provoke no rush to abandon
the concept of sources precisely because, for the time being at least,
international lawyers and their clients continue to believe such refinement
and elaboration is, Koskenniemi’s arguments notwithstanding, desirable,
necessary, and possible. Most international lawyers still want to pursue
the enterprise which drives Danilenko: we still feel the need to distinguish,
at least in relative terms, “legal” norms from “political” or morally

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remain relatively autonomous from politics).

195. Indeed, Koskenniemi’s effort in *From Apology to Utopia*, Koskenniemi, supra note
2, is designed to critique prevailing modes of thought. See also Martti Koskenniemi, *The Future
of Statehood*, 32 HARV. INT’L L.J. 397 (1991) (affirming the continued viability of a State-
centric system) [hereinafter Koskenniemi, *Future of Statehood*].

pages of criticism of international legal doctrine, Martti Koskenniemi’s *Apology to Utopia*
devotes a scant ten pages to alternatives which go “beyond objectivism.” Koskenniemi, supra
note 2, at 490–501.


198. It cannot be said that Danilenko does not make clear his explicit value preferences:
order, stability, certainty.

199. Danilenko, supra note 4, at 302.
And that need is not likely to disappear anytime soon — not while the system of international law continues to rely nearly exclusively on its own perceived legitimacy for effectiveness, rather than the force of arms or enactment by legislature, executive, or judiciary. For the foreseeable future it appears that States and other actors in international relations need to continue to believe that a "rule of law" either exists or can be made to appear to exist. They need to continue to believe that such legal rules are relatively distinguishable from arguments based on fundamental fairness or morality, have a definitive "either/or" quality, are subject to a self-contained system of rules about the rules — including circumscribed rules on interpretation — and that, faithfully applied, are capable of generating stability, certainty, and even perhaps, justice. At least to this extent, Danilenko's agenda — to seek to identify the secondary rules for perpetuating that rule of law — continues to have validity. Indeed, in a world creating ever more methods for international regulation, perhaps even undergoing a "paradigm-shift," the need for continuous but critical re-examination of the sources of regulation appears salutary and even vital.

200. But that view is now under attack, not just by critical legal scholars like Martti Koskenniemi, but also by unrepentant natural lawyers. See Fernando R. Teson, The Kantian Theory of International Law, 92 Colum. L. Rev. 53 (1992) (arguing for an international jurisprudence congruent with principles of domestic justice).