LEGAL RECURSIVITY AND INTERNATIONAL LAW: RETHINKING THE CUSTOMARY ELEMENT

ROOZBEH (RUDY) BAKER**

The use of the terms "traditional" and "modern" to describe alternative interpretations of customary international law is recent. Nevertheless, the viewpoints attached to them and the debates they have engendered have existed for at least the past forty years. The emergence of these two alternative interpretations of customary international law has generated much debate within the field. Both "traditional" and "modern" custom have very different interpretations of the role state practice and opinio juris play in the formation of customary international law. This has resulted in confusion over what the precise meanings of these two components of customary international law actually are. Could part of the explanation for the emergence of these two radically different takes lie in the idea that both state practice and opinio juris are increasingly proving inadequate in explaining the process of international norm formation? The growth of international criminal tribunals has resulted in a degree of institutionalized and hierarchical norms that have had no historical precedent in the international system. Although these international criminal tribunals were designed as self-contained legal regimes, their jurisprudence has, nevertheless, begun to be elevated into norms of customary international law. Couple this phenomenon with the increasing rise and influence of transnational actors within the international system, and a complex picture of actors and institutions emerges where the old formula of state practice and opinio juris no longer describes the reality of the situation. This article proposes that, to understand the new realities of the international system, one must turn to socio-legal studies and to the new groundbreaking work within that field on norm formation, implementation, and interaction.

** Lecturer in Law, University of Surrey. B.A., University of California at San Diego; J.D., University of Illinois; LL.M., University of California at Berkeley; Ph.D. (Politics and International Relations), University of Southern California. Correspondence: University of Surrey, School of Law, Guildford, Surrey, GU2 7XH, United Kingdom (U.K.). E-Mail: R.Baker@surrey.ac.uk I would like to thank Ashley Bowes, Terence Halliday, Dennis Paling, Regina Rauxloh, and Arman Sarvarian for their comments on an earlier version of this article.

INTRODUCTION

The use of the terms "traditional" and "modern" to describe alternative interpretations of customary international law is recent, having been introduced in 2001 by scholar Anthea Elizabeth Roberts.[1] Despite this, the viewpoints attached to these terms and the debates they have engendered have existed for at least the past forty years.[2] The "traditional" approach to customary international law holds that the creation of a customary rule comes from two co-equal elements: (1) the widespread consistent practice of states; (2) coupled with the belief (on the part of the acting state) that they are acting out of a sense of legal obligation or *opinio juris*.[3] If enough states act in a consistent manner, through a sense of legal obligation, for a long enough period of time, a new customary international rule is said to have been created. The "modern" approach to customary international law challenges "traditional custom's" reliance on the state practice prong in the test for customary international rules.[4] Instead, "modern custom" seeks to de-emphasize state practice in exchange for a heightened reliance on *opinio juris*. The key point stressed by "modern custom" is that *opinio juris* alone, rather than coupled with consistent state practice, formulates the foundational source of customary international law.[5] The emergence of these two alternative interpretations of customary

---

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

[2] *See* Roozbeh (Rudy) B. Baker, *Customary International Law in the 21st Century: Old Challenges and New Debates*, 21 EUR. J. INT'L L. 173, 178-184 (2010).

[3] PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 44 (7th ed. 1997); ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 6-7 (2005); *Restatement (Third) of The Foreign Relations Law of the United States* § 102(2) (1987).

[4] Roberts, *supra* note 1, at 758-759.

[5] Bin Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law?* 5 INDIAN J. INT'L L. 23 (1965); Bin Cheng, *Custom: The Future of State Practice in a Divided World*, *in* THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW 532 (R. St. J. Macdonald & Douglas M. Johnston eds., 1983); *Remarks of Judge Jimenez de Arechaga*, *in* CHANGE AND STABILITY IN INTERNATIONAL LAW-MAKING 48-50 (Antonio Cassese & Joseph H. Weiler eds., 1988); Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 546 (1993).

international law has generated much debate within the field. A great strength of "modern custom" is a dynamism that "traditional custom," with its emphasis on process, can simply never possess.[6] The great strength of "traditional custom," however, is an inherent restraint that ensures that customary international norms, if adopted, have a wide degree of acceptance within the international community.[7]

Both "traditional" and "modern" custom have very different interpretations of the role state practice and *opinio juris* play in the formation of customary international law. This has led to confusion over what the precise meanings of these two components of customary international law actually are. Ultimately the result of these contradictory interpretations has been a gradual amalgamation of these two formerly distinct ideas. The role of state practice and its relationship to *opinio juris* in the formation of customary international law formation has been the subject of much uncertainty in current scholarship. One key point of confusion is whether state practice is a separate element in customary international norm formation or rather folded into *opinio juris*. This uncertainty finds its source in the observation, by certain scholars, that for the state practice requirement to truly reflect that which it purports to reflect (state practice), a distinction must be made between the potential affirmative claims of a state (which would then count as state practice) versus simple government statements (which would not count as state practice). The key concept stressed here is that affirmative claims followed by action are very different things from statements that are not followed up by an act.[8] While this observation is clear enough, the problem that then arises is what to do with the government statements — if they do not count as state practice, then how are they to be classified? One problematic answer seems to be that they can be thought of as possible evidence of *opinio juris*,[9] which then has the potential of rendering the entire state practice / *opinio juris* divide meaningless.[10]

---

[6] DAVID J. BEDERMAN, CUSTOM AS A SOURCE OF LAW 144-145 (2010).

[7] KAROL WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW 160-168 (2nd ed. 1993); Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L L. 1, 46 (1988); Roberts, *supra* note 1, at 762-763.

[8] ANTHONY D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 87-98 (1971); H.W.A. THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION: AN EXAMINATION OF THE CONTINUING ROLE OF CUSTOM IN THE PRESENT PERIOD OF CODIFICATION OF INTERNATIONAL LAW 58 (1972); KAROL WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW 42, 84 (2nd ed. 1993).

[9] D'AMATO, *supra* note 8, at 87-98; Rein Müllerson, *The Interplay of Objective and Subjective Elements in Customary Law*, *in* INTERNATIONAL LAW: THEORY AND PRACTICE 161-164 (Karel Wellens ed., 1998); Maurice H. Mendelson, *The Formation of Customary International Law*, 272 RECUEIL DES COURS 155, 206 (1998) (Although Mendelson cautions against treating affirmative government action as evidence of both state practice and *opinio juris*.).

[10] *See, e.g.*, *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. U.S.A.)*, 1984 I.C.J. 246, 299 (Oct. 12) (Where the International Court of Justice held

Though the lack of clarity in what state practice must truly reflect has contributed to the gradual amalgamation of the former state practice / *opinio juris* divide, confusion over the exact meaning and parameters of *opinio juris* has also contributed to this problem. The confusion here stems from what some scholars have labeled as the "*opinio juris* paradox."[11] The "*opinio juris* paradox" refers to the fact that if the idea (i.e. of *opinio juris*) refers to the belief that a practice has already become a binding obligation, then the initial belief in an emerging norm is always a mistaken one.[12] How one views the implications of this paradox depends on whether *opinio juris* is seen as a law creating fact or as a law distinguishing it.[13] If *opinio juris* is a tool to distinguish between a mere usage / practice and a binding obligation, then the issue becomes moot.[14] If, however, *opinio juris* is something more, then the "*opinio juris* paradox" becomes highly problematic. As scholars have researched and demonstrated, international jurisprudence has issued conflicting and contradictory opinions that have at times supported both viewpoints — *opinio juris* as law creating and law distinguishing.[15] The paradox matters because if *opinio juris* is a law creating fact, then it no longer can have a role independent of state practice.[16]

The end result of all of these developments has been that the current state of international law involves deep confusion over the role of state practice and *opinio juris* within the customary element.[17] Could part of the explanation for the emergence of these two radically different viewpoints, "traditional" and "modern," lie in the idea that both state practice and *opinio juris* are increasingly proving inadequate in explaining the process of international norm formation? Could it be that the current understanding of the primitive or "customary" element of international law has, within the past thirty years, become increasingly obsolete as the

opinio juris could be confirmed by "the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas.").

[11] *See* Jörg Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems*, 15 EUR. J. INT'L L. 523, 534-535 (2004).

[12] *See* Olufemi Elias, *The Nature of the Subjective Element in Customary International Law*, 44 INT'L & COMP. LAW Q. 501, 502-503 (1995); Kammerhofer, *supra* note 11, at 534-535; BEDERMAN, *supra* note 6, at 149.

[13] *See generally* Elias, *supra* note 12.

[14] *See, e.g.*, MALANCZUK, *supra* note 3, at 45 ("*Opinio juris* is sometimes interpreted to mean that states must believe that something is already law before it can become law. However, that is probably not true; what matters is not what states believe, but what they say. If some states claim that something is law and other states do not challenge that claim, a new rule will come into being, even though all the states concerned may realize that it is a departure from pre-existing rules.").

[15] *See, e.g.*, Elias, *supra* note 12, at 506.

[16] *Id.* at 508-510.

[17] *See, e.g.*, Kammerhofer, *supra* note 11.

international legal system has begun to approach the complexity of its national counterparts?

The growth of international criminal tribunals has resulted in a degree of institutionalized and hierarchical norms that have had no historical precedent in the international system. Although these international criminal tribunals were designed as self-contained legal regimes, their jurisprudence has, nevertheless, begun to be elevated into norms of customary international law.[18] Couple this phenomenon with the increasing rise and influence of transnational actors[19] within the international system, and a complex picture of actors and institutions emerges where the old formula of state practice and *opinio juris* no longer accurately describes the situation. There has been recent scholarship describing the degeneration of state practice and *opinio juris* as the sole sources of customary international law.[20] Though interesting, this scholarship has left unexplored the question of how, in the wake of these new developments, one is to view the processes through which international norms develop. This article proposes that, to understand the new realities of the international system, one must turn to socio-legal studies and to the new groundbreaking work within that field on norm formation, implementation and interaction.

Socio-legal studies explore the effect of social forces on the law.[21] Socio-legal scholars are not interested in the internal rules and doctrines that form a specific doctrinal body of law, but instead consider how law can be, in part, a social construction which interacts with wider historical and cultural forces within society.[22] Socio-legal scholarship has identified, with great precision, the emergence of global norms and the causal mechanisms that accompany their implementation. Most important amongst this scholarship is the work done by Terence Halliday and Bruce Carruthers. Halliday and Carruthers have examined how global norms can be exchanged and transferred between the transnational governmental, quasi-governmental, and non-governmental institutions within the international community as a whole and domestic states.[23] Halliday and

[18] For a detailed description of this phenomenon, *see* Baker, *supra* note 2.

[19] The most widely accepted definition of what constitutes a transnational actor is the one first offered by Robert O. Keohane and Joseph S. Nye in 1971. Keohane and Nye define transnational actors as forces engaged in "contacts, coalitions, and interactions across state boundaries…not controlled by the central foreign policy organs of governments." *See* Joseph S. Nye & Robert O. Keohane, *Introduction*, *in* TRANSNATIONAL RELATIONS AND WORLD POLITICS xi (1972).

[20] *See* Baker, *supra* note 2.

[21] KITTY CALAVITA, INVITATION TO LAW & SOCIETY: AN INTRODUCTION TO THE STUDY OF REAL LAW 4 (2010)

[22] *Id*. at 3-5.

[23] *See* Terence C. Halliday & Bruce G. Carruthers, *The Recursivity of Law: Global Norm Making and National Law Making in the Globalization of Corporate Insolvency Regimes*, 112 AM. J. SOC. 1135 (2007); Terence C. Halliday, *Recursivity of Global Normmaking: A Sociolegal Agenda*, 5 ANN. REV. L. & SOC. SCI. 263 (2009).

Carruthers claim that law making and implementation, on both the system (international) and national level, can act as an iterative and recursive process ("legal recursivity" for short).[24] This article posits that such a framework of law making and implementation as an iterative and recursive process is a more apt description of how, in a new international system dominated by norm generating international tribunals and transnational actors, international rules develop and operate. In the new realities of the international system, state practice and *opinio juris* no longer adequately describe the process through which international norms develop. Given this reality, a new understanding of how international rules form is needed.

Part I of this article will provide a summary of the recent debates that have taken place within the field of international law between so-called adherents of "traditional custom" who claim that state practice and *opinio juris* still form equally the foundation of customary international law, and the so-called adherents of "modern custom" who claim that *opinio juris* can and should take a more central place over state practice. Part II will demonstrate the weakness of the current understanding of customary international law, one which holds state practice and *opinio juris* as the main foundational elements of international custom. This current understanding is flawed because an approach focused on state practice and *opinio juris* fails to take into account the very real effects that norm generating international tribunals and transnational actors have on the formation of international norms. Part III shall present a detailed introduction to the idea of "legal recursivity" and demonstrate how, in an era of norm generating international tribunals and transnational actors, it presents a more logical and empirically rooted explanation of how norms develop in the international system. This article will conclude with a discussion of how "legal recursivity" can provide the correct set of blueprints for moving international legal scholarship forward in this new era.

I. CUSTOMARY INTERNATIONAL LAW AT THE CROSSROADS

The use of the terms "traditional" and "modern" to describe alternative interpretations of customary international law are recent, having been introduced in 2001 by scholar Anthea Elizabeth Roberts.[25] This being said, though the use of these terms is fairly new, the viewpoints attached to them and the debates they have engendered have existed for at least the past forty years.[26] The emergence of these two alternative interpretations of

[24] Halliday & Carruthers, *supra* note 23, at 1135-1138.
[25] *See* Roberts, *supra* note 1.
[26] *See* Baker, *supra* note 2, at 178-184.

customary international law has generated much debate within the field. A great strength of "modern custom" is a dynamism that "traditional custom," with its emphasis on process, can simply never possess.[27] The great strength of "traditional custom," however, is inherent restraint that ensures that customary international norms, if adopted, have a wide degree of acceptance within the international community.[28] Interesting though the debates between these two approaches has been, the current state of international legal scholarship is one of deep confusion due to their longstanding argument. Part of the problem can be attributed to the fact that customary international law generally suffers from a heavily state-centric bias that fails to take into account the very real effects non-state forces, such as norm generating international tribunals and transnational actors, have on the international system. State practice and *opinio juris* are, after all, heavily keyed to state actions and motivations. The attempt of "modern custom" to de-emphasize state practice in favor of *opinio juris* can perhaps be seen then as a way to broaden the array of actors that contribute to the development of international norms. Yet shackled to the state-centric biases of customary international law, confusion has been the only result.

A. EVOLUTION: "TRADITIONAL CUSTOM" AND THE CLASSIC APPROACH

The fundamental components of the traditional approach to customary international law can be found in the widespread consistent practice of states coupled with the belief (on the part of the acting state) that they are acting out of a sense of legal obligation or *opinio juris*.[29] If enough states act in a consistent manner, through a sense of legal obligation, for a long enough period of time, a new customary international rule is said to be created. In this traditional approach, customary international law is heavily state-centric. If a nation state objects to a newly emerging rule of customary international law then it can, in theory, vocally object and announce that it does not view itself as bound to that rule.[30] This objection must be consistently reiterated lest it be lost[31] and, if a rule of customary international law is emerging and a nation state remains silent,

[27] BEDERMAN, *supra* note 6, at 144-145.
[28] WOLFKE, *supra* note 7, at 160-168; Weisburd, *supra* note 7, at 46 (1988); Roberts, *supra* note 1, at 762-763.
[29] MALANCZUK, *supra* note 3, at 44; AUST, *supra* note 3, at 6-7; *Restatement*, *supra* note 3, at § 102(2).
[30] *See Fisheries Case (United Kingdom v. Norway)*, 1951 I.C.J. 116 (Dec. 18). But *see also supra* note 34.
[31] MALANCZUK, *supra* note 3, at 46-48.

then this can be seen as giving implicit consent that the nation state will be bound by the new customary rule.[32]

In the same vein, multilateral treaties can transform into sources of customary international law binding on all states in the international system, whether they are parties to the particular treaty or not, if a large enough portion of non-signatory states in the international system adhere to their provisions out of a sense of legal obligation. States then are, in effect, creating a rule through a two-step process: (1) acting in conformance to said rule over a period of time (the physical element); and (2) because they feel they are legally obligated to do so (the mental element).[33] Traditionally accepted evidence of state practice and *opinio juris* has been taken to include domestic diplomatic correspondence and statements, domestic governmental reports and statements, domestic legislation, and domestic judicial decisions.[34]

There are certain rules of customary international law considered so vital that they cannot be contracted out by individual states. Such peremptory rules are labeled *jus cogens* norms.[35] *Opinio juris* plays an important role in elevating a regular customary international rule into a *jus cogens* norm,[36] for only when the majority of states in the international system believe that a regular customary international rule cannot be persistently objected to, or contracted out of, does this regular norm achieve elevation to *jus cogens*.[37] Running parallel to *jus cogens* norms are what are called obligations *erga omnes*. Obligations *erga omnes* are obligations considered so vital and important within the international system (usually in the form of *jus cogens* norms), that any state - whether directly affected or not - may sue another state in order to compel that the

[32] *See Restatement*, *supra* note 3, at § 102 comment d.

[33] What of the situation however when one has an inconsistency between state practice and *opinio juris* (on the part of one or a group of states)? According to the International Court of Justice (ICJ), in such situations state conduct that acts contrary to the rule should be viewed as a violation of said rule not as evidence of that the state does not intend to recognize said rule. *See Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 98 (June 27).

[34] MALANCZUK, *supra* note 3, at 39-40; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 6-7 (7th ed. 2008).

[35] *Vienna Convention on the Law of Treaties*, May 23, 1969, 155 U.N.T.S. 331, arts. 53, 64, 71; DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 23 (1st ed. 2001).

[36] A list of generally recognized *jus cogens* norms includes the right to self-determination; and prohibitions against aggression, genocide, slavery, racial discrimination, crimes against humanity, and torture. *See* International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries*, art. 26, U.N. Doc. A/56/10 (2001).

[37] ROSALYN HIGGINS, PROBLEMS AND PROCESSES: INTERNATIONAL LAW AND HOW WE USE IT 22 (Clarendon Press 1995). Other commentators however depart from this vision of *jus cogens* as a clear cut idea, *see, e.g.*, Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 414-416 (1989) (Where the authors demonstrate the difficulty in determining the meaning of *jus cogens* through a discussion of the a variety of definitions it has been given.).

obligation be met.[38] In this way obligations *erga omnes* can be seen as a determinant in questions concerning jurisdiction and standing in international law.[39]

B. REVOLUTION: THE EMERGENCE OF "MODERN CUSTOM"

By redrawing the role of state practice and *opinio juris* in the formation of customary international law, adherents of "modern custom" have posited that, far from being a slow moving cautious process, the formation of customary international law can be dynamic with the possibility of occurring nearly overnight.[40] "Modern custom" challenges "traditional custom's" reliance on the state practice prong in the test for customary international rules.[41] Instead, "modern custom" seeks to de-emphasize state practice in exchange for a heightened reliance on *opinio juris* and, in this sense, is more deductive in its logical reasoning where "traditional custom" is more inductive.[42] The key stressed by "modern custom" is that *opinio juris* alone, rather than combined with consistent state practice, formulates the foundational source of customary international law.[43] Proponents of "modern custom" cast state practice as an imprecise idea, with no exact model for the extent and regularity needed for the formation of a customary international rule.[44] State practice is instead viewed as more of a secondary factor in the formation of customary international law,[45] in that it can be thought of as composed of a general acceptance on the part of the community of states in the international system as a whole, rather than the expressed will of individual states.[46]

---

[38] *Barcelona Traction, Light & Power Co., Ltd. (New Application) (Belg. v. Spain)*, 1970 I.C.J. 4, 33-34 (Feb. 5); BEDERMAN, *supra* note 35, at 23.

[39] YITIHA SIMBEYE, IMMUNITY AND INTERNATIONAL CRIMINAL LAW 59-60 (2004).

[40] Cheng (1983), *supra* note 5, at 531-532; Ted Stein, *The Approach of a Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457 (1985); Louis Henkin, *Human Rights and State "Sovereignty"*, 25 GA. J. INT'L L. 37 (1995/96).

[41] Roberts, *supra* note 1, at 758-759.

[42] *Id*.

[43] Cheng (1965), *supra* note 5; Cheng (1983), *supra* note 5, at 532; *Remarks of Judge Jimenez de Arechaga*, *supra* note 5, at 48-50; Charney, *supra* note 5, at 546.

[44] MICHAEL BYERS, CUSTOM, POWER, AND THE POWER OF RULES 156-162 (1999).

[45] Indeed, the International Court of Justice seemed to, in part, endorse this point of view when, in the *Nicaragua* case, it relied more heavily on United Nations (UN) resolutions and international treaties (in order to ascertain customary international rules on the use of force and principle of non-intervention) than on actual state practice. *See Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 98-107 (June 27).

[46] Alain Pellet, *The Normative Dilemma: Will and Consent in International Law-making*, 12 AUSTL. Y.B. INT'L L. 22, 37-46 (1992). There are, however, contrary views to this line of reasoning within adherents of "modern custom." *See, e.g.*, Hiram E. Chodosh, *An Interpretive Theory of International Law*, 28 VAND. J. TRANSNAT'L L. 973, 1052-1056 (1995) (Chodosh

Taking this view further, the premise has been forwarded that it is impossible to determine whether states in the international system are aware of their obligations, whatever said obligations may be. For how can the attitudes and beliefs of a state which is, after all, a collective political institution, be determined?[47] Under this reasoning, international treaties, long held to be a separate source of international law have been held to actually generate customary international rules.[48] The key claim here by adherents of "modern custom" is that, as long as international treaties are to a certain extent widely ratified, then the *opinio juris* that this wide ratification represents on the part of the larger international community is enough to seamlessly transform the treaty provisions (binding on the signatories) into customary international law (binding on all).[49] Not only international treaties, but resolutions of the United Nations (UN) General Assembly[50] and the statements of non-governmental organizations,[51] can play a role in the formation of customary international rules.

On a related track, some adherents of "modern custom" have questioned the traditional formula for determining whether a rule of customary international law has become elevated to a *jus cogens* norm.[52] Moving away from the traditional method which involves a determination of whether the majority of states in the international system believe that a regular customary international norm cannot be persistently objected to or contracted out of, certain "modern custom" scholarship has proposed that an internationally recognized offense[53] which: (a) threatens the peace and security of mankind; and (b) shocks the conscience of humanity, attains elevation as a *jus cogens* norm.[54] This scholarship holds that while both

proposes 4/5 quorum of states adopting a treaty provision before it could be elevated into a customary norm.).

[47] D'AMATO, *supra* note 8, at 82-85.

[48] *Id*. at 104, 110, 164; Louis B. Sohn, *The International Law of Human Rights: A Reply to Recent Criticisms*, 9 HOFSTRA L. REV. 347, 352-353 (1981); Anthony D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1129 (1982); Louis B. Sohn, *"Generally Accepted" International Rules*, 61 WASH. L. REV. 1073, 1076 (1986).

[49] Sohn (1986), *supra* note 48, at 1077-1078.

[50] D'AMATO, *supra* note 48, at 1128 n.72; Sohn (1986), *supra* note 48, at 1074. Note that while it had never been disputed that the UN Security Council, under Articles 24(1) and 25 of the UN Charter (granting it the "primary responsibility for the maintenance of international peace and security" and binding the other UN member states to carry out its directives), had a very real and concrete influence upon international law, it had never been posited that the General Assembly possessed this influence as well.

[51] Isabelle R. Gunning, *Modernizing Customary International Law: The Challenge of Human Rights*, 31 VA. J. INT'L L. 211, 222-225 (1991).

[52] *See* M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 69 (1996).

[53] There are three categories of generally accepted international offenses (derived from various international treaties and custom): (1) war crimes and grave breaches of the *Geneva Conventions*; (2) crimes against humanity; and (3) genocide. *See* ILIAS BANTEKAS, INTERNATIONAL CRIMINAL LAW (1st ed. 2010).

[54] Bassiouni, *supra* note 52, at 69.

elements are not necessarily required for a crime to elevate to a *jus cogens* norms, if they are in fact found (i.e. within the context of an international crime), then that crime has absolutely attained status as *jus cogens*.[55]

C. SYNTHESIS OR CONFUSION?

"Modern custom," with its de-emphasis of state practice in favor of *opinio juris*, has provoked a serious response from adherents of "traditional custom," who have viewed the de-emphasis of the co-equal natures of state practice and *opinio juris* in the formation of customary international law as problematic.[56] These critics argue that the reinterpretation of customary international law advocated by adherents of "modern custom" poses a danger to the entire idea of customary international law.[57] As discussed, this reinterpretation minimizes the role of state practice as a key component in customary international law formation, and envisions the transformation of conventional international law into customary international law as a seamless process. The critique contends that "modern custom," in its emulation of *opinio juris* over state practice, often reflects aspirational goals rather than set standards,[58] and as such reveals itself to be highly normative in nature.[59]

The interpretation of customary international law advocated by the adherents of "modern custom" is, according to those who oppose it, one that seeks to move the sources of customary international law such as state practice and *opinio juris* away from their "practice-based" methodological orientation, and instead employs methods that are more normative in nature.[60] Followers of "traditional custom" hold that international treaties or resolutions of international bodies such as the UN should be seen as possible starting points in the development of international custom, not

---

[55] *Id*.

[56] Although note that some scholars have characterized "traditional custom" as not viewing state practice and *opinio juris* as co-equal but rather as state practice as having precedence over *opinio juris* which is described as a "secondary consideration." *See* Roberts, *supra* note 1, at 758.

[57] *See e.g.*, Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT'L L. 82, 83 (1988-1989). *See also* Robert Y. Jennings, *The Identification of International Law*, *in* INTERNATIONAL LAW, TEACHING AND PRACTICE 5 (Bin Cheng ed., 1982) (Where the author, on commenting on adherents of "modern custom," claims that what they elevate to customary international law, "is not only not customary law: it does not even faintly resemble a customary law.").

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

[59] *See generally* Roberts, *supra* note 1, at 761-770.

[60] G.J.H. VAN HOOF, RETHINKING THE SOURCES OF INTERNATIONAL LAW 107-108 (Kluwer Academic Publishers 1983); Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 425-426 (1983).

norm-generating acts in and of themselves.[61] Adherents of "traditional custom" claim that many of the resolutions that the UN General Assembly votes upon are aspirational in nature and are not intended to be embraced fully and unconditionally by those states voting for them.[62] Given this point of fact, according to followers of "traditional custom," the act of using state practice and *opinio juris* together as the yardsticks of custom formation gains all the more importance. For only then can aspirational or symbolic acts be separated from those intended to be law-making.[63] Followers of "traditional custom" claim that anything labeled as a customary rule of international law, in the absence of any ascertainable state practice, lacks legitimacy.[64]

II. INTERNATIONAL TRIBUNALS, TRANSNATIONAL ACTORS, AND THE CHALLENGE TO STATE-CENTRISM

As has been seen, current interpretations of customary international law are, in many respects, flawed. The debate between adherents of "traditional custom" versus those of "modern custom" has resulted in deep uncertainty and confusion over the role of state practice and *opinio juris* within the customary element. Uncertainty over the meanings and relationships between state practice and *opinio juris* aside, current approaches whether "traditional" or "modern" are also flawed due to a heavily state-centric bias that fails to take into account the very real effects that norm-generating international tribunals and transnational actors have on the international system.[65]

A. INTERNATIONAL TRIBUNALS

[61] Simma & Alston, *supra* note 57, at 89-90.
[62] Thomas M. Franck, *Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits)*, 81 AM. J. INT'L L. 116, 119 (1987).
[63] *See, e.g.*, A. Mark Weisburd, *American Judges and International Law*, 36 VAND. J. TRANSNAT'L L. 1475, 1505-1506 (2003) (Where the author criticizes international law scholars who, when purporting to make claims about what constitutes customary international law, do not refer to state practice.).
[64] *Id*. For a response to this line of reasoning, *see* Anthony D'Amato, *Custom and Treaty: A Response to Professor Arthur A. Weisburd*, 21 VAND. J. TRANSNAT'L L. 459 (1988).
[65] For example, in 2006, there were roughly 300 international organizations and around 40 international legal dispute settlement bodies in the world, and these numbers, high as they are, mostly exclude non-governmental advocacy groups. *See* José E Alvarez, *International Organizations: Then and Now*, 100 AM. J. INT'L L. 324 (2006).

The exponential growth of self-contained international criminal tribunals within the international system has had deep repercussions on how international norms form and develop. Though institutionally designed as self-contained legal regimes, many of the judgments of these tribunals have slowly begun to be elevated into international norms. While scholarship studying this phenomenon is new, the results do show the very real effects international tribunals are beginning to have on the development of international law. Given this, the effects that norm-generating international tribunals have had on the formation of international norms must be taken into account in any attempt to understand how these norms function.

Rudy Baker has studied how some of the recent jurisprudence of international tribunals, mainly the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), have become elevated into international norms.[66] He analyzed the jurisprudence of these tribunals in such diverse issue areas as: (a) the standards required for determining the nature of an armed conflict (i.e. whether it is of an "internal" or "international" nature for the purposes of international law);[67] (b) whether the traditional immunities for heads of state still remain absolute;[68] and (c) the correct *mens rea*[69] standard (a subjective standard based on what the accused knew versus an objective standard based on what the accused should have known) to be applied for international crimes prosecuted under the doctrine of command responsibility.[70] Baker has found that the jurisprudence of these tribunals in these issue areas have not only contradicted traditionally accepted international norms, but have themselves emerged to become accepted norms by states, international legal scholars and tribunals.[71]

B. TRANSNATIONAL ACTORS

The past several decades has seen a resurgence, mainly within the fields of international relations and sociology, of empirical scholarship

[66] *See* Baker, *supra* note 2.
[67] *Id*. at 186-188.
[68] *Id*. at 188-189.
[69] Under both the Roman inspired civil law and English inspired common law, all crimes are composed of two basic elements: the physical element or guilty act (*actus reus*), and the mental element or guilty mind (*mens rea*). *See e.g.*, JEAN PRADEL, MANUEL DE DROIT PÉNAL GÉNÉRAL 436-438. (9th ed. 1994); ZORAN STOJANOVIĆ, KRIVIČNO PRAVO, OPŠTI DEO 111-117, 162-164 (1st ed. 2000); RICHARD CARD, CRIMINAL LAW § 3.1 (15th ed. 2001); WAYNE R. LAFAVE, CRIMINAL LAW §§ 5.1, 6.1 (3rd ed. 2010).
[70] Baker, *supra* note 2, at 190-198.
[71] *Id*. at 186-198.

studying the effects that transnational actors have had on state behavior and vice versa. Though the approaches, methodologies and conclusions of this scholarship have varied, one finding has been universal: transnational actors have a very real role to play in both state behavior and the formation of international norms.

1. Transnational Actors within the International System

Studies on the interactions of transnational actors within the international system focus on how large-scale international governmental and nongovernmental organizations interact with states on the international level. The hallmark of this scholarship has been a focus on how the presence and influence of transnational actors within the international system affects the choices states make and the behaviors they exhibit.

Robert O. Keohane and Joseph S. Nye began in earnest the process of investigating how "transnational interactions or organizations affect interstate politics."[72] Moving beyond a state-centered paradigm that saw the state as the "basic unit of action"[73] within the international system, Keohane and Nye instead look to study how transnational actors can directly affect the international system. Through detailed studies of international governmental and nongovernmental organizations, multinational corporations, and cross-border social protest movements, Keohane and Nye have surmised that transnational actors can affect the international system in five major ways. First, transnational actors can promote "attitudinal changes" to people who have participated or been affected by them.[74] This can have a direct effect on a domestic state's policies and actions if enough of its elite and non-elite citizens are affected.[75] Second, transnational actors can help link together different national interest groups (within a related issue area) and thus assist them in coordinating their actions,[76] a process Keohane and Nye dub "international pluralism."[77] Third, transnational actors can create an environment where national governments are unable to directly pursue their interests (in a given issue area) alone and must instead seek the assistance of transnational organizations and networks,[78] a phenomenon Keohane and Nye label

[72] *See* ROBERT O. KEOHANE & JOSEPH S. NYE (EDS.), TRANSNATIONAL RELATIONS AND WORLD POLITICS (1972).
[73] Nye & Keohane, *supra* note 19, at ix.
[74] *Id*. at xvii-xviii.
[75] *See* Donald P. Warwick, *Transnational Participation and World Peace*, *in* TRANSNATIONAL RELATIONS AND WORLD POLITICS (1972).
[76] *See* Kjell Skjelsbaek, *The Growth of International Nongovernmental Organization in the Twentieth Century*, *in* TRANSNATIONAL RELATIONS AND WORLD POLITICS (1972).
[77] Nye & Keohane, *supra* note 19, at xviii-xix.
[78] *See* Edward L. Morse, *Transnational Economic Processes*, *in* TRANSNATIONAL RELATIONS AND WORLD POLITICS (1972).

"dependence and interdependence."[79] Fourth, by creating a system of "dependence and interdependence" where domestic states are dependent on forces they cannot directly control, transnational actors can inadvertently push those states to seek to manipulate transnational organizations and networks,[80] a process Keohane and Nye dub "creating new instruments for influence."[81] The fifth and final way that transnational actors affect the international system is through transnational organizations becoming, in Keohane and Nye's words, "autonomous or quasi autonomous actors in world politics,"[82] and thus seeking to pursue their own independent policy interests.[83]

Building on the fresh set of insights regarding the influence of transnational actors within the international system offered by Keohane and Nye,[84] the work of Richard W. Mansbach, Yale H. Ferguson and Donald E. Lampert seeks to offer a unifying framework for the study of transnational actors.[85] Attacking a state-centered paradigm viewed as inadequate because it does not sufficiently recognize the presence and influence of transnational actors, Mansbach, Ferguson and Lampert instead look to offer up a model of a "complex conglomerate system" which refers to how various types of autonomous actors, both state and transnational, will align and work together around specific issue areas.[86] To test their new model, Mansbach, Ferguson and Lampert isolated three geographic regions (the Middle East, Latin America and Western Europe) and studied the interactions between state and non-state actors within these regions for the period 1948-1972. Mansbach, Ferguson and Lampert's analysis reveals that non-state actors interacted considerably with the nation-states in each of the three regions tested.[87]

Looking to strike a balance between state-centric approaches and those taking into account the influence of transnational actors, the work of Harold K. Jacobson studies the interactions between international organizations and nation states within the international system.[88] Through his study of the early development, as well as contemporary practices, of international organizations and their interactions with domestic states,

---

[79] Nye & Keohane, *supra* note 19, at xix-xx.
[80] *See* Robert W. Cox, *Labor and Transnational Relations*, *in* TRANSNATIONAL RELATIONS AND WORLD POLITICS (1972).
[81] Nye & Keohane, *supra* note 19, at xx-xxi.
[82] *Id*. at xxi.
[83] *See* Lawrence Krause, *Private International Finance*, *in* TRANSNATIONAL RELATIONS AND WORLD POLITICS (1972).
[84] *See supra* note 71.
[85] *See* RICHARD MANSBACH, YALE FERGUSON, & DONALD LAMPERT, THE WEB OF WORLD POLITICS: NONSTATE ACTORS IN THE GLOBAL SYSTEM (1976).
[86] *Id*. at 41-45.
[87] *Id*. at 273-299.
[88] *See* HAROLD JACOBSON, NETWORKS OF INTERDEPENDENCE: INTERNATIONAL ORGANIZATIONS AND THE GLOBAL POLITICAL SYSTEM (1979).

Jacobson argues that international organizations have created a "complex web" within the international system that has "enmeshed" domestic states.[89] This phenomenon, Jacobsen argues, is at least in part a response to the international system evolving from the multistate system initially ushered in by the Peace of Westphalia and into a more interconnected model where global social and political norms interact and converge across borders.[90] The result of this new reality is that while domestic states still remain the main actors within the international system, their power within the system is no longer absolute, thus leading to an increased necessity to cooperate and develop consensus with one another through the "web" of international organizations.[91]

The work of Peter Willetts has sought to further explore and refine some of the findings regarding the influence of transnational actors within the international system first offered by Keohane and Nye.[92] Through case studies of six transnational actors, or what have been dubbed "transnational pressure groups,"[93] Willetts argues that the notion of power within the international system needs to be redefined. Power in the international system can no longer be defined solely as the authority / ability to do things — power can also be defined in terms of legitimacy as well.[94] Achieving compliance, argues Willets, is not based just upon authority, but also perceived legitimacy.[95] Through this refined definition of power, Willetts proposes that transnational actors have a great deal of power within the international system because although they lack the authority / ability for direct action, they can at times attack the legitimacy of domestic state actions, and in this way exert "pressure."[96] Legitimacy is attacked through "changing people's perception of the issues," which could be done through violent military action (e.g. the Palestine Liberation Organization) on one

[89] *Id*. at 14-19.
[90] *Id*. at 398-414.
[91] *Id*. at 416-422. It should be noted that Jacobson's ultimate conclusions here, although framed differently, in the end does not differ markedly from Keohane and Nye's findings regarding "international pluralism" (i.e. the ability of transnational actors to link together different national interest groups within a related issue and assist them in coordinating their actions), and "dependence and interdependence" (i.e. the ability of transnational actors to create an environment where national governments were unable to directly pursue their interests in a given issue area alone, and had to instead seek the assistance of transnational organizations and networks).
[92] *See* PETER WILLETS (ED.), PRESSURE GROUPS IN THE GLOBAL SYSTEM: THE TRANSNATIONAL RELATIONS OF ISSUE-ORIENTATED NON-GOVERNMENTAL ORGANIZATIONS (1982).
[93] These "transnational pressure groups" being: the Anti-Apartheid Movement, the Palestine Liberation Organization, Amnesty International, Oxfam, Friends of the Earth, and the Women's Movement.
[94] Peter Willetts, *Introduction*, *in* PRESSURE GROUPS IN THE GLOBAL SYSTEM: THE TRANSNATIONAL RELATIONS OF ISSUE-ORIENTATED NON-GOVERNMENTAL ORGANIZATIONS 21-22 (1982).
[95] *Id*.
[96] *Id*. at 22-24.

end of the spectrum through "presenting arguments and information" (e.g. the Anti-Apartheid Movement and Amnesty International) on the other.[97]

Martha Finnemore has explored how states can be "socialized" by the network of actors (both state and transnational) that make up the international system.[98] Rejecting the classic realist[99] presumption that domestic states have fixed goals of "power, security, and wealth," Finnemore has developed a social constructivist[100] approach which argues that socialization within the international system can affect the preferences of domestic states.[101] Finnemore empirically tests her theory through three case studies on how international institutions (the United Nations' Educational, Scientific and Cultural Organization or UNESCO; International Red Cross; and World Bank) are able to reconstitute the interests of their various domestic state members. This reconstitution is achieved through "teaching," where the various international organizations reflect to their domestic state members new international norms through "setting agendas, defining tasks, and sharpening interests."[102]

Though varied in its methods and approach to the study of transnational actors, the key similarity of all of the scholarship surveyed in this section has been its focus on how large-scale international governmental and nongovernmental organizations interact with states on the international level. As has been seen, this scholarship is consistent in the finding that the presence and influence of transnational actors within the international system affects the choices states make and the behaviors they exhibit. These findings speak to the need to include transnational actors in any discussion of how international norms are formed.

2. Studies of Transnational Actors on the State Level

---

[97] *Id*. at 186-187. As can be seen here, the ultimate conclusions reached by Willetts serve to further explore and refine some of the original findings of Keohane and Nye regarding "attitudinal changes" (i.e. the ability of transnational actors to change and affect elite and non-elite attitudes in a given issue area) and thus serve as a vindication of the original observations they first made.

[98] *See* MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY (1996).

[99] Classical realism is a state-centric viewpoint within international relations theory which holds that the international system is anarchic and as a result governed by principles that are forever constant—the main constant being the will (on the part of states) to power. It these twin ideas of anarchy and power that, above all else, anchor classical realism. Power is observed to be the main driving point that explains the behavior of actors in the anarchic international system. *See e.g.*, HANS MORGENTHAU, POLITICS AMONG NATIONS (Alfred A. Knopf 1948) (1985); KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS (1979).

[100] Social constructivism is a society-centric viewpoint within international relations theory which holds that the international system is governed by principles that are not permanent, but rather contingent on ongoing social processes and interactions (i.e. "constructed"). *See, e.g.*, John G. Ruggie, *What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge,* 52 INT'L ORG. 855 (1998).

[101] FINNEMORE, *supra* note 97, at 1-3, 5, 13.

[102] *Id*. at 12-13.

Studies of transnational actors on the state level focus on how transnational social movements and advocacy groups try to push their policy preferences and affect state behavior. The hallmark of this scholarship has been an emphasis on the tools and processes these transnational actors utilize in order to attempt to influence state behavior, and how international norms begin to emerge as a result.

Thomas Risse has looked to analyze the conditions under which transnational actors can penetrate domestic state governing structures and influence national policy.[103] Risse conceptualizes a theoretical framework that looks to both the national and international-level norms and institutions states operate within, in order to identify the policy impact of transnational actors.[104] A key variable that he utilizes is the variation in the amount of "international institutionalization" with regard to the specific policy being advocated by the transnational actors in question.[105] The higher the levels of "international institutionalization,"[106] the higher the expectation that transnational actors will be able to influence domestic state policies. International institutions can thus act as a force facilitating the access of transnational actors into national political structures, by making it easier for them to form policy coalitions with like-minded domestic actors and then directly lobby for their policy preferences.[107]

Jackie Smith, Charles Chatfield, and Ron Pagnucco have looked specifically at transnational actors which are advocacy groups and the policy preferences they advocate.[108] Labeling the transnational actors they study as "transnational social movement organizations" or TSMOs, Smith, Chatfield and Pagnucco explore how various TSMOs have been able to push their policy preferences onto domestic states through organizing constituencies, targeting international organizations, and mobilizing resources.

Margaret E. Keck and Kathryn Sikkink have sought to study not only specific transnational actors and their ability to affect domestic state behavior, but to move beyond and study "networks" of transnational advocacy groups.[109] "Transnational advocacy networks" are composed of

---

[103] *See* THOMAS RISSE-KAPPEN (ED.), BRINGING TRANSNATIONAL RELATIONS BACK IN: NON-STATE ACTORS, DOMESTIC STRUCTURES, AND INTERNATIONAL INSTITUTIONS (1995).

[104] Thomas Risse-Kappen, *Introduction*, *in* BRINGING TRANSNATIONAL RELATIONS BACK IN: NON-STATE ACTORS, DOMESTIC STRUCTURES, AND INTERNATIONAL INSTITUTIONS 6 (1995).

[105] *Id*. at 30.

[106] Measured by the existence, on the international level, of "cooperative" international institutions (e.g. UN or international treaty regimes, overarching supranational institutions such as the European Union, etc.) in specific policy areas. *See* Risse-Kappen, *supra* note 103, at 30-31.

[107] Risse-Kappen, *supra* note 103, at 30-31.

[108] *See* JACKIE SMITH, CHARLES CHATFIELD, & RON PAGNUCCO (EDS.), TRANSNATIONAL SOCIAL MOVEMENTS AND GLOBAL POLITICS: SOLIDARITY BEYOND THE STATE (1997).

[109] *See* MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (1998).

"relevant actors working internationally on an issue" who are "bound together by shared values, a common discourse, and a dense exchange of information and services."[110] Adopting the concept of "analytic frames" from sociology,[111] Keck and Sikkink argue that transnational advocacy networks work in part to fashion and present issues in a way that can "legitimate and motivate collective action."[112] Keck and Sikkink then fashion a model that explains how transnational advocacy networks frame issues and motivate collective action in order to affect specific policy changes in targeted domestic states. Labeling their model the "boomerang pattern," Keck and Sikkink envision a world where national advocacy groups can activate their transnational advocacy network that can then put pressure (through framing the issues at hand and thereby motivating collective action) on other domestic states and relevant international organizations.[113]

Building on Keck and Sikkink's earlier work,[114] Thomas Risse, Stephen C. Ropp and Kathryn Sikkink have attempted to bring together the "boomerang pattern" elaborated by Keck and Sikkink and synthesize it within a broader theoretical framework.[115] Laying out these conditions in a complex model which they label the "spiral model," Risse, Ropp and Sikkink argue that Keck and Sikkink's original "boomerang pattern" model can be elaborated.[116] The "spiral model" envisions a world where, much like the "boomerang pattern" model, national advocacy groups can activate their transnational advocacy network (made up of advocacy groups around the world with transnational reach) that would then put pressure (through framing the issues at hand and thereby motivating collective action) on other domestic states and relevant international organizations.[117] The two models differ in that the "spiral model" sees the process as fluid, with the targeted state first making blanket denials and resulting in a new round of targeted pressure, later followed by tactical concessions resulting in a new round of targeted pressure and, finally, rule consistent behavior. The key in the back and forth is that each stage can result in the targeted state becoming "socialized" or conforming to preferred behaviors and norms.[118]

---

[110] *Id*. at 2.
[111] Analytic frames "frame, or assign meaning to and interpret relevant events and conditions in ways that are intended to mobilize potential adherents and constituents, to garner bystander support, and to demobilize antagonists." *See* David A. Snow & Robert D. Benford, *Ideology, Frame Resonance, and Participant Mobilization*, 1 INT'L SOC. MOV'T RES. 197, 198 (1988).
[112] KECK & SIKKINK, *supra* note 108, at 2-4, 16-17.
[113] *Id*. at 12-16.
[114] *See* KECK & SIKKINK *supra* note 108.
[115] *See* THOMAS RISSE, STEPHEN C. ROPP, & KATHRYN SIKKINK (EDS.), THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE (1999).
[116] Thomas Risse & Kathryn Sikkink, *The Socialization of Human Rights Norms*, *in* THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE 17-19 (1999).
[117] *Id*. at 20.
[118] *Id*. at 10.

Sanjeev Khagram, James V. Riker and Kathryn Sikkink, much in the same vein as Smith, Chatfield and Pagnucco,[119] have sought to study the effects of transnational social movement organizations on the international system.[120] Looking in part to the social movements literature within sociology, including the concept of analytic frames,[121] Khagram, Riker and Sikkink argue that the main ability of transnational actors to affect change in the international system is either through taking well established "international norms"[122] and using them to "persuade" outlying actors to conform their behavior, or attempting to establish new "international norms" where none had previously existed.[123] Such "persuasion" is accomplished by transnational actors through "the use of information, persuasion, and moral pressure to contribute to change in international institutions and government."[124]

Though utilizing diverse methods and approaches to the study of transnational actors, the key similarity of all of the scholarship surveyed in this section has been its focus on how transnational social movements and advocacy groups try to push their policy preferences and affect state behavior, and how international norms can then begin to emerge as a result. As has been seen, this scholarship is consistent in its exploration of the tools these transnational actors utilize in order to attempt to affect state behavior, and seemingly suggests that at least some of these processes are iterative in nature. These findings speak to the need to include transnational actors in any discussion of how international norms are formed.

III. LEGAL RECURSIVITY: A WAY FORWARD?

Given the problematic nature of the current conceptualization of customary international law, which relies on the ill-defined and problematic components of state practice and *opinio juris* as its cornerstones, a new framework of thinking about customary international norm formation is needed. By moving away from "customary international law" and its dual components of state practice and *opinio juris,* and looking instead to understand how norms develop, new and empirically tested frameworks of norm formation from the social sciences can be introduced

---

[119] *See* SMITH ET AL. *supra* note 107.

[120] *See* SANJEEV KHAGRAM, JAMES V. RIKER, & KATHRYN SIKKINK (EDS.), RESTRUCTURING WORLD POLITICS: TRANSNATIONAL SOCIAL MOVEMENTS, NETWORKS, AND NORMS (2002).

[121] Sanjeev Khagram, James V. Riker, & Kathryn Sikkink, *From Santiago to Chile: Transnational Advocacy Groups Restructuring World Politics*, *in* RESTRUCTURING WORLD POLITICS: TRANSNATIONAL SOCIAL MOVEMENTS, NETWORKS, AND NORMS 12, 15-16 (2002).

[122] Khagram, Riker, and Sikkink define "international norms" here as shared standards of behavior accepted by a majority of actors within the international system.

[123] Khagram, Riker, & Sikkink, *supra* note 120, at 14-15.

[124] *Id*. at 11.

to the discussion. As shall be seen, "legal recursivity," a framework from socio-legal studies which views law-making and implementation, on both the international and national level as an iterative and recursive process, points the way forward.

A. LEGAL RECURSIVITY IN CONTEXT: TRANSNATIONAL ACTORS TAKE CENTER STAGE

Legal sociologists Terence Halliday and Bruce Carruthers have examined how norms can be exchanged and transferred between, on the one hand, the transnational governmental, quasi-governmental, and non-governmental institutions within the international community as a whole, and, on the other hand, domestic states. According to Halliday and Carruthers, law-making and implementation on both the international and national levels can act as an iterative and recursive process.[125] International and national level actors can develop legal norms that can then be refracted onto one another through exogenous processes such as economic coercion, persuasion through international institutions, and universal norms (which can then act as models on what constitutes acceptable behavior within the international and / or national system).[126] These norms can then undergo recursive cycles on both the international and national levels, as formal law ("the law on the books") goes through cycles of change as it is interpreted and implemented ("law in practice"),[127] refracting back and forth between the two levels. [128] That episodes of these recursive cycles will occur is not a given, nor will these cycles necessarily occur in perpetuity.[129] Rather, they are driven by four distinct identifiable mechanisms: (1) the indeterminacy of law (the ambiguities inherent in statutes, regulations, and court opinions that leads to the possible unintended consequences of their application, setting off repeated rounds of redrafting and reapplication[130]); (2)

[125] Halliday & Carruthers, *supra* note 23, at 1135-1138.
[126] *Id*. at 1146-1148.
[127] "Legal recursivity," following classic socio-legal theory, holds that the "conditions of lawmaking affect implementation, and the circumstances of practice influence what law gets placed on the books." *See* Halliday, *supra* note 23, at 269. *See also infra* note 127.
[128] Halliday & Carruthers, *supra* note 23, at 1144, 1146-1147. *See also* the work of Lauren Edelman (for an earlier exploration of this phenomenon in the national setting): Lauren Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531 (1992); Lauren Edelman, *Legality and the Endogeneity of Law*, *in* LEGAL AND COMMUNITY: ON THE INTELLECTUAL LEGACY OF PHILIP SELZNICK (2002); Lauren Edelman, *Law at Work: The Endogenous Construction of Civil Rights*, *in* HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES (2005).
[129] Halliday, *supra* note 23, at 274.
[130] Halliday & Carruthers, *supra* note 23, at 1149; Halliday, *supra* note 23, at 281-282.

contradictions (the phenomenon that emerges ideologically when clashing visions amongst actors leads to imperfect legal settlements, or institutionally when legal implementation is divided out between different institutions[131]); (3) diagnostic struggles (the struggle between various actors of diagnosing perceived shortcomings in legal norms and identifying corrective prescriptions[132]); and (4) actor mismatch (mismatches that occur when there is a disparity between actors who actually participate in the norm-making process in a particular issue area, and those who the norms actually affect — in other words, actors who are directly affected by a new norms implementation are not participants in its creation[133]). "Legal recursivity" conceptualizes norm-making as, above all else, an "exercise of power" and a "struggle among competing actors in global arenas."[134] Norm-making episodes have a beginning (time 1) when there are competing claims and conflicts and an end (time 2) when behavior and expectations have become "routinized, orderly, and predictable" by accepted, and therefore authoritative, norms.[135] Recursive cycles are what occur between time 1 and time 2.

[131] Halliday & Carruthers, *supra* note 23, at 1149-1150; Halliday, *supra* note 23, at 280-281.
[132] Halliday & Carruthers, *supra* note 23, at 1150-1151; Halliday, *supra* note 23, at 278-279.
[133] Halliday & Carruthers, *supra* note 23, at 1150-1151; Halliday, *supra* note 23, at 277-278.
[134] Halliday, *supra* note 23, at 268-269.
[135] *Id*. at 274.

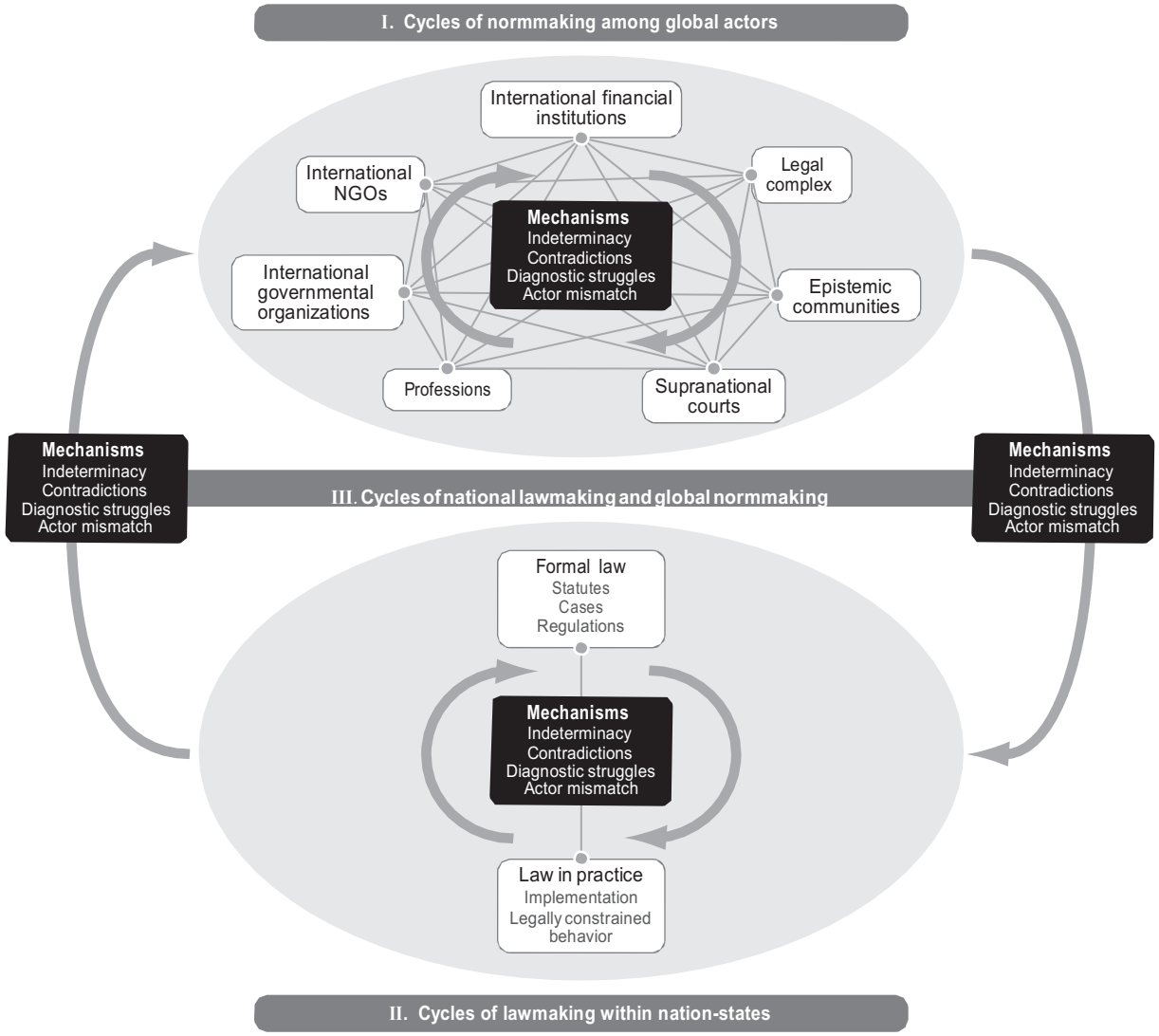

Figure 1: Legal Recursivity Explained[136]

B. LEGAL RECURSIVITY AS A BLUEPRINT FOR NORM INTERACTION

[136] Figure replicates chart provided in Halliday, *supra* note 23, at 270.

Through its detailed description of the causal mechanisms and processes of norm formation and implementation, Halliday and Carruthers's work on "legal recursivity" is exceptional in offering a true blueprint for examining the methods through which international and national norms interact. Additionally, "legal recursivity" fits well into the literature surveyed earlier detailing the empirical work done on the effects of international tribunals and transnational actors in the formation of international norms,[137] for it provides an overarching framework that describes the constant formation, reformation and refinement of international and national level norms, and the causal mechanisms that drive this process, both within and between the two levels (international and national)[138]. The identification of the causal mechanisms driving recursivity is key, as the identification of such mechanisms is essential if one is to truly empirically study any natural phenomenon.[139] As Gregory Shaffer and Tom Ginsburg have so rightly noted, international law scholarship must move beyond debates regarding its utility and instead move towards more empirical work studying "the conditions under which international law is formed and has effects."[140] "Legal recursivity" meets this challenge by being open to a whole range of qualitative (observational) empirical methods, including: comparative analysis,[141] ethnographic analysis,[142] case study analysis,[143] and process tracing[144]. It should be said,

[137] *See supra* Part II.

[138] Much of the literature surveyed earlier in § II, though rich in theoretical insight, was somewhat inadequate in detailing the causal mechanisms that drove the relationships investigated.

[139] Causal mechanisms have been defined in numerous ways by social scientists. They have been classified as anything from "the process by which a cause brings about an effect … a theory or an explanation, and what it explains is how one event causes another," to "entit[ies] that — when activated — generate … an outcome of interest," or as "a delimited class of events that change relations among specified sets of elements in identical or closely similar ways over a variety of situations". Despite this plethora of definitions, a simplified understanding of a causal mechanism, one that can partially incorporate all of the various conceptualizations just listed, could perhaps be that of a causal mechanism as a type of "trigger" that activates relationships between various social forces or variables. *See* BARBARA KOSLOWSKI, THEORY AND EVIDENCE: THE DEVELOPMENT OF SCIENTIFIC REASONING 6 (1996); James Mahoney, *Beyond Correlational Analysis: Recent Innovations in Theory and Method*, 16 SOC. F. 575, 580-581 (2001); Charles Tilly, *Mechanisms in Political Processes*, 4 ANN. REV. POLIT. SCI. 21, 25-26 (2001).

[140] *See* Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT'L L. 1 (2012).

[141] The comparative method involves the comparison and subsequent analysis of a set of cases. Through a systematic set of comparisons made between sets of cases, the effect of various differences across the cases under study can then be gauged. *See* ADAM PRZEWORSKI & HENRY TEUNE, THE LOGIC OF COMPARATIVE SOCIAL INQUIRY (1970); David Collier, *The Comparative Method*, *in* POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE II (1993).

[142] Ethnographic analysis involves continuous direct observation and possible interaction of the group(s) under study. *See* KAREN O'REILLY, ETHNOGRAPHIC METHODS (2005).

[143] The case study method involves the intense study of single case and serves as a useful methodological vehicle for studies looking to test and refine theories. The detailed descriptive analysis it demands can serve to provide for the observation of potential causal interactions between identified variables. *See* Arent Lijphart, *Comparative Politics and the Comparative*

however, that all of these empirical methods just listed are quasi-experimental in nature (as are all methods, either qualitative or quantitative, utilized by the social sciences). Any quasi-experimental method, by its very definition, implies that the researcher utilizing it cannot specifically manage the assignment of "causes to units."[145] Without randomized assignment of "causes to units," quasi-experiments run the risk of endogeneity — the effect seemingly caused by the independent variable[146] on the dependent variable[147] is actually a consequence of the dependent variable itself — in other words, the direction of influence from independent to dependent variable occurs in reverse.[148] Another related problem is the fact that unobserved and uncategorized variables (i.e. omitted variable bias) may be driving the seemingly observed relationship.[149]

The numerous problems of measurement associated with quasi-experimental research designs can and do present valid potential methodological stumbling blocks. This critique of quasi-experimental designs can be addressed, however, by the understanding that observational studies utilizing a quasi-experimental design will always suffer from imprecise models and partial data,[150] and indeed, by their very nature, suffer from several key threats to their internal validity (i.e. threats to the correlation in values between the independent variable and dependent variable).[151] The numerous problems of measurement associated with

Method, 65 AM. POL. SCI. REV. 682 (1971); John Gerring, *What is a Case Study and What is it Good For*?, 98 AM. POL. SCI. REV. 341 (2004).

[144] Process tracing is a method designed, in part, to identify the "causal process" or "causal chain" between independent and dependent variables. This is achieved through the systematic mapping of the "explanatory narrative" until the position where the relationships between the various variables can be identified. This can be undertaken through a detailed narrative, generalization, or an analytic explanation. *See* ANDREW BENNETT & ALEXANDER GEORGE, CASE STUDIES AND THEORY DEVELOPMENT IN THE SOCIAL SCIENCES (2005).

[145] Adam Przeworski, *Is the Science of Comparative Politics Possible?*, *in* OXFORD HANDBOOK OF COMPARATIVE POLITICS 8 (2007)

[146] The variable that potentially influences another variable.

[147] The variable that is potentially influenced by another variable.

[148] GARY KING, ROBERT O. KEOHANE, & SIDNEY VERBA, DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH 185-186 (1994).

[149] Przeworski, *supra* note 144, at 9-10. To work against omitted variable bias, strong theory coupled with a superior understanding of the cases under study can help.

[150] *See* David Collier, Henry E. Brady, & Jason Seawright, *Sources of Leverage in Causal Inference: Toward an Alternative View of Methodology*, *in* RETHINKING SOCIAL INQUIRY: DIVERSE TOOLS, SHARED STANDARDS 237, 242 (2004).

[151] These threats include: (1) history (specific events occurring between the pre-test and post-test in regards to the variables under study); (2) maturation (changes in the variables commiserate with the passage of time); (3) testing (changes in the variables stemming from the preparation to test them, rather than from the application of any treatment); (4) instrumentation (a change in the measurement used to rate the phenomena under study); (5) instability (unstable measurements); and (6) regression to the mean. For a more detailed description of these threats to internal validity

quasi-experimental designs can always be mitigated (though never completely eliminated) through a well-executed operationalization of the variables under study, good research design, strong theory, and a superior understanding of the cases under study.[152] Indeed, a point that bears making is that, their clear weaknesses aside, observational studies can be particularly well placed to give the researcher leverage in making "causal process observations."[153] These types of observations, which consist of "data that provide information about context or mechanism," can provide exceptional insight into the causal chains driving the relationships between the independent and dependent variables under study.[154] "Legal recursivity" is not only especially well-suited to overcome the measurement problems inherent in any quasi-experimental design, but to also provide the "thick" descriptive insight that only observational methods can provide. This is so because it: (a) is systematic in its approach through its focus on a constantly reoccurring set of dynamics; (b) introduces hypotheses related to the actors and mechanisms that can drive norm-making;[155] (c) identifies beginnings (time 1) and endings (time 2) in recursive cycles of norm-making; (d) is historical in outlook and takes contingent changes in institutions, based on shifts in time, seriously; and (e) is comparative and indeed encourages comparisons across issue areas and levels of analysis.[156]

CONCLUSION

The debate between adherents of "traditional" and "modern" custom stems from a fundamental flaw in international legal scholarship — its heavy state-centric bias. While such an approach was necessary in the era when the nation state ruled supreme, that era is long over. If international legal scholarship is to move forward, then the rise of norm-generating international tribunals and transnational actors and their effect on the international system must not be ignored and, indeed, they have to be given center stage. This article has presented a novel approach to the exploration of the ways norms form in the international system, one which

and methodological tools that can be used to combat them, *see* DONALD T. CAMPBELL & JULIAN C. STANLEY, EXPERIMENTAL AND QUASI-EXPERIMENTAL DESIGNS FOR RESEARCH (1966); Donald T. Campbell & H. Laurence Ross, *The Connecticut Crackdown on Speeding: Time Series Data in Quasi-Experimental Analysis*, *in* THE QUANTITATIVE ANALYSIS OF SOCIAL PROBLEMS (1970).

[152] Collier, Brady, & Seawright, *supra* note 149, at 238.

[153] *Id*. at 252.

[154] *Id*. at 252-255.

[155] In this way "legal recursivity" corrects a key flaw in international law "theory," the lack of any clear or accepted over-arching theoretical framework. *See* Kammerhofer, *supra* note 11, at 536-551.

[156] Halliday, *supra* note 23, at 269.

looks to new and empirically tested models of norm formation from the social sciences. In pursuing this line of inquiry, the idea of "legal recursivity" proposed by legal sociologists Terence Halliday and Bruce Carruthers has been suggested as a more apt description of how international norms develop and operate in a new international system dominated by norm-generating international tribunals and transnational actors. "Legal recursivity" examines how norms can be exchanged and transferred between the transnational governmental, quasi-governmental, and non-governmental institutions within the international community as a whole, and domestic states. "Legal recursivity," as a description of how international norms develop and operate (and indeed interact with national norms) points a way forward for international scholarship towards a more rigorous, scientific, and thus empirical approach. The international system is on pace to become ever more complex, as international tribunals continue to expand their areas of jurisdiction and transnational actors continue in their efforts to influence state behavior. Under such circumstances, research into the development and operation of individual international norms becomes all the more vital.