Michigan Journal of International Law

Volume 17 | Issue 1

1995

Custom, Power, and the Power of Rules

Michael Byers
Queens' College, University of Cambridge

CUSTOM, POWER, AND THE POWER OF RULES

CUSTOMARY INTERNATIONAL LAW FROM AN INTERDISCIPLINARY PERSPECTIVE

*Michael Byers**

---

* Ph.D. Candidate, Queens' College, University of Cambridge; Supervisor in International Law, Queens' College, Christ's College and Trinity College, Cambridge; Founding Member, Public International Law and Policy Group. B.C.L., McGill University (1992); LL.B., McGill University (1992); B.A., University of Saskatchewan (1988).

I wish to express my thanks to Philip Allott, Blaine Baker, James Crawford, Peter Haggenmacher, Benedict Kingsbury, Martti Koskenniemi, Claus Kress, Susan Marks, Georg Nolte and Stephen Toope for their helpful comments on earlier drafts, to Frances Nicholson for her editorial assistance, and to Jayaprakash Sen, whose intellectual contributions at the early stages of this project were most significant.

This article is dedicated to Professor Jean-Guy Quenneville of St. Thomas More College and the Department of Political Studies at the University of Saskatchewan. Professor Quenneville, now retired, is largely responsible for my interest in legal systems and international law.

INTRODUCTION

There are three parts to the title of this article. The first is "Custom," because this article is about the process of customary international law. The process of customary international law involves the maintenance, development, and change of customary rules, which constitute an important part of the international legal system.[1] The second part of the title is "Power," because this article argues that the process of customary international law is based in large part on applications of state power, that is, the ability of one state to compel or significantly influence the behavior of another. The third part of the title is "the Power of Rules," because this article argues that the applications of state power which are largely responsible for the maintenance, development, and change of customary rules are themselves qualified by rules and principles of international law. Power, as dealt with in this article, is power qualified and transformed by the international legal system.

The first two parts of the title also typify two academic disciplines. The first part, "Custom," symbolizes the discipline of international law, while the second part, "Power," symbolizes the discipline of international relations. The third part of the title, "the Power of Rules," anticipates an attempt to bridge the gap between those two disciplines.

This article begins by explaining briefly the differing perspectives which these two general categories of scholars — those who study international law and those who study international relations — have of international society generally, and of law and power more specifically. This article exposes the fact that power is an important but largely unnoticed subject of much international legal discourse and also can-

1. This article focuses on the customary process as it operates with respect to generally applicable international rules. The process operates in a similar manner, but with a more restricted scope, with respect to rules of regional, or special, customary international law. For explanations of regional or special customary international law as it has, more or less, traditionally been understood, see Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1, 28–31 (1974–75); Anthony A. D'Amato, *The Concept of Special Custom in International Law*, 63 AM. J. INT'L L. 211 (1969); G. Cohen-Jonathan, *La coutume locale*, 1961 ANNUAIRE FRANÇAIS DE DROIT INT'L [A.F.D.I.] (Centre National de Recherche Scientifique) 119; and Paul Guggenheim, *Lokales Gewohnheitsrecht*, 11 ÖSTERREICHISCHE ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT UND VÖLKERRECHT [Ö.Z.ö.R.] 327 (1961).

vasses attempts by international relations scholars to incorporate law into their understandings of power.

An attempt is then made to synthesize the two perspectives into a general theory of customary international law. This theory explains the process of customary international law as a social institution created and shaped by the shared understandings and patterned behavior of self-interested states. According to this theory, customary rules largely arise through the application of power by states within a framework made up of the customary process and a number of fundamental structural principles of international law. This theory thus seeks to bring the study of power within the scope of international legal scholarship in a way that does not deny an important element of stability and determinacy to law. It might also encourage some international relations scholars to regard international law as a constraint on the exercise of power which cannot be ignored or changed in response to short-term interests.[2]

With these two goals in mind, the final four sections of this article provide examples of how certain fundamental principles of international law qualify the application of state power in the process of customary international law. The first of these sections considers the principle of jurisdiction, the second the principle of personality, the third the principle of reciprocity, and the fourth the principle of legitimate expectation.

This article draws heavily on recent work in both international law and international relations, but does not fit entirely within either domain. Instead, it acknowledges the complexity of social relationships in a way which might disconcert some international lawyers and international relations scholars, who are, perhaps necessarily, accustomed to operating within discrete spheres of analysis.[3] By exploring the complex relationship between customary international law and state power, this article

---

2. *See* ORAN R. YOUNG, INTERNATIONAL COOPERATION 206–09 (1989); discussion *infra* part II. Anne-Marie Slaughter Burley has written that "if law . . . does push the behavior of states toward outcomes other than those predicted by power and the pursuit of national interest, then political scientists must revise their models to take account of legal variables." Anne-Marie S. Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 206 (1993).

3. *See* discussion *infra* p. 129. For support for an interdisciplinary approach to the study of law, see Philip Allott, *Making Sense of the Law*, CAMBRIDGE REV., Mar. 1987, at 15; Philip Allott, *Making Sense of the Law*, CAMBRIDGE REV., June 1987, at 65. For an acknowledgment of the need for international relations scholars to engage social complexity, see Justin Rosenberg, *The International Imagination: IR Theory and 'Classic Social Analysis'*, 23 MILLENNIUM 85 (1994). It should also be noted that because this article deals with power as it is qualified and transformed by the international legal system, its examination of the work of international relations scholars focuses on that relatively small part of their literature which has dealt with power as it is applied within the context of regimes or institutions. See discussion *infra* part II.

seeks to demonstrate that increased movement between the two disciplines, while not necessarily leading to better solutions to practical problems, may well lead to better understandings of the international society in which we live.

I. POWER AND INTERNATIONAL LAW

In adopting an interdisciplinary perspective on the process of customary international law this article makes three assumptions which are fundamental to that traditionally dominant school of international relations scholarship referred to as "realism." The first two of these assumptions are also important aspects of many modern conceptions of international law.

First, this article makes a statist assumption: that the actors primarily engaged in the process of customary international law are states.[4] Second, it makes a consensual assumption: that states do not become subject to international legal obligations unless they have first given their consent. This consent, however, may come in the form of general consent to the process of customary international law, and not as specific consent to individual rules.[5] Third, this article assumes that states act in

---

4. States are clearly not the only actors of importance on the international stage. Transnational corporations, currency speculators, insurgents, criminals, terrorists and human rights groups are all able to influence other actors, including states, in important ways. Nevertheless, states, as the sole holders of full international legal personality, are almost entirely responsible for the behavior which makes and changes international law, even though that behavior may be heavily influenced by the activities of other, non-state actors. Consequently, an explanation of a process of international law creation — in a fairly restricted sense — does not necessarily have to deal with non-state actors. For similar statist positions adopted by realists, see, *e.g.*, HANS J. MORGENTHAU, POLITICS AMONG NATIONS (3d ed. 1965); GEORG SCHWARZENBERGER, POWER POLITICS 13–15 (3d ed. 1964); KENNETH WALTZ, THEORY OF INTERNATIONAL POLITICS 93–97 (1979); and, for commentary, see JUSTIN ROSENBERG, THE EMPIRE OF CIVIL SOCIETY 10–15 (1994). For examples of non-statist realist approaches, which are only just beginning to appear, see SUSAN STRANGE, STATES AND MARKETS (1988); Virginia Haufler, *Crossing the Boundary between Public and Private: International Regimes and Non-State Actors*, *in* REGIME THEORY AND INTERNATIONAL RELATIONS 94 (Volker Rittberger ed., 1993).

5. By accepting some rules of customary international law states are necessarily accepting rules about how those rules are maintained, developed or changed. *See* PHILIP ALLOTT, EUNOMIA: NEW ORDER FOR A NEW WORLD 145–77 (1990); JOSEPH RAZ, PRACTICAL REASON AND NORMS 123–29 (1990). For particularly clear statements as to the consensual approach to customary international law, see The Steamship Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A), No. 9, at 18 (Sept. 7); P.E. Corbett, *The Consent of States and the Sources of the Law of Nations*, 6 BRIT. Y.B. INT'L L. 20 (1925); GODEFRIDUS J.H. VAN HOOF, RETHINKING THE SOURCES OF INTERNATIONAL LAW 76 (1983). For consensual ("contractual") language from international relations scholars see Robert O. Keohane, *The Analysis of International Regimes*, *in* REGIME THEORY AND INTERNATIONAL RELATIONS, *supra* note 4, at 23; Friedrich Kratochwil, *Contracts and Regimes*, *in* REGIME THEORY AND INTERNATIONAL RELATIONS, *supra* note 4, at 73.

largely self-interested ways, and that one, if not the primary, way in which they promote their self-interest is the application of power.[6]

In addition, this article adopts a broad definition of power. Power is the ability of one actor to compel or significantly influence the behavior of another. It may be applied through the use or threat of force, through economic incentives or penalties, or through a variety of social pressures. It may be derived from a number of different sources, including military capabilities, wealth or moral authority. It may be augmented or constrained by concepts, values, institutions and rules. It is above all a relational concept, in that the ability to compel or influence always depends on the relative abilities of the different actors concerned either to apply or resist pressure.

With few notable exceptions, legal scholars have avoided considering *directly* the effects of power relationships on the creation of international legal rules.[7] Instead, they have to varying degrees generally assumed that international law is created through processes which are at least *procedurally* objective and in that sense apolitical. This assumption of procedural objectivity is based, in turn, on the not entirely solid concept of state equality.

The concept of state equality has been part of international legal thought for more than two centuries.[8] It finds representative expression in Article 2(1) of the Charter of the United Nations, which states that

---

However, because many realists still assume that consent is required for every individual rule *and* think that any effective legal system requires strong enforcement mechanisms, they remain skeptical about whether international law has any real, "prescriptive" effect. *See, e.g.*, J.S. Watson, *A Realistic Jurisprudence of International Law*, *in* YEAR BOOK OF WORLD AFFAIRS 265 (George W. Keeton & Georg Schwarzenberger eds., 1980). For a response to the concern about enforcement see John H.E. Fried, *How Efficient is International Law?*, *in* THE RELEVANCE OF INTERNATIONAL LAW: ESSAYS IN HONOR OF LEO GROSS 93 (Karl W. Deutsch & Stanley Hoffmann eds., 1968).

6. This is the classic realist assumption. *See, e.g.*, EDWARD H. CARR, THE TWENTY YEARS' CRISIS 1919–1939, at 85–88 (2d ed. 1961); MORGENTHAU, *supra* note 4, at 5–8; ROBERT O. KEOHANE, *The Demand for International Regimes*, *in* INTERNATIONAL INSTITUTIONS AND STATE POWER 101 (1989).

7. The exceptions include 1 HAROLD D. LASSWELL & MYRES S. MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY 399–452 (1992); SCHWARZENBERGER, *supra* note 4, at 198–212. *But see* SCHWARZENBERGER, *supra*, at 506–09. For another, recent exception, see Shelley Wright, *Economic Rights, Social Justice and the State: A Feminist Reappraisal*, *in* RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 117 (Dorinda G. Dallmeyer ed., 1993) [hereinafter Wright, *A Feminist Reappraisal*]. For a discussion of the similarities and differences between the ideas of Lasswell and McDougal and those advanced in this article, see *infra* pp. 123–24 and note 98.

8. In 1758 Emer de Vattel wrote that "[a] dwarf is as much a man as a giant is; a small Republic is no less a sovereign state than the most powerful Kingdom." E. DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF INTERNATIONAL LAW 7 (Charles G. Fenwick trans., 1916).

"[t]he Organization is based on the principle of the sovereign equality of all its Members," and it has been articulated repeatedly in the resolutions and declarations of the United Nations General Assembly.[9] There is, however, an important difference between the notional, or formal, equality of states and social equality.[10]

The concept of formal equality is, in some respects, an essential element of the international legal system. All states are entitled to participate in the system because they are formally equal. Reciprocity, a principle examined in some depth later in this article,[11] has the legal effects it does because all states are formally entitled to the same general rights and subject to the same general obligations. In terms of law creation, the concept of formal state equality is of particular importance with respect to the creation of law through treaties. Formal equality allows states to enter into these agreements with reasonable assurance that the obligation of *pacta sunt servanda*, the rules of treaty interpretation, and the duty to make reparation in the event of a breach will be applied on an equal basis.[12] Nevertheless, just as contract law in national legal systems allows for the application of bargaining power while at the same time regulating the interaction of economically interested parties, the rules governing international treaties do not eliminate disparities in either negotiating strength or the ability to impose effective retaliatory sanctions in the event of a breach.[13] However, these rules do provide an

---

9. *See, e.g., Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., 1883d mtg., U.N. Doc. A/RES/2625 (1970). Note, however, the creation of special rights for the permanent members of the Security Council in Chapter V of the U.N. Charter, and the weighting of votes in the World Bank and International Monetary Fund. Articles of the International Bank for Reconstruction and Development (World Bank) art. 5(3)(a), 2 U.N.T.S. 39, 134; 606 U.N.T.S. 295 (July 22, 1944); Articles of Agreement of the International Monetary Fund art. 12(5)(a)–(b), 726 U.N.T.S. 266 (July 22, 1944).

10. *See* James Crawford, *Islands as Sovereign Nations*, 38 INT'L & COMP. L.Q. 277, 284–87 (1989) (explaining the difference between formal equality among states and actual equality in terms of power and resources). The difference between formal and social equality is also relevant to national legal systems. *See, e.g.*, ANNE E. MORRIS & SUSAN M. NOTT, WORKING WOMEN AND THE LAW (1991); J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION (1979); Carol Bacchi, *Do Women Need Equal Treatment or Different Treatment?*, 8 AUSTL. J.L. & SOC'Y 80 (1992). For theoretical discussions see JOHN RAWLS, A THEORY OF JUSTICE 60–90 (1971) and RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 179–83, 223–39 (1977).

11. *See infra* part VI.

12. *See generally* PAUL REUTER, INTRODUCTION TO THE LAW OF TREATIES (José Mico & Peter Haggenmacher trans., 2d ed. 1995).

13. *See generally* Robert Y. Jennings, *What is International Law and How Do We Tell It When We See It?*, 37 SCHWEIZERISCHES JAHRBUCH FÜR INTERNATIONALES RECHT [Schw. J.i.R.] 59, 68 (1981); Alain Pellet, *The Normative Dilemma: Will and Consent in International*

essential element of procedural consistency, the absence of which would have significantly constrained the enormous expansion in treaty relations which has occurred in the latter half of the twentieth century.

The concept of formal state equality is considerably less useful with respect to the process of customary international law which, in the words of Oscar Schachter, "gives weight to effective power and responsibility."[14] The customary process gives weight to power because, rather than involving quasi-contractual agreements, it concerns patterns of legally relevant behavior which, if not effectively opposed, may develop into legal rules.[15] Although all states are equally entitled to participate in the process, it is generally easier for more powerful states to engage in behavior which will significantly affect the maintenance, development, or change of customary rules than it is for less powerful states to do so.[16]

Furthermore, as this article will later discuss, the maintenance, development, or change of customary rules usually involves a weighing

---

Law-Making, 12 AUSTL. Y.B. INT'L L. 22, 42–45 (1992). It is interesting to note that international treaties are still considered valid even if they have been entered into under duress, unless that duress has involved an unlawful use of force. This is not the case with contracts in most national legal systems. *See* John P. Dawson, *Economic Duress — An Essay in Perspective*, 45 MICH. L. REV. 253 (1947). Power is thus even less constrained by international treaty law than it is by most national laws of contract.

14. Oscar Schachter, *Entangled Treaty and Custom*, *in* INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABTAI ROSENNE 717, 721 (Yoram Dinstein ed., 1989). Schachter's sentence continues: "whereas multilateral treaty-making . . . treats all States as equally capable." *Id. See also* Oscar Schachter, *International Law in Theory and Practice*, 178 RECUEIL DES COURS D'ACADEMIE DE DROIT INTERNATIONAL [R.C.A.D.I.] 9, 26–32 (1982); Oscar Schachter, *Remarks on Disentangling Treaty and Customary International Law*, 81 AM. SOC'Y INT'L L. PROC. 157, 158, 163–64 (1987).

15. *See generally* H.W.A. THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION (1972); KAROL WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW (2d rev. ed. 1993); Akehurst, *supra* note 1; Gennady M. Danilenko, *The Theory of International Customary Law*, 31 GER. Y.B. INT'L L. 9 (1988). Opposition is the only option open to a state which does not approve of a proposed or developing rule. *See* Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT'L L. 1, 1 n.3 (1985); *see generally* I.C. MacGibbon, *Customary International Law and Acquiescence*, 33 BRIT. Y.B. INT'L L. 115 (1957); I.C. MacGibbon, *The Scope of Acquiescence in International Law*, 31 BRIT. Y.B. INT'L L. 143 (1954).

16. At a very basic level, powerful states have larger, better financed diplomatic corps and are therefore better able to follow international developments across a wide spectrum of issues. This enables them to support, in a timely fashion, those developments which they perceive as furthering their interests, and to object to those developments which they view as being contrary to those interests. If more than verbal or written statements are required, powerful states also have the military, economic and political strength to enforce jurisdiction claims, impose trade sanctions, and dampen or divert international criticism. However, the ability of states to contribute to the process of customary international law may also vary because of internal political constraints, such as those which have existed in Japan and Germany with respect to the use of force, and the differing traditions and self-perceptions which national societies have of their role in world events.

of different amounts of supporting, ambivalent, and opposing behavior.[17] Power, and its relational nature, is therefore particularly important in the process of customary international law.

Finally, states frequently choose to remove themselves from power struggles over particular customary rules by acquiescing to new or potential changes or developments. If, for instance, the world's most powerful states are ambivalent with respect to a new or developing rule and do nothing, the power relationships among less powerful but more interested states may be determinative.[18] These power relationships will, in turn, be qualified by the relative strengths of different sources of power, the self-evident nature of some shared interests and the existence of fundamental, structural principles of international law. Of course, in some situations there is no disagreement among states as to the desirability of a particular rule and therefore no opposition to it. Relative power does not play a role in these situations, although such situations are rare.[19]

Unfortunately, many international legal scholars have ignored the effects of power relationships on the development of customary rules, or have made ineffective attempts to explain these effects away.[20]

---

17. *See* discussion *infra* part III.B.

18. A similar phenomenon may occur with respect to the negotiation of some multilateral treaties. In situations where the more powerful states are less interested in the outcome of the negotiations than some less powerful states, these weaker states may assume leading roles.

19. One example of such a situation is the development of the prohibition against genocide. *See generally* Malcolm Shaw, *Genocide and International Law*, *in* INTERNATIONAL LAW AT A TIME OF PERPLEXITY, *supra* note 14, at 797. Other possible examples include the development of rules concerning the use of outer space and celestial bodies, *see generally* Bin Cheng, *United Nations Resolutions on Outer Space: 'Instant' International Customary Law?*, 5 INDIAN J. INT'L L. 23 (1965), and the rule concerning coastal state jurisdiction over the continental shelf. *See generally* James Crawford & Thomas Viles, *International Law on a Given Day*, *in* FESTSCHRIFT FÜR KARL ZEMANEK 45 (1994). The absence of opposition in these situations allows customary rules to develop very quickly and to become, in effect, almost "instant" customary international law.

20. Anthony D'Amato, for instance, agreed that some states are better at publicizing their actions and related legal opinions than other states and are consequently more effective in shaping customary international law. ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 96–97 (1971). However, he assumed that the customary process offers a level playing field. He claimed that "all nations have the same set of entitlements; that each entitlement has equal legal standing vis-a-vis other entitlements; that international law strives to preserve the equilibrium that equal entitlements create by permitting retaliation by nations whose entitlements have been violated . . . ." Anthony D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1112 (1982). As a result, "the customary rules that survive the legal evolutionary process are those that are best adapted to serve the mutual self-interest of *all* states." Anthony D'Amato, *Trashing Customary International Law*, 81 AM. J. INT'L L. 101, 104 (1987) (emphasis added). D'Amato did not consider whether the degree to which a state participates in the process — the degree to which it protects its "entitlements" — might relate to its relative power vis-à-vis other states. For views similar to that of D'Amato on this point, see Akehurst, *supra* note 1, at 23; and, albeit not explicitly, Danilenko, *supra* note 15.

Schachter is one scholar who has recognized that power is an important factor in the maintenance, development, and change of customary rules, but nobody has expanded this insight to provide a detailed explanation of the role of power in the process of customary international law.[21]

A. *Power and Resolutions and Declarations as State Practice*

Although most international legal scholars do not explicitly acknowledge the important role played by power in the process of customary international law, power is a central, if largely unrecognized, part of ongoing debates on the subject. For example, scholars still debate whether, in what way and to what degree the resolutions and declarations of international organizations (particularly the United Nations General Assembly) are able to contribute to the maintenance, development, and change of rules of customary international law. The traditional position, reflective of a period in which a few powerful states dominated the international system more than any do today, provided that resolutions and declarations are only able to contribute to the extent that they are expressions of *opinio juris*, the subjective element of customary international law.[22] Some scholars even expressed doubt as to this function, suggesting that resolutions and declarations cannot constitute reliable expressions of *opinio juris* because state representatives frequently do not believe what they say.[23]

---

21. For other, limited acknowledgments of the importance of power in the customary process, see, *e.g.*, V.D. Degan, *Peaceful Change*, 16 REVUE BELGE DE DROIT INT'L [R.B.D.I.] 536, 549 (1981–82); Pellet, *supra* note 13, at 44; K. Venkata Raman, *Toward a General Theory of International Customary Law*, *in* TOWARD WORLD ORDER AND HUMAN DIGNITY, ESSAYS IN HONOR OF MYRES S. MCDOUGAL 365, 388 (W. Michael Reisman & Burns H. Weston eds., 1976) [hereinafter Raman, *Toward a General Theory*]; W. Michael Reisman, *The Cult of Custom in the Late 20th Century*, 17 CAL. W. INT'L L.J. 133, 144 (1987). For a call for an explanation on the role of power, see Daniel M. Bodansky, *The Concept of Customary International Law*, 16 MICH. J. INT'L L. 667 (1995) (book review).

22. *See, e.g.*, Georges Abi-Saab, *The Development of International Law by the United Nations*, 24 REVUE EGYPTIENNE DE DROIT INTERNATIONAL [R.E.D.I.] 95, 100 (1968); René-Jean Dupuy, *Coutume Sage et Coutume sauvage*, *in* MÉLANGES OFFERTS À CHARLES ROUSSEAU 75, 83–84 (1974). For more on *opinio juris*, see discussion *infra* part III.A. With respect to changes in the international system, it seems clear that the process of decolonization, the acquisition by non-industrialized states of a numerical majority in many international organizations, the economic resurgence of Western Europe and the Pacific Rim, the end of the Cold War, the disintegration of the Soviet Union and the demise of most command economies have reduced and rearranged the relative power advantages and disadvantages which existed in the early post-World War II years.

23. *See, e.g.*, Gaetano Arangio-Ruiz, *The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations*, 137 R.C.A.D.I. 419, 455–59 (1972-III).

Since 1945 the General Assembly has become an important forum for the newly-independent states of the non-industrialized world. These states, however, have found themselves severely disadvantaged in a legal system which accords greatest influence to wealth and military strength. Attempts to change the system have enjoyed limited success. These new states have used their numerical majority to adopt resolutions and declarations which advance their own interests rather than those of powerful states.[24] They have also, in conjunction with a significant number of legal scholars (and arguably the International Court of Justice), asserted that these resolutions and declarations are important instances of state practice which create, or at least indicate, rules of customary international law.[25] Most powerful states and scholars from powerful states have resisted this assertion of power by new states.[26] A compromise position may now be emerging, to the effect that resolutions and declarations are instances of state practice which do not carry as much weight as those instances of state practice that involve more traditional forms of state action.[27] In any event, it is clear that states and

---

24. In some cases the non-industrialized states have nevertheless recognized the necessity of getting the powerful states on their side. A good example of this occurred during the negotiation of the 1982 United Nations Convention on the Law of the Sea. *See* Hugo Caminos & Michael R. Molitor, *Progressive Development of International Law and the Package Deal*, 79 AM. J. INT'L L. 871–82 (1985).

25. *See, e.g.*, OBED Y. ASAMOAH, THE LEGAL SIGNIFICANCE OF THE DECLARATIONS OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS 46–62 (1966); JORGE CASTANEDA, LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS 168–77 (Alba Amoia trans., 1969); ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 6–7 (1963); Eduardo Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 R.C.A.D.I. 1, 30–34 (1978-I); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 1, 4, at ¶¶ 183–90 (June 27) [hereinafter Nicaragua Case]. For a paper which goes further and considers the behavior of non-governmental organizations relevant to the process of customary international law, see Isabelle R. Gunning, *Modernizing Customary International Law: The Challenge of Human Rights*, 31 VA. J. INT'L L. 211 (1991).

26. A debate on this issue took place in the Sixth Committee of the United Nations General Assembly in 1974. *Review of the Role of the International Court of Justice*, U.N. GAOR 6th Comm., 29th Sess., 1470th mtg., Agenda Item 93 at 38, U.N. Doc. A/C.6/SR.1470 (1974) (Mexico); 1486th mtg. Agenda Item 93 at 133–4, U.N. Doc. A/C.6/SR.1486 (1974) (Netherlands & Mexico); 1492d mtg., Agenda Item 93 at 166–70, U.N. Doc. A/C.6/SR.1492 (1974) (various states). *See also* D'Amato, *Trashing Customary International Law*, *supra* note 20; Stephen M. Schwebel, *United Nations Resolutions, Recent Arbitral Awards and Customary International Law*, *in* REALISM IN LAW-MAKING: ESSAYS IN HONOUR OF WILLIAM RIPHAGEN 203 (Adriaan Bos & Hugo Siblesz eds., 1986); I. Seidl-Hohenveldern, *International Economic Law*, 198 R.C.A.D.I. 9, 68 (1986-III); Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 417 (1983). For a particularly strong, recent expression of this view from a Polish author, see K. Wolfke, *Some Persistent Controversies Regarding Customary International Law*, 24 NETH. Y.B. INT'L L. 1, 3–4 (1993).

27. This is the position adopted here. *See* discussion *infra* part III.B; *accord* Pellet, *supra* note 13, at 44; GUY LADREIT DE LACHARRIÈRE, LA POLITIQUE JURIDIQUE EXTÉRIEURE DE LA

scholars, despite their refusal to frame the debate about resolutions and declarations in these terms, are disputing the role of power in the formation of customary international law.

B. *Power and the Scope of International Human Rights*

The role of power in the process of customary international law is also an important, albeit not explicit, element of the debate about the extent to which international human rights law can pierce the territorial jurisdictions of non-consenting states.[28] It is generally accepted that the rules and procedures articulated in human rights treaties apply, as treaty obligations, only to states which have ratified those treaties. Yet many scholars have insisted that even those states which have refused to ratify human rights treaties have international human rights obligations. They have based this insistence on two main grounds. First, by ratifying the U.N. Charter, all member states accepted the general human rights obligations set out in Articles 55(c) and 56.[29] This argument asserts that the subsequent human rights treaties have simply elaborated the Charter-

---

FRANCE 55–58 (1983). For a suggestion of support see 1 OPPENHEIM'S INTERNATIONAL LAW 31 (Robert Jennings & Arthur Watts eds., 9th ed. 1992). For an attempt to remove the debate — as it relates to human rights — from the area of customary international law and place it under the rubric of general principles of international law, see Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT'L L. 82 (1992). It is interesting that this debate has focused on those organizations which operate on the basis of one state-one vote, and not on other organizations, such as the World Bank and International Monetary Fund, which operate on the basis of weighted voting systems. The one state-one vote system is itself an important qualifier on traditional forms of power, in that it has given less powerful states a better means of expression, and raised the possibility that this expression, itself a new source of power, could have law-creating effects.

28. The traditional position is exemplified by the U.N. Charter: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter . . . ." U.N. CHARTER art. 2(7). *See also* Ian Brownlie, *The Relation of Law and Power*, *in* CONTEMPORARY PROBLEMS OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF GEORG SCHWARZENBERGER ON HIS EIGHTIETH BIRTHDAY 19, 21 (Bin Cheng & E.D. Brown eds., 1988).

29. Article 55 states:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> (*c*) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. . . .

U.N. CHARTER art. 55(c). Article 56 states that "[a]ll Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55." U.N. CHARTER art. 56.

based obligations, not created new obligations in themselves.[30] Second, scholars have asserted that rules of customary international law have developed with respect to the content of specific human rights and the jurisdiction of the international community to monitor, encourage respect for and even enforce the implementation of those rights within the territory of non-consenting states.[31]

Many states and some scholars have disagreed strongly with the above propositions.[32] The objections of many non-industrialized states to the "cultural imperialism" of the international human rights movement and continued stonewalling by states such as China, Indonesia and Iran stand in stark contrast to the language of instruments such as the Universal Declaration of Human Rights and the claims of most scholars working in the field.

In practice, international organizations have settled on a compromise. This middle ground accepts the development of some human rights as rules of customary international law but limits the international community to a "droit de regard": a right to monitor and encourage from the outside the protection of those rights within non-consenting states.[33] This compromise does not allow individual states, groups of states or international organizations to intervene directly in the internal affairs of non-consenting states.[34]

Humanitarian intervention is the only significant area of international law in which this compromise might be breaking down. However, state practice in support of a right of humanitarian intervention is minimal, especially when compared to decades of nonintervention on human-

---

30. *See, e.g.*, THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 81–85 (1989); Jean-François Bonin, *La protection contre la torture et les traitements cruels, inhumains et dégradants: l'affirmation d'une norme et l'évolution d'une définition en droit international*, 3 REVUE QUÉBÉCOISE DE DROIT INTERNATIONAL [R.Q.D.I.] 169, 171–73 (1986); Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 13–17 (1982).

31. *See generally* MERON, *supra* note 30, at 79–135; Simma & Alston, *supra* note 27, at 84–96 (reviewing various positions).

32. *See, e.g.*, Eric Lane, *Demanding Human Rights: A Change in the World Legal Order*, 6 HOFSTRA L. REV. 269, 279–86 (1978); J.S. Watson, *Autointerpretation, Competence, and the Continuing Validity of Article 2(7) of the UN Charter*, 71 AM. J. INT'L L. 60, 71–77 (1977); Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L L. 1, 39–41 (1988). This article does not deal with the first of these propositions. However, it should be noted that the language of Articles 55 and 56 is language of promotion, and not of enforcement or protection.

33. *See* Simma & Alston, *supra* note 27, at 98–99.

34. This compromise is not absolutely clear-cut. For instance, many states consider that the provision, by other states or international organizations, of financial support to opposition groups constitutes intervention in their internal affairs. Nevertheless, such support is sometimes openly provided.

itarian grounds. Moreover, recent humanitarian interventions have been conducted under the aegis of Chapter VII of the Charter. This meant that situations such as those in northern Iraq, Somalia, Haiti and Rwanda had to be classified, somewhat tenuously, as threats to "international peace and security" and that the "right" to intervene did not need to exist as a right under customary international law.[35]

This human rights debate is clearly about the role of power in the process of customary international law, although it is rarely framed in those terms. At the most basic level, it is a debate about the continuing validity of the traditional view that states have the exclusive right to govern matters occurring within their own borders and not affecting other states, in light of increasing efforts to challenge that exclusivity with customary rules.

C. *Power and the Transforming Effects of Legal Systems*

It is clear from the preceding discussion that power is derived from a number of different sources. First, power derived from military capabilities provides states with the option of using force to impose their will, or resist the efforts of others to do so. Second, power derived from wealth provides states with the capability to impose and withstand trade sanctions, to grant Most Favored Nation status or not to care whether it is granted. Power derived from wealth also enables states to support an effective diplomatic corps which can monitor international developments and apply pressure, based on all the various sources of power, in political organizations such as the United Nations. Third, power is derived from moral authority: the ability to appeal to general principles of justice. In the human rights field, for instance, the existence of a high

35. The existence of large numbers of refugees in these situations provided the strongest ground on which a threat to international peace and security could have been established. However, refugee flows received little attention in the relevant debates of the Security Council. As for the status of humanitarian intervention outside the scope of Chapter VII, many recent scholarly contributions on the subject have not even considered its legality under customary international law. *See, e.g.*, Ruth Gordon, *United Nations Intervention in Internal Conflicts: Iraq, Somalia, and Beyond*, 15 MICH. J. INT'L L. 519 (1994); Mark R. Hutchinson, *Restoring Hope: U.N. Security Council Resolutions for Somalia and an Expanded Doctrine of Humanitarian Intervention*, 34 HARV. INT'L L.J. 624 (1993); David M. Kresock, *"Ethnic Cleansing" in the Balkans: The Legal Foundation of Foreign Intervention*, 27 CORNELL INT'L L.J. 203 (1994); Donatella Luca, *Intervention humanitaire: questions et reflexions*, 5 INT'L J. REFUGEE L. 424 (1993). *But see* Christopher Greenwood, *Is there a right of humanitarian intervention?*, 49 WORLD TODAY 34 (1993); Richard B. Lillich, *Humanitarian Intervention through the United Nations: Towards the Development of Criteria*, 53 ZEITSCHRIFT FÜR AUSLANDISCHES ÖFFENTLICHES RECHT UND VÖLKENRECHT [Z.a.ö.R.V.] 557 (1993); Anthony C. Ofodile, *The Legality of ECOWAS Intervention in Liberia*, 32 COLUM. J. TRANSNAT'L L. 381 (1994).

degree of moral authority in support of some customary rules has discouraged states which might otherwise have opposed those rules from doing so, from openly violating those rules, or from admitting to concealed violations of them.[36] These different sources of power are important in terms of the process of customary international law because their cumulative effect determines whether and to what degree different states are able to engage in behavior which contributes to the maintenance, development, and change of customary rules.

Less noticeable but equally important are the legitimizing and constraining effects that the international legal system has on applications of state power. States pursue their self-interest in many different ways. On occasion they may apply raw, unsystematized power in the pursuit of a short-term goal. However, the application of raw power promotes instability and escalation, and is not particularly subtle or efficient. More frequently, states will apply power within the framework of an institution or legal system. States develop and utilize institutions and legal systems because they create expectations of behavior, which lessens the risk of escalation and facilitates efficiency of action, and because they promote stability, thus protecting states which recognize that they could find themselves on the opposite side of an issue in future situations.[37]

However, a legal system such as the international legal system does more than simply create expectations and promote stability. It also fulfills an essentially social function by transforming applications of raw power into legitimate power, thereby creating rights to apply power within certain structures using certain means. For instance, in the absence of an overarching, law-making sovereign, the international legal system demands reciprocity: recognition on the part of those applying power of the rights of others to apply power within those same structures and using those same means. This recognition in turn imposes significant constraints on states as they engage in behavior that contributes to the maintenance, development, or change of rules of customary

---

36. The prohibition against torture is probably the best example of such a rule. *See* NIGEL S. RODLEY, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW 63–64 (1987). Moral authority would also seem to have played an important role in the entire process of decolonization. For a philosophical examination of this source of power, see generally Friedrich Nietzsche, *The Genealogy of Morals, reprinted in* 13 THE COMPLETE WORKS OF FRIEDRICH NIETZSCHE (Oscar Levy ed., 1913).

37. This latter insight is generally attributed to John Rawls. *See* RAWLS, *supra* note 10, at 235–43. The creation of institutions and legal systems by states is thus motivated by long-term calculations of self-interest. On the creation of institutions, see generally KEOHANE, *The Demand for International Regimes*, *supra* note 6; YOUNG, *supra* note 2, at 1–6. For further discussion of the benefits offered by institutions, see *infra* pp. 166–67.

international law.[38] By qualifying and constraining the application of state power in the customary process in this and other ways,[39] the international legal system distinguishes the resulting rules of customary international law from the arbitrary commands of powerful states, and accords those rules the authority and compelling power of the entire international society of which that legal system is a part.[40]

By applying power in the process of customary international law, states thus create generalized rules which both protect and constrain established sources, and further applications, of power in an ever-changing world. The debates about resolutions and declarations as state practice and the scope of international human rights are therefore also debates about the structure of the international legal system, about the ways in which that system has legitimized the application of certain forms of power, and whether it should continue to do so.

This explanation of the legitimizing and constraining effects of the international legal system also represents the crucial difference between the approach adopted by this article and that adopted by the "New Haven School." According to Harold Lasswell, Myres McDougal and their "associates," power finds expression in and is to some degree

---

38. For a discussion of the effects of the principle of reciprocity, see *infra* part VI.

39. See *infra* parts IV–VII.

40. On the role of legal systems in legitimizing power so as to create law, see ALLOTT, *supra* note 5, at 133–66; 1 MAX WEBER, ECONOMY AND SOCIETY 31–36 (Guenther Roth & Claus Wittich eds., 1968); MAX WEBER ON LAW IN ECONOMY AND SOCIETY 3–9 (Max Rheinstein & Edward Shils trans., 1954). Weber's use of "legitimacy," which, despite its emphasis on commands and office, is concerned with the effects of legal processes on the creation of rules, may be contrasted with that made by Thomas Franck. *See* THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990).

Franck's concept of legitimacy is broader than Weber's; in addition to the processes of rule creation, legitimacy is derived from factors, such as internal coherence, which are inherent in rules themselves, and factors, such as ritual and pedigree, which are associated with but not an intrinsic part either of rules or the processes of rule creation. When Franck discussed rule creation he did so using modified versions of H.L.A. Hart's concepts of secondary rules and rule(s) of recognition. According to Franck, "[a] rule has *greater* legitimacy if it is validated by having been made in accordance with secondary rules about rule-making." FRANCK, *supra*, at 193 (emphasis added). In addition, "there is widespread acceptance by states of the notion that time-and-practice-honored-conduct — pedigreed custom — has the capacity to bind states . . . ." *Id.* at 189. This "rule of recognition" is part of a larger, "ultimate rule of recognition," *id.*, which in turn is but one of several ultimate rules. These rules, which are "irreducible prerequisites for an international concept of right process," *id.* at 194 (emphasis omitted), and *not* derived from any *legal* process, are the sole source of legitimacy within the process whereby particular, primary rules are created.

This article, while agreeing that legitimacy may flow from many sources, adopts Weber's approach to legitimacy and focuses on the legitimizing effects of the customary process *as such*. This view is consistent with this article's assertion, *infra* part III.D., that even the fundamental principles which structure the international legal system are derived from the customary process, and are therefore not external to it.

derived from the authority and control exercised by decision-makers.[41] This exercise of authority and control through the decision-making process gives rise to law or, in the case of customary international law, to behavior which creates law.[42] However, although decisions ideally should consider values in pursuit of common interests or goals, the legal system *itself* places no restrictions and has no qualifying effects on this process.[43]

In contrast, this article focuses on how the international legal system, and more specifically the customary process and certain fundamental, structural principles of international law, accord or withhold legitimacy from the *results* of decision-making processes, namely applications of state power. Thus, the application of authority and control is qualified in a manner which resembles the value-inspired process described and systematized by the New Haven School. At the same time, it is more institutionalized and internationalized, and therefore less prone to state-specific subjectivity. In short, the New Haven School seeks to define how individual decision-makers should consciously engage in making laws which further the "common interest." As will be explained later in this article, the customary process and certain fundamental, structural principles of international law already fulfill this function, determining common interests in a more objective manner than an individual decision-maker, before protecting and promoting those interests with law.[44]

D. *Power and Critical Legal Scholarship*

In recent years the important role played by power in the international legal system has been exposed to some degree by Critical Legal

---

41. For a concise, readily comprehensible explanation of the New Haven School approach, see W. Michael Reisman, *The View from the New Haven School of International Law*, 86 AM. SOC'Y INT'L L. PROC. 118 (1992).

42. *See* Raman, *Toward a General Theory*, *supra* note 21; and K. Venkata Raman, Prescription of International Law by Customary Practice (1967) (unpublished S.J.D. thesis, Yale Law School).

43. The values, as defined by the New Haven School, are power, entitlement, wealth, skill, well-being, affection, respect and rectitude. The most important of the common interests or goals is the furtherance of "human dignity." For applications of this approach to specific areas of international law, see generally MYRES S. MCDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION (1961); MYRES S. MCDOUGAL & WILLIAM T. BURKE, THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA (1962); MYRES S. MCDOUGAL ET AL., THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER: PRINCIPLES OF CONTENT AND PROCEDURE (1967); MYRES S. MCDOUGAL ET AL., LAW AND PUBLIC ORDER IN SPACE (1963).

44. For further discussion of the relationship between the ideas espoused by this article and the New Haven School, see *infra* note 98.

Studies scholars, which may explain, in part, the disquiet which many international lawyers feel with respect to the work of jurists such as David Kennedy and Martti Koskenniemi.[45] The goal of these scholars, like their counterparts working within national legal systems, is to expose the myths of objectivity, value freedom, and determinacy in law and law creation by deconstructing legal texts, thus demonstrating that legal systems are neither self-contained nor politically neutral. Instead, those systems are based on tensions inherent in liberal ideology between, for example, the community and the individual or positivism and naturalism.[46]

Unfortunately, those Critical Legal Studies scholars working in international law have themselves only just begun to explore the non-legal factors which must be responsible for the inconsistencies they criticize. Koskenniemi, for instance, has suggested that customary international law in the human rights field is determined not by formal tests of legal validity, but by "an anterior — though at least in some respects largely shared — criterion of what is right and good for human life."[47] According to Koskenniemi, shared values and differing degrees of political conviction about the value of particular norms — rather than a legal process as such — account for the existence of, and hierarchy among, the various international human rights.[48] However, this examina-

---

45. The two most important works are: DAVID KENNEDY, INTERNATIONAL LEGAL STRUCTURES (1987) and MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA (1989). *See also* Anthony Carty, *Critical International Law: Recent Trends in the Theory of International Law*, 2 EUR. J. INT'L L. 66 (1991) (summarizing and critiquing Kennedy and Koskenniemi's books). *But see* David J. Bederman, *Stalking Phaedrus*, 18 GA. J. INT'L & COMP. L. 527 (1988) (reviewing DAVID KENNEDY, INTERNATIONAL LEGAL STRUCTURES (1987)); Phillip R. Trimble, *International Law, World Order, and Critical Legal Studies*, 42 STANFORD L. REV. 811, 822–32 (1990) (reviewing DAVID KENNEDY, INTERNATIONAL LEGAL STRUCTURES (1987)).

46. It is important to note that those Critical Legal Studies scholars who have focused on national legal systems have had a second project, namely, designing alternative modes of discourse, resource distribution and conflict resolution. *See, e.g.*, HUGH COLLINS, THE LAW OF CONTRACT (2d ed. 1993); ROBERTO M. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986); David Jabbari, *From Criticism to Construction in Modern Critical Legal Theory*, 12 OXFORD J. LEGAL STUD. 507 (1992). Koskenniemi, at the end of his book, has offered a tentative and rather amorphous agenda for reconstructing the international legal order which he has just attempted to take apart; an agenda based on free-ranging communication, imaginative context-transformation and deeply-felt notions of justice. KOSKENNIEMI, *supra* note 45, at 458–501.

47. Martti Koskenniemi, *The Pull of the Mainstream*, 88 MICH. L. REV. 1946, 1953 (1990) (book review). With respect to non-human rights rules he has reaffirmed the dominant role of politics and power. *See, e.g.*, Martti Koskenniemi, *The Politics of International Law*, 1 EUR. J. INT'L L. 4, 7 (1990). This is why, in response to theories attempting to explain the sources of international human rights, he has cautioned against "the pull of the mainstream."

48. For an explanation of how Koskenniemi's suggestion might accord with the theory of customary international law advanced in this article, see *infra* part III.C.

tion of non-legal factors has remained peripheral to Koskenniemi's larger project of exposing inconsistencies in international law.[49]

Scholars from the non-industrialized world have long recognized the importance of power and inequality in the international legal system. They have argued that the system, including its rule-making processes, was created by industrialized states to serve their own interests and not the interests of newer, less powerful states.[50] Their perspective on the role of power helps explain their position with respect to the issue of whether resolutions and declarations may constitute state practice in the process of customary international law.[51]

More recently, feminist legal scholars have hypothesized that the international legal system is dominated by male power.[52] Many academics are uncomfortable with this proposition,[53] and it is possible that their discomfort is accentuated by the fact that some feminist legal scholars are also beginning to explore the limits of the concept of state equality in international law.[54] Yet, as with the Critical Legal Studies scholars, feminist scholars and scholars from the non-industrialized world have only exposed the importance of power; they have yet to explain how power operates within the international legal system to create law.

The failure of international legal scholars to examine rigorously the important role played by power in the customary process is perhaps understandable in that any international lawyer who does so risks seeing customary international law rendered largely redundant, as strictly an

---

49. Kennedy, for his part, stated emphatically that: "I do not analyze the relationship between international legal materials and their political and interpretive milieu. I am not concerned about the context within which arguments are made and doctrines developed." KENNEDY, *supra* note 45, at 7. It should also be noted that Koskenniemi's, albeit tentative, examination of non-legal factors has followed the direction already taken by some of his national law counterparts. *See, e.g.*, THE POLITICS OF LAW (David Kairys ed., rev. ed. 1990).

50. *See, e.g.*, MOHAMMED BEDJAOUI, TOWARDS A NEW INTERNATIONAL ORDER (1979); Edward Kwakwa, *Emerging International Development Law and Traditional International Law — Congruence or Cleavage?*, 17 GA. J. INT'L & COMP. L. 431 (1987); K.B. Lall, *Economic Inequality and International Law*, 14 INDIAN J. INT'L L. 7 (1974).

51. *See* discussion *supra* part I.A.

52. *See, e.g.*, Hilary Charlesworth, *The Public/Private Distinction and the Right to Development in International Law*, 12 AUSTL. Y.B. INT'L L. 190 (1992); Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991); Christine Chinkin, *A Gendered Perspective to the International Use of Force*, 12 AUSTL. Y.B. INT'L L. 279 (1992); Shelley Wright, *Economic Rights and Social Justice: A Feminist Analysis of Some International Human Rights Conventions*, 12 AUSTL. Y.B. INT'L L. 241 (1992); Wright, *A Feminist Reappraisal*, *supra* note 7.

53. *See, e.g.*, Fernando R. Téson, *Feminism and International Law: A Reply*, 33 VA. J. INT'L L. 647 (1993).

54. *See, e.g.*, Wright, *A Feminist Reappraisal*, *supra* note 7.

effect of what states do rather than as a factor which affects how they behave. In short, individual customary rules would be subject to change as a result of any modification in the power relationships among states.

This risk is even larger in scope than it may at first seem, since most of the fundamental principles which structure the international legal system, including the treaty-making process, are themselves customary in origin. International law as a whole would therefore be rendered inherently unstable and lacking in any sustained, determinant effect. International lawyers, in turn, would become as peripheral to international society as international law. They would be nothing more than participants in an illusion, where practitioners cite nominally objective, stable, and determinable rules while ignoring the impossibility of objectivity, stability and determinacy.[55]

II. Law, Power, and International Relations

During the 1930s and 1940s a split developed in Anglo-American international law, with scholars such as E.H. Carr and Hans Morgenthau rejecting what they perceived as the misplaced idealism of "Wilsonian" legal-moralism in favor of power-oriented "realism." These scholars were soon identified as belonging to a new academic discipline called international relations. As realists, these early international relations scholars had little interest in law; from their perspective, states were merely self-interested actors engaged in a ruthless struggle for power.[56]

It later became apparent to a few international relations scholars that law was, in one way or another, still a part of international society and thus something which they needed to incorporate into their realist understandings of international relations. Stanley Hoffmann, Morton Kaplan and Nicholas Katzenbach, for instance, attempted to explain the existence of international law on the basis of systems theory.[57] For these

---

55. This, indeed, is Koskenniemi's main point. *See* Koskenniemi, *supra* note 45, at 476–83; *see also* Philip Allott, *Language, Method and the Nature of International Law*, 45 Brit. Y.B. Int'l L. 79 (1971).

56. *See, e.g.*, Carr, *supra* note 6, at 170–207; Morgenthau, *supra* note 4, at 275–311. It is important to note that a similar idealist/realist split had already occurred elsewhere. In Germany the debate about the "Rechtsnatur des Völkerrechts" may be traced back at least as far as Hegel. *See* G.W.F. Hegel, Elements of the Philosophy of Right ¶¶ 330–40 (T.M. Knox trans., 1967). For an historical overview see Georg Dahm, Völkerrecht 7–14 (1958). Scholars from the United States have dominated the debate in the second half of the twentieth century, although linkages with the earlier debate in Germany — one being through Morgenthau — are apparent.

57. *See* Morton A. Kaplan & Nicholas de B. Katzenbach, The Political Foundations of International Law (1961); Stanley Hoffmann, *International Systems and International Law*, *in* International Law and Organization 89 (Richard A. Falk & Wolfram F. Hanrieder eds., 1968).

systems theorists, law was a part as well as a product of any political system seeking to regulate itself. However, in their evaluation, the international system, unlike national systems, had not established sufficient consensus to permit the creation of truly independent, binding rules. States, in short, were not prepared to allow international law to play an autonomous role.[58] Consequently, although international law existed, it was entirely dependent on the fluctuating power relationships among states.

Structural realism, largely associated with the work of Kenneth Waltz, also sought to explain international relations in a systemic manner. Yet structural realists considered systems theory to be unsatisfactory because it involved the regulation of actors through systems which those actors themselves created. Structural realists favored what was in effect a new systems theory which focused on the larger system, or structure, within which actors operate. For Waltz, this larger structure included an ordering principle, the specification of functions of differentiated units, and the distribution of capabilities across those units.[59] Although it is conceivable that Waltz could have included international law among those structural elements which determine how actors in the international system interact, he argued instead that unequal states engage each other in a system, the defining structural aspect of which is anarchy.[60]

Waltz's rejection of international law as a structural element might be regarded as a decisive step away from a possible reconciliation between the disciplines of international relations and international law.[61] However, the idea of structural or systemic controls on the exercise of unequal power left open the possibility of incorporating international law into a more sophisticated realist conception of international relations.

Regime theorists have seized this possibility, taking Waltz's idea of structural control and developing it in terms of the structural characteristics of "sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations."[62] Regime theorists, in short,

---

58. *See, e.g.*, Stanley Hoffmann, *International Law and the Control of Force*, *in* THE RELEVANCE OF INTERNATIONAL LAW, *supra* note 5, at 21; KAPLAN & KATZENBACH, *supra* note 57, at 350.

59. *See* WALTZ, *supra* note 4, at 88–101.

60. *Id.* at 102–28. Waltz used "anarchy" in the Greek sense of the word, to refer to the absence of an overarching sovereign.

61. *See, e.g.*, Burley, *supra* note 2, at 217 ("[Waltz] left no room whatsoever for international law.").

62. The definition is taken from Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, *in* INTERNATIONAL REGIMES 1, 2 (Stephen

are international relations scholars who have recognized the difficulties involved in attempting to explain all relations among states solely on the basis of relative power and short-term calculations of self-interest. Instead, they suggest that sets of rules or procedures developed by and between states may acquire a life of their own, controlling, or at least qualifying, the day-to-day application of power by those and other states. To an international lawyer this phenomenon sounds like international law by another name. Indeed, it is international law, with the important twist that regime theorists, unlike international lawyers, are directly concerned about the relationship between power and sets of rules or procedures.[63]

Regime theorists, like most political scientists, are operating at a different level of analysis from most legal scholars. Political scientists are interested in how groups of human beings organize themselves and interact with one another. In the national sphere, they examine the political processes which, among other things, give rise to legal rules. Most legal academics, on the other hand, are concerned with determining the existence, meaning, scope of application and effect of legal rules, and not so much with understanding the processes through which those rules are created.

Although it is relatively easy to make a distinction between the study of lawmaking and the determination of rules when dealing with legislatively-enacted or executively-decreed law, the linkages between these activities are much more evident in judge-made or custom-based legal systems. The law in these systems is constantly evolving as the relevant actors, be they judges, states, or ordinary individuals, continually engage in legally relevant behavior.[64] As a result, change in these

---

D. Krasner ed., 1983). This article's interpretation of the relationship between structural realism and regime theory would thus appear to differ from that initially put forward by Slaughter Burley. However, Slaughter Burley later acknowledged the connection between structural realism and regime theory, referring to regime theory at one point as "modified Structural Realism." Burley, *supra* note 2, at 221; *see also id.* at 219; YOUNG, *supra* note 2, at 92 n.41; ROBERT O. KEOHANE, *Neoliberal Institutionalism: A Perspective on World Politics*, *in* INTERNATIONAL INSTITUTIONS AND STATE POWER, *supra* note 6, at 1, 7–8 [hereinafter KEOHANE, *Neoliberal Institutionalism*].

63. International relations scholars have yet to study relationships between different regimes, focusing instead on relationships between particular regimes and states. This article does likewise, although the relationship between the process of customary international law and other international institutions, and in particular how the subsequent development or change of customary rules affects pre-existing treaties, deserves attention. *See*, in this context, the work of the Institut de droit international on *Problems arising from a succession of codification conventions on a particular subject*, 66 ANNUAIRE (Institut de Droit international) 13, 195–208 (1995).

64. They are, in this sense, both creators and subjects of the law. On this "dédoublement fonctionnel" see GEORGES SCELLE, PRÉCIS DE DROIT DES GENS, DEUXIÈME PARTIE: DROIT

systems is often incremental, whereas legislatively-enacted or executively-decreed law tends to change less often, and when it does change, it does so more abruptly. It is therefore difficult to study the rules of a judge-made or custom-based legal system without devoting considerable time and thought to the manner in which the system operates.[65] The rules are part of the system, the system is a process, and the questions of which rules exist and how those rules are made necessarily coalesce. For this reason, and since no overarching sovereign exists in the international system, an interdisciplinary approach to the study of customary international law is called for.[66]

To a regime theorist, power and the rules and procedures which result from patterns of interdependence "are closely related — indeed, two sides of a single coin."[67] This is because interdependence is often asymmetrical; despite their dependence on each other some states remain more powerful, and therefore less dependent than others.[68] Since interdependence is both the reason for, and the result of, regimes, those structures necessarily reflect the frequently asymmetrical nature of inter-state power relationships.[69]

CONSTITUTIONNEL INTERNATIONAL 10–12 (1934). On customary legal systems other than customary international law see, *e.g.*, JOHN L. COMAROFF & SIMON ROBERTS, RULES AND PROCESSES: THE CULTURAL LOGIC OF DISPUTE IN AN AFRICAN CONTEXT (1981); JOHN P. REID, LAW FOR THE ELEPHANT: PROPERTY AND SOCIAL BEHAVIOR ON THE OVERLAND TRAIL (1980); Michael Reisman, *Looking, Staring and Glaring: Microlegal Systems and Public Order*, 12 DENV. J. INT'L L. & POL'Y 165 (1983); Walter O. Weyrauch & Maureen A. Bell, *Autonomous Lawmaking: The Case of the 'Gypsies'*, 103 YALE L.J. 323 (1993).

65. Nevertheless, many people operating within judge-made legal systems do seem to operate strictly on the basis of "black-letter law." This focus is not possible in custom-based systems unless periodic and authoritative determinations of the state of customary law with respect to specific questions are readily available. It is possible that the high degree of authority the international community accords to previous decisions of the International Court of Justice in subsequent disputes thus represents an attempt to find determinacy through rules without becoming submerged in trying to understand the customary process. *See* A.W.B. Simpson, *The Common Law and Legal Theory*, *in* OXFORD ESSAYS IN JURISPRUDENCE 77 (A.W.B. Simpson ed., 2d ed. 1973).

66. *See* discussion *supra* part I.C.

67. Robert O. Keohane & Joseph S. Nye, Jr., *Power and Interdependence Revisited*, 41 INT'L ORG. 725, 730 (1987).

68. *See generally* ROBERT O. KEOHANE & JOSEPH S. NYE, POWER AND INTERDEPENDENCE 10–11 (1977); *see also* Keohane & Nye, *Power and Interdependence Revisited*, *supra* note 67, at 728, and citations therein.

69. According to the regime theorists, it is because states seeking to further their self-interest recognize the benefits of cooperation that they create sets of rules and procedures. Realist premises are thus central to the entire project of regime theory. *See* ROBERT O. KEOHANE, AFTER HEGEMONY (1984); KEOHANE, INTERNATIONAL INSTITUTIONS AND STATE POWER, *supra* note 6. *See also* discussion *supra* note 6 and accompanying text. Presumably, a higher degree of interdependence between states or within groups of states will result in those states having an interest in a greater number and scope of transnational structures. See, in this context, the writings of "liberal" theorists of international law, such as Burley, *supra* note 2.

Regime theorists have not written much about informal rules and procedures, although some of them have recognized that regimes "may be more or less formally articulated, and . . . may or may not be accompanied by explicit organizations."[70] Instead, they have focused on multilateral treaties and international organizations, around or within which informal rules and procedures may develop, but if they do develop, fulfill only a supplementary role. Regimes, according to regime theorists, operate in "issue areas" such as environmental protection, telecommunications, human rights, and the law of the sea.[71] And the majority of regime theorists have concentrated their attention on issue areas of a commercial nature, such as trade, monetary management and technology transfer.[72]

---

70. *See, e.g.*, YOUNG, *supra* note 2, at 13. Young wrote:

> Some writers have fallen into the habit of equating regimes with the agreements in terms of which the regimes are often expressed or codified. In practice, however, international regimes vary greatly in the extent to which they are expressed in formal agreements, treaties, or conventions. . . . As in domestic society, moreover, it is common for informal understandings to arise within the framework established by the formal structure of an international regime. Such understandings may serve either to provide interpretations of ambiguous aspects of the formal arrangements . . . or to supplement formal arrangements by dealing with issues they fail to cover. . . . Though it may be helpful, formalization is clearly not a necessary condition for the effective operation of international regimes. There are informal regimes that have been generally successful, and there are formal arrangements that have produced unimpressive results . . . .

Id. at 24 (footnotes omitted). However, Young gave no example of an informal regime which has been "generally successful." *See also id.* at 15 n.11, 214.

71. Young has written: "International regimes . . . are . . . specialized arrangements that pertain to well-defined activities, resources, or geographical areas and often involve only some subset of the members of international society." YOUNG, *supra* note 2, at 13. Specific regimes, and the issue areas they regulate, are often "nested" in larger and more general regimes which address larger and more general issue areas. Consequently, regimes build on, and rarely conflict with one another. *Id.* at 14; *see also* ORAN YOUNG, RESOURCE MANAGEMENT AT THE INTERNATIONAL LEVEL (1977); Peter F. Cowhey, *The International Telecommunications Regime: The Political Roots of Regimes for High Technology*, 44 INT'L ORG. 169 (1990); Jack Donnelly, *International Human Rights: A Regime Analysis*, 40 INT'L ORG. 599 (1986); Ernst B. Haas, *Why Collaborate? Issue-Linkage and International Regimes*, 32 WORLD POLITICS 357 (1980); Peter M. Haas, *Epistemic Communities and the Dynamics of International Environmental Co-operation*, *in* REGIME THEORY AND INTERNATIONAL RELATIONS, *supra* note 4, at 168; Stephen D. Krasner, *Sovereignty, Regimes, and Human Rights*, *in* REGIME THEORY AND INTERNATIONAL RELATIONS, *supra* note 4, at 139; Robert E. Money, Jr., *The Protocol on Environmental Protection to the Antarctic Treaty: Maintaining a Legal Regime*, 7 EMORY INT'L L. REV. 163 (1993).

72. This focus is perhaps partly due to Keohane's use of a market-forces analogy to explain the "demand" for international regimes. *See* KEOHANE, *The Demand for International Regimes*, *supra* note 6; *see also* VINOD K. AGGARWAL, LIBERAL PROTECTIONISM: THE INTERNATIONAL POLITICS OF ORGANIZED TEXTILE TRADE (1985); Richard N. Cooper, *Prolegomena to the Choice of an International Monetary System*, 29 INT'L ORG. 63 (1975); Jock A. Finlayson & Mark W. Zacher, *The GATT and the Regulation of Trade Barriers: Regime Dynamics and Functions*, *in* INTERNATIONAL REGIMES, *supra* note 62, at 273; Ernst Haas, *supra* note 71.

Regime theory has recently developed into an area of international relations thought referred to as institutionalism.[73] Its two leading proponents have been Robert Keohane and Oran Young, although the ideas of these two scholars have differed in important ways. For Keohane, the concept of institutions was far larger in scope than that of regimes. It included all "persistent and connected sets of rules (formal and informal) that prescribe behavioral roles, constrain activity and shape expectations."[74]

Keohane divided institutions into three groups on the basis of their differing degrees of organization or formality. First, there are "formal intergovernmental or cross-national nongovernmental organizations." Second, there are international regimes, which Keohane defined as "institutions with explicit rules, agreed upon by governments, that pertain to particular sets of issues in international relations." Regimes are, in short, "specific contractual solutions." Finally, there are conventions, which Keohane defined as "informal institutions, with implicit rules and understandings, that shape the expectations of actors."[75]

Keohane elaborated somewhat on his idea of conventions, stating that they "enable actors to understand one another and, without explicit rules, to coordinate their behavior" and that they "are especially appropriate for situations . . . where it is to everyone's interest to behave in a particular way as long as others also do so." States conform to conventions because "non-conformity to the expectations of others entails costs." Keohane provided two examples of conventions: first, "[t]raditional diplomatic immunity" before it was codified in the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations and, second, reciprocity.[76]

---

73. It is again worth noting that continental European scholars have already covered much of this ground. For what can only be described as early institutionalist thought, see THE FRENCH INSTITUTIONALISTS (Albert Broderick ed. & Mary Welling trans., 1970) (translating and analyzing the works of Maurice Hauriou, Georges Renard and Joseph Delos); CARL SCHMITT, ÜBER DIE DREI ARTEN DES RECHTSWISSENSCHAFTLICHEN DENKENS (1934). *See also* SCELLE, *supra* note 64 (regarding international law).

74. KEOHANE, *Neoliberal Institutionalism*, *supra* note 62, at 3.

75. *Id.* at 3–4.

76. *Id.* at 4. Keohane explained reciprocity as involving "exchanges of roughly equivalent values in which the actions of each party are contingent on the prior actions of the others in such a way that good is returned for good, and bad for bad." Robert O. Keohane, *Reciprocity in International Relations*, 40 INT'L ORG. 1, 8 (1986). He distinguished between "specific reciprocity," where two parties "exchange items of equivalent value in a strictly delimited sequence," *id.* at 4, and "diffuse reciprocity," where exchanges occur within a group of parties, with the cooperative behavior of one party frequently being rewarded in another situation, at some other time, by a party which did not benefit directly from that first specific instance of cooperative behavior. *Id.* at 4, 20.

Keohane's definition of conventions is similar to, and would seem to encompass, the process of customary international law. Like many customary rules, Keohane's conventions are "temporally and logically prior to regimes or formal international organizations" and "[i]n the absence of conventions, it would be difficult for states to negotiate with one another or even to understand the meaning of each other's actions."[77] Unlike customary rules, however, Keohane's conventions do not appear to be legally binding.[78] Conventions, like regimes and organizations, are voluntary constructs of states. However, unlike the explicit rules involved in regimes and organizations, conventions are not "contractual" in nature. Therefore, non-conformity with conventions merely imposes efficiency costs and does not constitute a breach of legal obligations.

The concept of international law held by Keohane is itself unstable and indeterminate since the unequal application of state power is not substantially checked by the existence of legal obligations. Although Keohane's institutions "affect the incentives facing states, even if those states' fundamental interests are defined autonomously,"[79] they are defined by power-maximizing states and subject to redefinition at their

---

Keohane's concept of diffuse reciprocity was an advance on previous discussions of reciprocity by international relations scholars, where it was assumed that the degree of trust or obligation necessary to support such non-specific exchanges does not exist between states. *See, e.g.*, ROBERT AXELROD, THE EVOLUTION OF COOPERATION 3–20 (1984). However, although Keohane based his explanation of diffuse reciprocity on "a widespread sense of obligation" among the members of a group, he did not consider the connections between obligation, reciprocity, and law. Keohane, *Reciprocity in International Relations*, *supra*, at 20. The furthest he went was to state that "actors recognize that a 'veil of ignorance' separates them from the future but nevertheless offer benefits to others on the assumption that these will redound to their own advantage in the end." *Id.* at 23. This article goes much further and considers reciprocity, in addition to being a general social concept which recognizes the benefits of specific and diffuse cooperation, as a fundamental, structural principle of international law which plays an important role in qualifying the application of state power in the maintenance, development, and change of customary rules. *See* discussion *infra* part VI.

77. KEOHANE, *Neoliberal Institutionalism*, *supra* note 62, at 4.

78. Keohane seemed to believe that these (informal) conventions are not part of international law. He has emphasized the formal nature of international law, writing (here using the word conventions in a different sense, to refer to multilateral treaties) that "all formal international regimes are parts of international law, as are formal bilateral treaties and conventions." ROBERT O. KEOHANE, *International Institutions: Two Approaches*, *in* INTERNATIONAL INSTITUTIONS AND STATE POWER, *supra* note 6, at 158, 163; *see also* discussion of Keohane's understanding of reciprocity, *supra* note 76. However, Keohane expressly acknowledged that informal or implicit but nevertheless legally binding rules exist at the national level, noting that "some very strong institutions, such as the British constitution, rely principally on unwritten rules." KEOHANE, *International Institutions: Two Approaches*, *supra*, at 163.

79. KEOHANE, *Neoliberal Institutionalism*, *supra* note 62, at 5.

will, or at least at the will of the most powerful among them.[80] Despite the fact that redefinition may not occur, and indeed may be undesirable because of the benefits derived from the institution or difficult because of the widespread consensus which may be required to do so, law remains vulnerable to short-term variations in the power relationships among states.[81]

The same is true of the institutions which Young has described. For Young, all social institutions, including international institutions, arise as a result of "the conjunction of behavioral regularities and convergent expectations."[82] This conjunction "commonly produces identifiable social conventions, which actors conform to without making elaborate calculations on a case-by-case basis . . . ."[83]

Young's institutions, like Keohane's, are subject to rapid change as a result of evolving power relationships and have no truly independent force. The furthest Young went was to point out that "[i]nstitutions change in response to an array of political, economic, technological, sociocultural, and even moral developments."[84] Yet it is these developments which affect the relative interests and power of different states, which in turn change international institutions. Young was, in fact, writing about how different developments concerning different sources of power affect states, how they choose to behave, and what they are able to create in the way of international institutions.

Young and Keohane have ascribed great influence to institutions. They are, in this respect, very different from what Young has referred to as the "[o]rthodox students of international relations" who "assume that international institutions, including regimes of various sorts, are mere surface reflections of underlying forces or processes, subject to change with every shift in the real determinants of collective outcomes."[85]

---

80. Keohane has posited that "changes in the relative power resources available to major states will explain changes in international regimes." ROBERT O. KEOHANE, *The Theory of Hegemonic Stability and Changes in International Economic Regimes, 1967–1977*, *in* INTERNATIONAL INSTITUTIONS AND STATE POWER, *supra* note 6, at 74, 75. He has also written that "[i]n modern international relations, the pressures from domestic interests, and those generated by the competitiveness of the state system, exert much stronger effects on state policy than do international institutions, even broadly defined." KEOHANE, *Neoliberal Institutionalism*, *supra* note 62, at 6. He added that his theory "emphasizes the pervasive significance of international institutions *without denigrating the role of state power*." *Id.* at 11 (emphasis added).

81. *See generally* KEOHANE, AFTER HEGEMONY, *supra* note 69, at 85–109; *see also* discussion *infra* pp. 166–68.

82. YOUNG, *supra* note 2, at 81.

83. *Id.* at 82 (footnote omitted).

84. *Id.* at 205.

85. *Id.* at 58. As an example of the orthodox international relations reaction to regime theory and institutionalism, Young cited Susan Strange, *Cave! hic dragones: A Critique of*

However, neither of them has been able to go on to demonstrate convincingly that any international institution, whether an organization, treaty or customary rule, is in any way truly independent from the power relationships which exist among states.

Young, to his credit, has recognized this failure. He has written that "[o]ne of the more surprising features of the emerging literature on regimes is the relative absence of sustained discussions of the significance of regimes, or, more broadly, social institutions, as determinants of collective outcomes at the international level."[86] The result, he concluded,

> is something of an analytic vacuum. The ultimate justification for devoting substantial time and energy to the study of regimes must be the proposition that we can account for a good deal of the variance in collective outcomes at the international level in terms of the impact of institutional arrangements. For the most part, however, this proposition is relegated to the realm of assumptions rather than brought to the forefront as a focus for analytical and empirical investigation.[87]

In short, international relations scholars have generally failed to demonstrate that international institutions actually make a difference, that they qualify the application of state power in some significant way.

This article is in part an attempt to help fill the "analytic vacuum" Young has described, to demonstrate that international institutions are not, at the relevant level of analysis, "epiphenomena whose dictates are apt to be ignored whenever actors find it inconvenient or costly to comply with them and whose substantive provisions are readily changeable whenever powerful members of the community find them cumber-

---

Regime Analysis, *in* INTERNATIONAL REGIMES, *supra* note 62, at 337. YOUNG, *supra* note 2, at 58 n.2.

86. YOUNG, *supra* note 2, at 206. Young cited Krasner, *supra* note 62, at 5–10, and THE ANTINOMIES OF INTERDEPENDENCE 462–65 (John G. Ruggie ed., 1983) as partial attempts which have been made. *See also* Thomas J. Biersteker, *Constructing Historical Counterfactuals to Assess the Consequences of International Regimes*, *in* REGIME THEORY AND INTERNATIONAL RELATIONS, *supra* note 4, at 315; Helmut Breitmeier & Klaus D. Wolf, *Analysing Regime Consequences*, *in* REGIME THEORY AND INTERNATIONAL RELATIONS, *supra* note 4, at 339.

87. YOUNG, *supra* note 2, at 206–07; *see also* Andrew Hurrell, *International Society and the Study of Regimes*, *in* REGIME THEORY AND INTERNATIONAL RELATIONS, *supra* note 4, at 49, 53 ("The central problem, then, for regime theorists and international lawyers is to establish that laws and norms exercise a compliance pull of their own, at least partially independent of the power and interests which underpinned them and which were often responsible for their creation.") (citation omitted).

some or otherwise outmoded."[88] The process of customary international law is, it will be suggested, a power-qualifying social institution of the kind for which many international relations scholars are searching.[89]

III. The Process of Customary International Law as a Social Institution

International lawyers usually claim that customary international law results from the coexistence of two elements. First, there must be a consistent and general practice among states. Second, states must believe that this practice is required by law.[90] This second, subjective element is frequently referred to as *opinio juris sive necessitatis*, or *opinio juris* for short. There are many problems with this general understanding of customary international law. They cannot be reviewed in detail here, but they can be divided into three problem groups. First, there are problems associated with the subjective element of *opinio juris*, such as the cognitive problem of how artificial entities called states can "believe," the chronological problem of requiring states creating new law to believe that they are behaving in accordance with existing law, and the epistemological problem of determining the content of this second element of *opinio juris* using the only evidence available, the first element of state practice. Second, there are problems associated with determining the law-creating effect of different kinds and differing degrees of repetition and consistency of state practice. Finally, there are problems associated with the concept of state equality and assumptions of procedural objectivity. This article focuses on this third category.

Over the years there have been many attempts to explain the process of customary international law in a theoretically coherent way.[91] The

---

88. Young, *supra* note 2, at 208. For other attempts to demonstrate the normative independence of international law see, *e.g.*, Francis A. Boyle, World Politics and International Law (1985); Louis Henkin, How Nations Behave (2d ed. 1979); Brownlie, *The Relation of Law and Power*, *supra* note 28; Fried, *supra* note 5.

89. For an acknowledgement of the need for international relations scholars to address the issue of customary international law, see Kratochwil, *Contracts and Regimes*, *supra* note 5, at 73, 84–93.

90. *See generally* Statute of the International Court of Justice art. 38(1)(b) [hereinafter ICJ Statute]; North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, at 44 para. 77 (Feb. 20); Ian Brownlie, Principles of Public International Law 4–11 (4th ed. 1990); Oppenheim's International Law, *supra* note 27, at 25–31; Rudolf Bernhardt, *Customary International Law*, *in* I Encyclopedia of Public International Law 898–902 (Rudolf Bernhardt ed., 1992); Danilenko, *supra* note 15.

91. The more notable efforts include: D'Amato, The Concept of Custom in International Law, *supra* note 20; John Finnis, Natural Law and Natural Rights 238–45 (1980); Thirlway, *supra* note 15; Akehurst, *supra* note 1; Cheng, *supra* note 19; Corbett, *supra* note 5; Charles De Visscher, *Coutume et traité en droit international public*, 59 Revue

number and diversity of these attempts and the growing interest of scholars in the subject are strong indications of how the discipline of international law craves a more convincing rationalization. It is therefore surprising that no legal scholar has yet reached out to the discipline of international relations in an attempt to explain the process of customary international law as a social institution in a political system made up of socially unequal, self-interested states.

Based on the definitions provided by Keohane and Young, the process of customary international law is clearly a social institution. In Keohane's terms it is a persistent and connected set of informal rules which prescribe behavioral roles, constrain activity, and shape expectations.[92] In Young's terms it is an identifiable social convention which results from the convergence of patterned behavior and actor expectations, and to which states conform without making elaborate calculations on a case-by-case basis.[93] The similarities between Young's definition of institutions and traditional definitions of customary international law, namely the convergence of state practice and *opinio juris*, are striking.[94]

As a social institution the process of customary international law is above all a set of shared beliefs, expectations or understandings held by the individual human beings who govern and represent states. Like all institutions, and the international system itself, it is a set of ideas.[95] The most fundamental idea is that the behavior of states with respect to a

---

GENERALE DE DROIT INTERNATIONAL PUBLIC [R.G.D.I.P.] 353 (1955); Dupuy, *supra* note 22; Paul Guggenheim, *Les deux éléments de la coutume en Droit international*, *in* 1 LA TECHNIQUE ET LES PRINCIPES DU DROIT PUBLIC, ETUDES EN L'HONNEUR DE GEORGES SCELLE 275 (1950); Raman, *Toward a General Theory*, *supra* note 21; Raman, Prescription of International Law by Customary Practice, *supra* note 42. Recent efforts of note include: Peter Haggenmacher, *La doctrine des deux éléments du droit coutumier dans la pratique de la cour internationale*, 90 R.G.D.I.P. 5 (1986); Fredric L. Kirgis, Jr., *Custom on a Sliding Scale*, 81 AM. J. INT'L L. 146 (1987); Martti Koskenniemi, *The Normative Force of Habit: International Custom and Social Theory*, 1 FINNISH Y.B. INT'L L. 77 (1990); Koskenniemi, *The Pull of the Mainstream*, *supra* note 47; Weisburd, *supra* note 32; and WOLFKE, *supra* note 15.

92. KEOHANE, *Neoliberal Institutionalism*, *supra* note 62, at 3.

93. YOUNG, *supra* note 2, at 81–82. The process of customary international law would also seem to fit within the scope of the well-known definition of international regimes provided by Krasner. *See* Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, *supra* note 62.

94. *But see* the discussion of *opinio juris*, *infra* part III.A. It should also be noted that Young has been somewhat inconsistent with respect to his definition of social institutions. Near the end of his book he defined them as "behaviorally recognizable practices consisting of roles linked together by clusters of rules or conventions governing relations among the occupants of these roles." YOUNG, *supra* note 2, at 196. Actor expectations are not a part of this latter definition.

95. *See* ANTHONY CARTY, THE DECAY OF INTERNATIONAL LAW? 20–21 (1986); KOSKENNIEMI, *supra* note 45; ALLOTT, *supra* note 5, at 145–77; James Crawford, *Negotiating Global Security Threats in a World of Nation States: Issues and Problems of Sovereignty*, 38 AM. BEHAV. SCI. 867 (1995); Karen Knop, *Re/Statements: Feminism and State Sovereignty in International Law*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 293 (1993).

legal issue provides an indication of the degree to which those states are interested in seeing a particular legal outcome.[96] Not all states will agree as to which legal outcome is most desirable. The process of customary international law resolves many of these sorts of differences by acting as a kind of "universalising public interest phenomenon"[97] which creates legally binding rules when the behavior of states indicates that most states would find their creation either desirable or acceptable, and only a few, or none at all, would not find it so.[98]

This general idea — that the behavior of states provides an indication of the degree to which they are interested in seeing a particular legal outcome — is fleshed out by a number of other ideas or shared understandings. These shared understandings determine what behavior is relevant to the process of customary international law, as well as the degree to which, and the manner in which, that behavior is relevant.[99]

---

96. The interests of states are not necessarily identical, or even similar to the interests of those individuals who live within states. *But see* discussions of the statist assumption, *supra* note 4 and internal political processes, *infra* note 98.

97. This expression was first used to refer to the process of customary international law by Philip Allott in a graduate seminar on the History and Theory of International Law at the University of Cambridge during the Lent Term 1994. For a brief written formulation see Philip Allott, *The International Court and the Voice of Justice*, *in* FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE: ESSAYS IN HONOUR OF SIR ROBERT JENNINGS (Vaughn Lowe & Malgosia Fitzmaurice eds., forthcoming 1995).

98. This may be a particularly useful insight for international relations scholars. Christopher Joyner has stated that: "[p]olitical science can gain from international law by accepting the proposition that the law is a significant means for organizing political forces, for setting perceptions of national interests, and for promoting ways to attain those national interests." Christopher C. Joyner, *Crossing the Great Divide: Views of a Political Scientist Wandering in the World of International Law*, 81 AM. SOC'Y INT'L L. PROC. 385, 390 (1987). In this way the customary process fulfills the main purpose of all of Keohane's institutions in that it facilitates cooperation, and does so in a way which takes into account variations in the mutual interest of states. As with all of Keohane's institutions, variations in the mutual interest, acting through the institution, have substantial effects on state behavior, in this case through the development of new customary rules. *See* KEOHANE, *Neoliberal Institutionalism*, *supra* note 62, at 2–3.

It should be noted that both institutionalism and the theory of customary international law set out in this article assume that each state has engaged in some sort of internal political process in order to balance competing interests within the state, and that states use international institutions, in this case the customary process, to translate those determinations of individual state interest into global interests in the absence of more formalized political structures at the international level. In contrast, some scholars, such as those making up the New Haven School and more recent "liberal" authors, have sought to break down the divide between the determination of interests nationally and internationally. *See, e.g.*, LASSWELL & MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY, *supra* note 7, at 417–25; Reisman, *The View from the New Haven School of International Law*, *supra* note 41, at 122; Burley, *supra* note 2. For a defense of the statist stance adopted here, see *supra* note 4.

99. *See* N.E. Simmonds, *Between Positivism and Idealism*, 50 CAMBRIDGE L.J. 308 (1991) (discussing the importance of shared understandings to legal systems generally); *see generally* MICHAEL WALZER, SPHERES OF JUSTICE (1983) (discussing the importance of shared understandings to social interaction and distributive justice).

A. *Shared Understandings of Legal Relevance*

A first set of these shared understandings requires that state behavior, in order to contribute to the customary process, must be carried out in a legally relevant manner.[100] These shared understandings will accept or reject behavior based on what states openly do or admit to doing,[101] on what they do not do, on what state representatives say, or on the basis of the context in which the behavior takes place.[102] To use a classic example from the latter category, using white paper for diplomatic correspondence is not behavior relevant to a legal or potentially legal issue.[103] In contrast, using a sealed bag for diplomatic correspondence and respecting that seal is legally relevant behavior. The decisive factor distinguishing this legally relevant from legally irrelevant behavior is the context in which the behavior takes place. Context, physical acts, omissions, claims, denials, concealments and the submission of disputes to courts or tribunals all may indicate that a state views a particular issue, or behavior linked to that issue, as having legal relevance.

Traditional theories of customary international law rely on *opinio juris* to determine legal relevance. In brief, a state must believe that what it is doing is in accordance with an existing rule of customary international law. There are, of course, problems with this traditional

---

100. *See* Haggenmacher, *supra* note 91, at 108–25 (suggesting that *opinio juris* involves the interpretation of state practice within a "shared conceptual universe") (author's translation). These shared understandings of legal relevance will normally, but not necessarily, precede the behavior which is subjected to them. In this sense *opinio juris*, see discussion *infra* pp. 139–42, usually comes before the behavior which gives rise to any specific rule. This might be seen as being consistent with the order expressed in the ICJ Statute: "[I]nternational custom, as evidence of a general practice accepted as law." ICJ STATUTE art. 38(1)(b). *See* OPPENHEIM'S INTERNATIONAL LAW, *supra* note 27, at 26 n.5. However, this article does not assume that states are always aware of the potential law creating effects of their behavior, nor that they invariably know the legal outcomes they are seeking. It is possible that these understandings could develop *ex post facto*. *See, e.g.*, Nuclear Tests (Aus. v. Fr.), 1974 I.C.J. 253.

101. It is assumed for the purposes of this article that actions which are denied or concealed by states are not considered as constituting behavior capable of contributing to the maintenance, development, or change of customary rules. However, the denial or concealment may itself be considered to be such behavior. The most obvious example of this involves actions in violation of the prohibition against torture. *See* RODLEY, *supra* note 36. *But see* Weisburd, *supra* note 32. Pleadings before and decisions of international arbitral tribunals which the parties wish to keep confidential, but which are leaked, constitute another, more controversial example.

102. Simmonds, for one, has stressed the importance of context to shared understandings. *See* Simmonds, *supra* note 99, at 318.

103. This example is drawn from Akehurst, *supra* note 1, at 33.

formulation.[104] Of the many attempts to address these problems, one of the most attractive is Anthony D'Amato's suggestion that a rule must be "articulated" in a way that will be noticed by states before or in conjunction with state practice in order for that practice to be able to contribute to the process of customary international law.[105]

Yet D'Amato's suggestion fails to provide a solution for situations such as that of the sealed diplomatic bag where no explicit "articulation" may have been made, unless one treats the *context* of the behavior — diplomatic documents in a sealed bag — as some sort of implicit articulation. And this, in turn, brings one back to shared understandings of legal relevance. *Opinio juris*, in terms of states believing that they are acting in accordance with preexisting or simultaneously developing legal rules, is not particularly helpful, either as a practical tool for determining the existence of customary rules, or as an explanation of how those rules arise.[106]

Analyses of the judgments of the International Court have supported this conclusion, since the Court, while supporting the concept of *opinio juris* in principle, has repeatedly ignored it in practice.[107] Instead, the Court has followed the same approach to determining legal relevancy as is suggested in this article: examining what states have openly done or admitted to doing, what in some cases they have not done, what state representatives have said, and the context in which that behavior has taken place.

Opinio juris is, however, a useful concept if used to refer to the shared understandings, such as those concerning the legal relevance of behavior, which constitute the process of customary international law. Although what states, or more precisely the human beings who represent

---

104. *See supra* pp. 136–37.

105. *See* D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW, *supra* note 20, 74–87.

106. Some scholars have suggested that *opinio juris* could be forward-looking, as a widespread consideration on the part of states that it is desirable and appropriate that a particular rule be adopted. *See* FINNIS, *supra* note 91, at 238–45; Crawford & Viles, *supra* note 19, at 66–67; Dupuy, *supra* note 22, at 849. However, this approach renders *opinio juris* relatively meaningless, as any change in any law will almost invariably result from the will of lawmakers to see that change occur. Furthermore, if one understands this forward-looking *opinio juris* as a required constitutive element of any customary rule — an element which must, in certain situations, be proved — it begins to look a great deal like D'Amato's articulation, although it would seem to restrict the expression of *opinio juris* to a narrower range of actors than D'Amato's articulation does. This concept of *opinio juris* does not account for the shared understandings as to the process and parameters of law creation which control the maintenance, development, and change of rules of customary international law.

107. *See* Haggenmacher, *supra* note 91; *see also* MERON, *supra* note 30, at 36 (discussing the *Nicaragua* case); MacGibbon, *supra* note 15, at 128–29 (discussing the Permanent Court of International Justice).

them, believe, will only be apparent from their behavior, and even though the assignation of legal relevance to behavior will often be recognized and passed over in silence, the whole exercise reflects deeper understandings that are akin to Ludwig Wittgenstein's "form of life."[108] Law is not, in H.L.A. Hart's terms, "behavior at the point of a gun,"[109] but is instead reflective of a deeper social consciousness.[110]

These shared understandings are most significant in the domain of the process of law creation rather than at the level of individual rules. It is the social institution of the process of customary international law which best represents "the conjunction of behavioral regularities and convergent expectations."[111] With respect to a particular customary rule, for example, that a diplomatic bag is inviolable, the convergent expectations which are of greatest importance during the period in which the rule is developing relate to the process through which that rule develops rather than to the content of the rule in question. Only after the rule has come into being will there be a shared belief in its existence; before that time any shared belief will be with respect to the process through which the rule could arise, and perhaps to the desirability of that rule arising.[112] *Opinio juris* should therefore be regarded above all as the shared belief in the process of customary international law, and more precisely, as the shared understandings that constitute that process.[113]

---

108. *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 226–27 (G.E.M. Anscombe trans., 2d ed. 1958).

109. *See* H.L.A. HART, THE CONCEPT OF LAW 18–20 (1961); H.L.A. HART, ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY 243–68 (1982).

110. Carty has traced the origin of the concept of customary international law, and the idea of *opinio juris*, to the German historical school of Friedrich von Savigny and Leopold von Ranke. According to this approach *opinio juris* is the common will, or legal consciousness of a *Volk*, or people. CARTY, *supra* note 95, at 30–35. But Carty's attempt to revitalize this approach continues to restrict it to *within* nations, and to nationalism. *See id.* at 36–39. This article argues for a broader, more inclusive notion of community. The *degree* of shared consciousness is, consequently, much reduced.

111. YOUNG, *supra* note 2, at 81.

112. *See* the comments on Finnis' approach to *opinio juris*, *supra* note 106.

113. Simmonds has made similar reference to the importance of shared understandings as relating to legal processes, rather than just individual rules. He has written:

> But suppose that we think of the law as developing relatively clear and settled rules that reflect, but stabilise, pre-existing informal rules and convergent patterns of behavior. Might not the "rule of recognition" (for example) then be thought of as a further level of reflection and stabilisation? This time it would not be informal rules of conduct amongst the general populace that would be reflected and stabilised, but the convergent practices and expectations of lawyers and others in looking to certain texts (such as judgments, decrees, scholarly writings, etc.) and employing certain forms of argument in the decision of disputes and the interpretation of rules.

Simmonds, *supra* note 99, at 319.

The fact that shared understandings are most important with respect to the process of customary international law, rather than with respect to specific rules, is one of the reasons why power is able to play an important role in that process. The shared understandings which constitute the customary process are largely immune to fluctuations in the relative power positions of states. Like a number of similarly near-immutable structural principles of international law, these shared understandings accommodate the frequently asymmetrical applications of state power which maintain, develop or change customary rules in such a way as to challenge severely assumptions of procedural objectivity without denying all stability and determinacy to international law.

B. *Shared Understandings of the Relationship Between Interest, Behavior, and Cost*

Another shared understanding of importance to the process of customary international law is that the behavior of states with respect to a legal or potentially legal issue must be assessed so as to determine if there is a substantially shared interest in any particular legal outcome. This shared understanding rests on an essentially "realist" assumption: that states behave in accordance with their own interests.[114] However, because states determine their own interests, those interests may involve much more than maximizing power in relation to other states. Much will depend on the internal political system of the state concerned, its relative affluence, and the existence or perception of external threats, which could include threats of a military, economic or environmental nature.

Linking behavior to interest is essential to explaining the process of customary international law. It enables one to distinguish different kinds of behavior, different kinds of states, and different kinds of legal rules — all of which have varying effects on the customary process. This link also provides an explanation as to why some customary rules require a great deal of supporting behavior from states while others appear to arise more out of shared values than state behavior, and, further, as to why different customary rules have varying degrees of resistance to change. Finally, this analysis allows consideration of different sources of power to be incorporated into an analysis of customary international law.

Different kinds of behavior result in different costs for states, with cost being calculated in military, economic, political or human terms. Some acts, such as protecting one's fishing vessels in distant waters or

114. *See supra* note 6 and accompanying text.

imposing trade sanctions against another state, may be very costly. Diplomatic communications or statements in international organizations will usually entail far lower costs. An enormous range of possible actions and statements exists, with a correspondingly broad range of costs. A state, when contemplating whether to engage in legally relevant behavior in support of, or in opposition to, an existing, emerging, or potential customary rule will weigh these costs against its interest in each particular legal outcome. All states engage in similar calculations, and since the customary process operates by measuring states' interests before creating appropriate rules, that process therefore accords greater weight to behavior involving greater cost than it does to behavior involving less cost.[115] It is for this reason that acts usually carry more weight than statements in the process of customary international law.[116]

However, due to the varying level of resources among states, the costs associated with a particular action may be negligible for one state and prohibitive for another. Some states will lack the capacity, let alone the resources, to engage in certain types of action.[117] The process of customary international law, as a universalizing public interest phenomenon, clearly takes such disparities among states into some account, which helps explain why the United States, the United Kingdom, and Japan have found themselves together as persistent objectors to at least one new customary rule.[118] Greater weight will be accorded to a statement coming from a state's representative in a situation in which that state could not act than will be accorded to a statement from that same representative in a situation in which the state could act. Similarly, acts by some states will sometimes carry more weight than similar acts by other states. Trade sanctions imposed by a small, economically vulnerable state against its main trading partner are likely to be considered more legally significant than trade sanctions imposed by a large, wealthy state against a state with which it has only limited trading links.

---

115. A similar analysis was presented by Raman in his Yale S.J.D. thesis:

> Where the parties are in disagreement as to the significance of past events to the determination of the requirements for present decision, the extent to which base values were expended by them may create a modest presumption that there were shared expectations about such requirements for decision. It is therefore appropriate in examining the authoritativeness of a practice to take into account the extent of commitment made by the parties through the base values at their disposal, which in this connection includes not only power and wealth but all other values.

Raman, Prescription of International Law by Customary Practice, *supra* note 42, at 466.

116. *See* Akehurst, *supra* note 1, at 2 n.1.

117. *See, e.g.*, the comments on internal, political limitations on state action, *supra* note 16.

118. *See* discussion *infra* note 182 and accompanying text.

This assessment may be skewed, however, by the fact that the more powerful state usually will be able to allocate more resources to publicizing its legally relevant behavior, and will likely attract more attention than less powerful states as a result.[119] In addition, more powerful states are usually watched more closely than less powerful states. All other things being equal, the actions of more powerful states are accorded greater weight by the customary process than the actions of less powerful states. Thus, the process of customary international law compensates only partly for power disparities among states.[120]

Since a rule of customary international law develops when most states behave as if they favor, or at least do not object to, the development of that particular rule, determining whether a rule exists usually involves weighing supporting, ambivalent, and opposing behavior.[121]

---

119. Only the most affluent of states publish digests of their own legally relevant behavior. Australia (AUSTL. Y.B. INT'L L.), Belgium (R.B.D.I.), Canada (CAN. Y.B. INT'L L.), France (A.F.D.I.), Germany (Z.A.Ö.R.V.), Italy (RIV. D.I.), Japan (JAPAN. ANN. INT'L L.), South Africa (S. AFR. Y.B. INT'L L.), Switzerland (SCHW.J.I.R.) and the United Kingdom (BRIT. Y.B. INT'L L.) do. China, Russia and India do not. Surprisingly, the United States has recently decided to cease publication of the Digest of United States Practice in International Law.

120. This article is thus careful not to assume that the rules which result from the customary process, or the way in which the process itself operates, are satisfactory to all states. *See* discussion of D'Amato's approach, *supra* note 20. Cultural and ideological differences persist, notwithstanding the predominant influence of western liberal values in the international legal system. Areas of serious disagreement remain largely unregulated or indeterminate. However, the fact that all states rely, to one degree or another, on rules of customary international law indicates that certain long-standing shared understandings are present as to the way in which the customary process operates.

121. *See, e.g.*, Akehurst, *supra* note 1, at 13–14. This behavior necessarily exists on a spectrum. For example, the strength with which a state voices its opposition to or opposes through actions, an existing, emerging or potential rule may vary depending on the importance the state attaches to the outcome it desires. This article reduces the spectrum to three positions — supporting, ambivalent, and opposing — solely for explanatory purposes. In addition, it should be re-emphasized that this theory of customary international law is essentially consensual in nature because a state, having accepted the process of customary international law supports or acquiesces in, for example, the development of a new rule knowing that its behavior will contribute to the development of the rule. *See* discussion *supra* note 5 and accompanying text. If it opposes the development of that rule and does so consistently, but is not successful in preventing its development, it will find itself in the position of a persistent objector with all of its rights under international law preserved. *See* discussion *infra* pp. 162–65.

Koskenniemi has argued that the concept of acquiescence in this context "tends to be a camouflage for arguing from a conception of justice, most frequently from the principle that legitimate expectations should not be ignored." He asserted that "[i]t is not really — despite appearances — a consensual argument at all." Koskenniemi, *The Pull of the Mainstream*, *supra* note 47, at 1951. However, Koskenniemi used a strict definition of consent, one that did not accord with the social construction of that concept adopted by states. States base legitimate expectations on acquiescence to the maintenance, development, or change of rules of customary international law because the shared understandings which make up the customary process include an understanding to the effect that a state which acquiesces to the maintenance, development, or change of a rule is not objecting, and therefore consenting to it.

Such a weighing process begins when behavior which could support a new rule appears. For instance, suppose that State A wants a new rule to develop and therefore acts in accordance with, or issues a statement in support of, its preferred new rule. State B is ambivalent towards the new rule and does nothing. State C does not want the new rule to develop and therefore acts in a way which would be in violation of the new rule, were it to develop, or issues a statement objecting to it. All other states are in the position of State A, State B or State C. If there are many State As, some State Bs, and only a few State Cs, the proposed rule will become a rule of customary international law and the State Cs may become persistent objectors.[122] If there are few State As, some State Bs, and many State Cs, the proposed rule will not develop. In either case the State As, had they acted in violation of an existing rule in order to indicate their support for a new rule, would have violated customary international law. However, the fact that widespread support is required for a new rule to develop makes it unlikely that a successful State A would be regarded as legally responsible for such a violation, except perhaps by persistent objectors, if there are any. The question therefore becomes more one of opposability than breach.

The two examples above are relatively straightforward. Frequently, the balance between supporting and opposing states is not so clear, or the different kinds of behavior do not fall within three strictly definable groups. Consequently, it will be more difficult to determine whether a rule has developed or changed. The different weights accorded to different acts, omissions, and statements in different contexts further complicate matters, as does the self-evident nature of some shared interests.

C. *The Self-Evident Nature of Some Shared Interests*

Rules of customary international law also differ on the basis of the relative amounts of supporting behavior, as compared to opposing behavior, necessary for them to come into existence. Some scholars have pointed to international human rights as one area where rule cre-

---

Consequently, Koskenniemi has failed to break out of the consensual mould. Whether states acquiesce because of larger, shared conceptions of justice or morality is another, more valid question. *See* discussions *infra* part III.C and pp. 165–67.

It should also be noted that this consensual explanation is not compromised by the emergence of new states as there is an important difference between the act of joining the club of law creators and participation in the process of law creation. New states invariably rely on some rules of customary international law. By doing so they accept the process by which those rules have arisen, as well as a place in that ongoing process. *See generally* discussion *supra* note 5 and accompanying text. This then provides them with the opportunity to seek to change such rules as do not correspond with their interests.

122. For more on persistent objection, see discussion *infra* pp. 162–65.

ation involves a lower behavioral threshold or burden of proof.[123] As noted earlier, Koskenniemi has suggested that customary international law in the human rights field is determined not by formal tests of legal validity, but by an "anterior — though in some respects largely shared — criterion of what is right and good for human life."[124]

If the customary process, by determining the interests of individual states in particular rules, operates to maximize the interests of states as a whole, the weighing of supporting, ambivalent, and opposing behavior may be understood as a facilitative, and not always necessary, exercise. In other words, although the interests of states will usually become clear through a careful examination of their actions and statements, in some instances their interests may be so obvious that such a careful weighing of behavior is not required.

This conclusion appears to explain many of those customary rules which attract the label *jus cogens*, such as the most fundamental of human rights or the rule of non-intervention.[125] Other customary rules, including most other international human rights, also benefit from the self-evident nature of some shared interests in that, even if the relevant shared interests are not sufficiently clear or widely shared to create a

---

123. *See, e.g.*, MERON, *supra* note 30, at 113; Schachter, *International Law in Theory and Practice*, *supra* note 14, at 336. Schachter included the rules against aggression and on self-defence within the same category. Schachter, *Entangled Treaty and Custom*, *supra* note 14, at 734. For a similar, although not identical view, see Kirgis, *supra* note 91, at 149.

124. Koskenniemi made a point which, intuitively, must be correct:

> Some norms seem so basic, so important, that it is more than slightly artificial to argue that states are legally bound to comply with them simply because there exists an agreement between them to that effect, rather than because, in the words of the International Court of Justice (ICJ), noncompliance would "shock [] the conscience of mankind" and be contrary to "elementary considerations of humanity".

Koskenniemi, *The Pull of the Mainstream*, *supra* note 47, at 1946–47 (footnote omitted) (quoting from the advisory opinion on *Reservations to the Convention on the Preservation and Punishment of the Crime of Genocide* and the judgment in the *Corfu Channel* case).

For a similar argument from an international relations scholar, see Hurrell, *supra* note 87, at 65–66. This section of this article attempts to respond, in part, to Hurrell's concern about the artificial separation of order and justice in academic explanations of international relations and international law. *Id.* at 65–69.

125. This conclusion may explain, in part, why the International Court did not feel it necessary in the *Nicaragua* case to examine the past conduct of states with respect to the rule of non-intervention. *See* Nicaragua Case, *supra* note 25. Schachter wrote that "states and tribunals do not question the continued force of those rules [on self-defense and against aggression, genocide, torture, etc.] because of inconsistent or insufficient practice. . . . This is not because the rules express 'noble aspirations' . . . but . . . because they express deeply-held and widely shared convictions about the unacceptability of the proscribed conduct." Schachter, *Entangled Treaty and Custom*, *supra* note 14, at 734. In addition, the fact that all states have an obvious interest in these rules goes a long way to explaining the *erga omnes* character which it is frequently asserted that *jus cogens* rules have. It may also explain the ease and frequency with which natural law arguments are applied in support of them.

rule by themselves, their existence reduces the relative degree of supporting behavior necessary to do so. Thus, the self-evident nature of some shared interests frequently works together with supporting behavior to create rules of customary international law.[126] Consequently, although there is clearly something different about how some customary rules arise, this difference can be understood as working with rather than against the normal process of customary international law, a process which usually, but not necessarily, weighs supporting, ambivalent, and opposing behavior to determine shared interests before protecting and promoting those interests with law.[127]

D. *Varying Degrees of Resistance to Change*

As a result of the weighing of supporting, ambivalent, and opposing behavior, as well as the self-evident nature of some shared interests, some customary rules are stronger than others in terms of their resis-

---

126. Supporting behavior may also prove useful in guarding against problems of cultural relativism by demonstrating that the interests really are shared. It should also be noted that some, but not all of these self-evident shared interests might be labelled values. *See* discussion *supra* notes 47–48 and accompanying text. However, it is an objective, and not a subjective phenomenon which is being described here.

127. This role of the customary process as a means of identifying state interests through behavior, and the role played by the self-evident nature of some shared interests, may go a long way towards explaining Koskenniemi's larger concern. He has written:

> The dynamics of international legal argument are provided by the constant effort of lawyers to show that their law is either concrete or normative and their becoming thus vulnerable to the charge that such law is in fact political because apologist or utopian. Different doctrinal and practical controversies turn on transformations of this dilemma. It lies behind such dichotomies as "positivism"/"naturalism", "consent"/"justice", "autonomy"/"community", "process"/"rule", etc., and explains why these and other oppositions keep recurring and do not seem soluble in a permanent way. They recur because it seems possible to defend one's legal argument only by showing either its closeness to, or its distance from, state practice.

Koskenniemi, *The Politics of International Law*, *supra* note 47, at 8 (summarizing FROM APOLOGY TO UTOPIA).

If, as this article argues, the closeness to, or distance from state behavior depends on the self-evident, or non-self-evident nature of states' interests in a particular rule, then Koskenniemi's apologetic/utopian dilemma may be nothing more than Simmonds' positivism/idealism tension playing itself out on the international plane. While Koskenniemi has viewed the situation as proof of the incoherence and political subjectivity of (international) law, Simmonds has embraced and celebrated the complexity as truly reflective of human society. *See* Simmonds, *supra* note 99. In addition, this explanation of the capacity of the self-evident nature of some shared interests to give rise to customary rules may account, at least in part, for McDougal's famous reliance on "the test of *reasonableness*" to determine that the United States had the right to create a sizeable exclusion zone on the high seas for the purposes of atmospheric nuclear tests. Myres S. McDougal, Comment, *The Hydrogen Bomb Tests and the International Law of the Sea*, 49 AM. J. INT'L L. 356, 361 (1955). For McDougal, if not for others, it was self-evident that the defense of "the values of a free world society" was a shared interest of sufficient importance to support such a rule. *Id.*

tance to change. For instance, a rule which every state has supported, towards which no state has been ambivalent, and which none has opposed will be extremely difficult to change. In contrast, a rule which one state has supported and towards which all other states have been ambivalent will be at the mercy of any opposing state.[128] Similarly, the resistance to change of a customary rule will be increased if states have a self-evident shared interest in it, and, as was noted in the previous section of this article, the self-evident nature of some shared interests and the weighing of supporting, ambivalent, and opposing behavior will sometimes work together to create a higher degree of resistance to change.[129]

The most interesting consequence of this phenomenon is that some rules have received so much support that they have become, for all practical purposes, immutable. Although it is conceivable that enough opposing behavior could destroy the most resistant of rules, this possibility is only theoretical with respect to a number of rules, which consequently provide a framework for the rest of the international legal system.[130] These "structural principles," although derived from the process of customary international law, or at least an earlier process akin to it, now guide and qualify the application of state power in the maintenance, development, and change of less resistant, non-structural customary rules.

The most fundamental of these structural principles are those which define or characterize the state, as states are almost entirely responsible for the behavior which makes and changes international law.[131] Four such principles can be identified: jurisdiction, personality, reciprocity,

---

128. *See generally* Akehurst, *supra* note 1, at 13–14, 19; D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW, *supra* note 20, at 91–93.

129. The passage of time is also a factor. All other things being equal, more recent behavior is accorded more weight than less recent behavior. However, this adjustment may be offset by the fact that a well-established rule frequently attracts a higher degree of legitimate expectation than a less well-established rule. *See* discussion *infra* part VII.

130. It is, however, still a possibility, albeit one which would threaten the current international legal system, contrary to the interests of at least the more powerful states, and which consequently might necessitate the development of new rules to replace those destroyed. For similar views as to the mutability of fundamental, or constitutional rules, see Rolf E. Sartorius, *Hart's Concept of Law*, *in* MORE ESSAYS IN LEGAL PHILOSOPHY 131, 158–59 (Robert Summers ed., 1971); N.E. Simmonds, *Why Conventionalism Does Not Collapse into Pragmatism*, 49 CAMBRIDGE L.J. 63, 77–79 (1990); Simmonds, *Between Positivism and Idealism*, *supra* note 99, at 320–21. *Contra* HART, THE CONCEPT OF LAW, *supra* note 109, at 89–96. For a strong suggestion that Hart's approach might be appropriate in international legal theory, see Pellet, *supra* note 13, at 39–40.

131. See discussion *supra* note 4.

and legitimate expectation.[132] In short, states are entities which have jurisdiction, which is primarily, but not exclusively, territorially based. They have full international legal personality, which gives them the competence to represent themselves and their nationals in international law. They are formally equal and therefore entitled to the same general rights and subject to the same general obligations, as is ensured through the principle of reciprocity. Finally, states are not subject to the application of rules of international law unless they consent, as is provided by the principle of legitimate expectation, which subsumes both explicit and inferred consent.

The final four sections of this article provide examples of how each of these principles qualifies the application of state power in the customary process. These examples are not meant to be exhaustive. Instead, they are presented in an attempt to demonstrate that each of these principles affects, in some significant way, the outcome of efforts by states, through applications of power, to maintain, develop, or change particular rules of customary international law.

IV. Custom, Power, and the Principle of Jurisdiction

This article has already discussed the fact that some customary rules differ from others in important ways, such as in terms of their resistance to change. Some rules and principles of international law have become, for all practical purposes, immutable. Less resistant rules develop and change within the structure provided by highly resistant rules and principles. These less resistant rules can be subdivided in many ways. One of the more interesting methods of division addresses the relationship to state territory, as that relationship is defined by the principle of jurisdic-

---

132. James Crawford identified the following *five* "exclusive and general legal characteristics of States":

> (1) In principle, States have plenary competence to perform acts, make treaties, and so on, in the international sphere . . . .
> (2) In principle States are exclusively competent with respect to their internal affairs . . . .
> (3) In principle States are not subject to compulsory international process, jurisdiction, or settlement, unless they consent . . . .
> (4) States are regarded in international law as "equal". . . . It is a formal, not a moral or political, principle. . . .
> (5) Finally, any derogations from these principles must be clearly established: in case of doubt an international court or tribunal will decide in favour of the freedom of action of States . . . .

James Crawford, The Creation of States in International Law 32–33 (1979). The four principles examined in this article are derived from and form the basis of these five characteristics: the first amounts to personality, and the second to jurisdiction. The fourth involves an aspect of reciprocity, and the third and fifth are both associated with legitimate expectation.

tion, and more specifically, by the principle of territorial jurisdiction.[133] Subdivided in this way, these less resistant, nonstructural rules break down into internal rules, boundary rules, and external rules.

To understand the differences between internal, boundary, and external rules it is useful to view these nonstructural customary rules as resulting from tensions among different, more resistant rules or principles. One rule or principle, such as that of territorial jurisdiction, pulls one way; another rule or principle, such as that of the freedom of the high seas, pulls another way. When the behavior of states allows the tensions among these competing rules or principles to stabilize, the result is a less resistant rule of customary international law, such as the rule concerning the breadth of the territorial sea.[134] As a result of these tensions, and because the factors producing them can always change, nonstructural rules are often unstable, although some will obviously be more stable than others.[135] This instability renders nonstructural rules subject to change with the fluctuating interests and patterns of behavior of states. These patterns of behavior are linked to the relative power of states but also are qualified in various ways by the customary process and by structural principles of international law. How these patterns are qualified will depend in large part on whether they concern internal,

---

133. Although the principle of jurisdiction sometimes operates extraterritorially, it is of greatest importance in the territorial context. Consequently, this article confines itself to examining the effects of the principle in respect to territory and uses the term "jurisdiction" to refer only to territorial jurisdiction. In addition, it may be argued that territorial jurisdiction is not a principle of international law having an effect on the application of power so much as it is a principle which recognizes and is dependent on the application of power as reflected in a state's control over territory. However, the boundaries of states are delimited, and statehood defined, by rules and principles of international law. State-like entities may have preceded the international legal system, but the power relationships which gave rise to the territorial state have subsequently been conceptualized, transformed, and legitimized by that system. Were this not the case, territorial jurisdiction would be a much more fluid concept than it is today.

134. A good expression of this tension with respect to the breadth of the territorial sea follows:

> The limit of this zone [the territorial sea] is . . . commonly recognised as extending to three miles from low-water mark . . . . It may, indeed, be that the present limit, in view of modern conditions, needs to be extended; but however desirable such an extension of territorial rights may be for some purposes, it must, until ratified by common usage or international agreement, be regarded as inadmissible, and as an infringement of the principle of the freedom of the sea.

PITT COBBETT, LEADING CASES ON INTERNATIONAL LAW 144 (Hugh H.L. Bellot ed., 4th ed. 1922) (footnotes omitted). Other rules have also resulted from the tension between the principle of territorial jurisdiction and the freedom of the high seas, the most important of these being the rule concerning the Exclusive Economic Zone. Another example of a customary rule developing out of tension between competing principles is the rule concerning state immunity from jurisdiction. *See* discussion *infra* note 138 and accompanying text.

135. For discussion of varying degrees of resistance to change, see *supra* part III.D. In the case of boundary rules instability renders them indeterminate. *See* discussion *infra* notes 242–43 and accompanying text.

boundary, or external rules. The paragraphs below examine the differing effects that applications of power have on these three kinds of rules.

A. *Internal Rules*

A state is most powerful within the confines of its own borders. Although states are able to project power outside of their borders, the strength of that projected power will normally wane further away from the state, and will generally be weakest within the territories of other states. These differing degrees of power are the result of control over territory, itself directly dependent on power, but that control over territory is legitimized and given effect in the international legal system by the principle of territorial jurisdiction.[136]

Internal rules are rules which states seek to apply to other states within the territorial jurisdictions of the first states. In these situations, states with territorial jurisdiction have a power advantage over states without territorial jurisdiction because they are better able to maintain or alter behavior patterns with respect to particular legal issues within their own territory. Such territorially-based control over behavior patterns can have decisive effects on the maintenance, development, or change of customary rules, especially if the preponderance of behavior relevant to any particular legal issue occurs within the territorial jurisdiction of those states which have a strong interest in maintaining, developing, or changing a customary rule with respect to that behavior.

A good example of an internal rule involves the rule concerning state immunity from the jurisdiction of foreign courts, a rule which is widely regarded as having changed from an absolute to a restrictive

---

136. See, for example, the following statement by Max Huber in the *Island of Palmas* arbitration:

> The development of the national organization of states during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the state in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.

Island of Palmas Case (U.S. v. Neth.) 2 R.I.A.A. 829, 838 (1928). On the nature of territorial jurisdiction as a principle of international law, see discussion *supra* part III.D and note 133. It should be noted that the traditional principle of territorial jurisdiction is currently under some challenge, not least by developments in international environmental law. *See generally* Canadian Coastal Fisheries Protection Act, *as amended* (1994), *reproduced in* 33 I.L.M. 1383 (1994); ALEXANDRE KISS & DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 115–54 (1991); Alan Raul & Paul Hagen, *The Convergence of Trade and Environmental Law*, NAT. RESOURCES & ENV'T, Fall 1993, at 3; Michelle L. Schwartz, *International Legal Protection for Victims of Environmental Abuse*, 18 YALE J. INT'L L. 355 (1993). On the legitimizing effect of legal systems, see *supra* part I.C.

standard over the course of the last century.[137] The tension in this instance, between the principle of territorial jurisdiction and the principle of legitimate expectation (in the sense that states cannot be subject to compulsory jurisdiction without their consent),[138] stabilized in favor of the principle of territorial jurisdiction. The rule of restrictive immunity developed at least partly because the vast majority of state immunity disputes arose within the territorial jurisdiction of states which supported that rule. These states, by applying restrictive immunity within their borders, were consequently able to alter the preponderance of behavior with respect to the issue of state immunity worldwide, thus developing a new, generally applicable rule of customary international law.

A second example of an internal rule involves the attempt by non-industrialized states to change the customary rule concerning the standard of compensation for the expropriation of foreign-owned property. Although this change was strongly resisted by more powerful Western industrialized states, the non-industrialized states managed to shift the applicable standard away from that of "prompt, adequate, and effective compensation."[139] They were able to do so despite their relative power disadvantages *vis-à-vis* the Western industrialized states at least in part because they had territorial jurisdiction in most situations where the issue of compensation for expropriation arose. In short, most disputes over the expropriation of foreign-owned property arose in the non-industrialized world.

---

137. For good, standard reviews of the history of the state immunity rule see OPPENHEIM'S INTERNATIONAL LAW, *supra* note 27, at 341–63; Sompong Sucharitkul, *Immunities of Foreign States Before National Authorities: Some Aspects of Progressive Development of Contemporary International Law*, *in* I ESTUDIOS DE DERECHO INTERNACIONAL: HOMENAJE AL PROFESOR MIAJA DE LA MUELA 477 (1979); Peter D. Trooboff, *Foreign State Immunity: Emerging Consensus on Principles*, 200 R.C.A.D.I. 235 (1986-V). For somewhat different perspectives see Claude Emanuelli, *L'immunité souveraine et la coutume internationale: de l'immunité absolue à l'immunité relative?*, 22 CAN. Y.B. INT'L L. 26 (1984); and discussion *infra* Part VII.A.

138. *See generally* James Crawford, *Execution of Judgments and Foreign Sovereign Immunity*, 75 AM. J. INT'L L. 820, 852, 856 (1981); discussion *supra* note 134 and accmpanying text.

139. *See generally* C.F. Amerasinghe, *Issues of Compensation for the Taking of Alien Property in the Light of Recent Cases and Practice*, 41 INT'L & COMP. L.Q. 22 (1992); Rudolf Dolzer, *New Foundations of the Law of Expropriation of Alien Property*, 75 AM. J. INT'L L. 553 (1981); Richard B. Lillich, *The Valuation of Nationalized Property in International Law: Toward a Consensus or More 'Rich Chaos'?*, *in* III THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 183 (Richard B. Lillich ed., 1975); Kenneth M. Siegel, Note, *The International Law of Compensation for Expropriation and International Debt: A Dangerous Uncertainty*, 8 HASTINGS INT'L & COMP. L. REV. 223 (1985). For a suggestion that the "prompt, adequate, and effective" standard was never a rule of customary international law, see Oscar Schachter, *Compensation for Expropriation*, 78 AM. J. INT'L L. 121 (1984).

More recently, the collapse of the Soviet Union has placed the Western industrialized states in a stronger position in terms of foreign direct investment. Increasingly, they have sought to protect their investments through the negotiation, with individual non-industrialized states, of bilateral investment treaties providing for levels of compensation higher than that available under customary international law. It is possible that the proliferation of these treaties will return the customary standard to "prompt, adequate, and effective compensation."[140] However, such a change would once more demonstrate the qualifying effect of the principle of territorial jurisdiction because these treaties would, in effect, allow Western industrialized states to shift the locus of the behavior with greatest legal relevance to this rule outside the territories of individual non-industrialized states. In other words, the conclusion of an investment treaty moves the behavior which is of greatest legal relevance to the standard of compensation from the post-expropriation to the pre-investment phase, before the investment in question has been committed to the territorial jurisdiction of any particular non-industrialized state.[141]

B. *Boundary Rules*

Boundary rules differ from internal rules in that they relate to issues arising at the intersection of a state's territorial jurisdiction with an international or internationalized zone. A good example of a boundary rule is the rule concerning the breadth of the territorial sea. In boundary rule situations, a state which is in geographic proximity to the area where the rule is to be applied will usually be in a more powerful position than states which are more distant. This variation in power results because the ability to project power derived from some sources, especially military capabilities, is at least partly dependent on geographic proximity.[142] The advantage held by geographically proximate states in boundary rule situations may explain the extension of the breadth of

---

140. *See* Davis R. Robinson, *Expropriation in the Restatement (Revised)*, 78 AM. J. INT'L L. 176, 177–78 (1984); *see also* RICHARD B. LILLICH & BURNS H. WESTON, INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS 34–43 (1975) (regarding the analogous situation of lump sum agreements). *But see* Amerasinghe, *supra* note 139, at 30; Dolzer, *supra* note 139, at 565–68; Schachter, *supra* note 139, at 126–27.

141. If a shift to a higher customary standard is occurring, it may also be at least partly the result of decisions of the Iran-United States Claims Tribunal. *See* Patrick M. Norton, *A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation*, 85 AM. J. INT'L L. 474, 482–86, 505 (1991). If this is the case, the fact that the Tribunal was set up primarily to facilitate the release of frozen Iranian assets in the United States may support the argument which is being advanced here.

142. Power derived from other sources, such as wealth, travels very well.

the territorial sea to twelve nautical miles in the face of strong opposition by powerful maritime states, in particular the United States, the United Kingdom, and Japan.[143] It may also explain why a relatively weak state such as Iceland was able to play such a decisive role in the development of new customary rules governing coastal fisheries.[144] Geographic proximity should be particularly advantageous in relation to rules based on continuing economic activity, such as fishing.

C. *External Rules*

External rules involve restrictions which states seek to impose on the freedom of other states to act within those other states' own territories. In these situations the states seeking to impose the restrictions are at a power disadvantage because they do not have territorial jurisdiction, which has a crippling effect on their ability to change behavior patterns so as to create new rules or modify old ones. International human rights provide a good example of this effect. Driven in part by applications of power derived from moral authority, states have either participated or acquiesced in the creation of a multitude of rules concerning international human rights. Many states have consented to the application of treaty-based review and individual petition procedures. However, apart from a few small but nonetheless significant developments, such as the establishment of United Nations special rapporteurs on several topics, mechanisms to facilitate the application of international human rights rules within the territorial jurisdictions of nonconsenting states have not been put in place.[145] The ability of nonconsenting states to control behavioral patterns within their own territorial jurisdictions is a formidable barrier to those who seek to change that behavior and thus create rules of customary international law which provide effective protection to all human beings.

As this discussion of internal, boundary, and external rules has shown, the principle of territorial jurisdiction qualifies the application of state power in the process of customary international law. In some

---

143. Legitimacy, of the general variety described by FRANCK, *supra* note 40, may also have played a role here, in that a coastal state's claim to control over the harvesting of fisheries, the exploitation of seabed minerals and the prevention of pollution in the area involved would seem more legitimate than the claims of distant states. On the opposition of the powerful maritime states to this rule, see discussion *infra* note 182 and accompanying text.

144. *See, e.g.*, Fisheries Jurisdiction (Gr. Brit. and N. Ir. v. Ice.) 1974 I.C.J. 3 (July 25); *see generally* WILLIAM T. BURKE, THE NEW INTERNATIONAL LAW OF FISHERIES 1–24 (1994); 1 D.P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 510–81 (1982).

145. *See generally* discussion *supra* part I.B.

situations it goes so far as to render weak and ineffective those states which are normally regarded as quite powerful.

V. CUSTOM, POWER, AND THE PRINCIPLE OF PERSONALITY

In order for an individual or entity to be able to hold rights and be subject to obligations within a particular legal system, that individual or entity must have legal personality. In addition, certain individuals or entities within that legal system will, depending on their particular character, also be entitled to hold such rights and be subject to such obligations. Legal personality, like territorial jurisdiction, is not only something which can be objectively determined, it is also a requirement, and, in some cases, an entitlement. For this reason it may be considered a structural principle of international law.[146]

Different degrees of legal personality may exist within any given legal system. However, an individual or entity with *full* legal personality is capable of holding as many rights and being subject to as many obligations as any other individual or entity within that legal system. In a legal system in which the same individuals or entities are both creators and subjects of the law, having full legal personality means that the individual or entity in question is formally entitled to participate in the relevant processes of law creation to the same extent as any other individual or entity.[147] By extension, in the international legal system, only those individuals or entities that have international legal personality are entitled to participate in the process of customary international law, and only those individuals or entities that have full international legal personality are entitled to participate fully in that process.[148]

In the state-centric international legal system, states are the only holders of full international legal personality. In principle, all states have the same degree of legal personality, and in that sense all states are formally equal. Thus, all states, from the weakest to the most powerful, are equally entitled to participate in the process of customary international law.[149]

---

146. For a discussion of territorial jurisdiction as a structural principle of international law, see *supra* note 133.

147. *See* discussion of formal equality *supra* notes 8–16 and accompanying text.

148. Individuals and entities which do not have international legal personality do engage in activities which are relevant to the process. Judges and scholars, for instance, play an important role in identifying rules and exposing and analyzing legally relevant behavior. However, only holders of legal personality are able to engage directly in legally relevant behavior, which is then weighed to determine the existence and content of particular customary rules.

149. *See* discussion *supra* notes 8–16 and accompanying text.

This equal right to participate in the customary process immediately acts to qualify the application of state power, as the supporting and opposing behavior of less powerful states is weighed together with that of more powerful states when determining the existence and content of particular customary rules. Therefore, large numbers of less powerful states behaving in unison can sometimes "outweigh" smaller numbers of more powerful states.

Such a numerical imbalance existed when the rule concerning the twelve-mile territorial sea developed: the powerful maritime states were so vastly outnumbered by weaker states that opposition by the former failed to prevent the development of the new rule.[150] Similarly, attempts by Western industrialized states to prevent a change in the standard of compensation required for expropriation were ineffective, at least partly, because of the large number of less powerful states which supported that change.[151]

One of the best examples of a customary rule which developed because of a numerical advantage on the part of less powerful states is the right of self-determination in the context of decolonization. There, an ever-growing number of relatively less powerful states was able to expand the scope of a rule despite the fact that most of the more powerful states were initially opposed to that expansion.[152]

This particular qualifying effect of the principle of personality will be greatest when the behavior responsible for the maintenance, development, or change of a rule is the sort of behavior in which less powerful states easily engage. Consequently, rules which develop largely or entirely as a result of statements are more open to the participation of less powerful states than rules which develop largely or entirely as a result of acts. The statement-driven nature of the international human rights movement thus partly explains the influential role which less powerful states have played in developing customary rules in that area.[153]

Another qualifying effect of the principle of personality appears in the context of recognition. Recognition is the process whereby states formally acknowledge that other entities are states, thereby according them full international legal personality.[154] Unrecognized states may be

---

150. *See* discussion *infra* part VII.B.

151. *See* discussion *supra* pp. 151–53.

152. *See generally* EYASSU GAYIM, THE PRINCIPLE OF SELF-DETERMINATION 36–39 (1990); UMOZURIKE O. UMOZURIKE, SELF-DETERMINATION IN INTERNATIONAL LAW (1972); Clyde Eagleton, *Self-Determination in the United Nations*, 47 AM. J. INT'L L. 88 (1953).

153. *See* discussion *supra* part I.B.

154. States will sometimes also recognize new governments. *See generally* Jochen A. Frowein, *Recognition*, *in* 10 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 340 (Rudolf

able to participate in the international legal system, but not to the same extent as recognized states. Among other things, unrecognized states are generally not admitted to international organizations, and if they are admitted they are usually not allowed to participate fully.[155] This exclusion limits or prevents them from contributing to the negotiation and adoption of resolutions and declarations. Moreover, unrecognized states generally do not have diplomatic representation in other states, meaning that their position with respect to the maintenance, development, and change of particular customary rules may not always be clear. Therefore, their supporting and opposing behavior may not be weighed alongside that of other states.

However, notwithstanding their partial exclusion from the international legal system, unrecognized states still have rights and are subject to obligations under international law.[156] Thus, they are able to participate in the customary process in any situation in which they are not restricted by their lack of diplomatic representation or by the refusal of other states to engage in cooperative behavior. Their acts and statements remain at least potentially relevant, but what is in effect their lack of full international legal personality, stemming from the lack of recognition, limits their opportunities to participate, and thus qualifies the application of power, in the process of customary international law.[157]

The principle of personality completely prevents most non-state actors from participating directly in the customary process. For instance, corporations are some of the most powerful international actors, but because they have, at best, only limited international legal personality, they are incapable of participating in the process of customary international law, at least in terms of being able to represent themselves.[158] Similarly, although assertions abound to the effect that individual human beings have limited international legal personality (for example, with

---

Bernhardt ed., 1987); CRAWFORD, *supra* note 132, at 10–25 (discussing recognition of states). However, to the degree that this article considers recognition, it confines itself to the recognition of states.

155. *See, e.g.*, G.A. Res. 2024, U.N. GAOR 4th Comm., 20th Sess., Agenda Item 23, at 65–28194, U.N. Doc. A/L.466 (1965) (regarding the refusal to admit Rhodesia to the United Nations); G.A. Res. 3237, U.N. GAOR, 29th Sess., 2296th plen. mtg., at 74-32548, U.N. Doc. A/RES/3237 (1974) (regarding the granting of observer status in the General Assembly to the Palestine Liberation Organization).

156. *See generally* OPPENHEIM'S INTERNATIONAL LAW, *supra* note 27, at 197–203.

157. A similar situation exists with respect to new states. *See* discussion *supra* note 121.

158. *See generally supra* note 4; *see also* A.A. Fatouros, *National Legal Persons in International Law*, *in* 10 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 299 (Rudolf Bernhardt ed., 1987); D. Kokkini-Iatridou & P.J.I.M. de Waart, *Foreign Investments in Developing Countries — Legal Personality of Multinationals in International Law*, 14 NETH. Y.B. INT'L L. 87 (1983).

respect to international human rights), and although individuals can be held responsible under international law for certain crimes, individuals remain unable to participate directly in the process of customary international law.[159]

To the degree that individuals and corporations play a role in the process of customary international law, they do so through the mechanism of diplomatic protection. Diplomatic protection means that for the purposes of international claims, the rights of an individual or corporation are assimilated to the rights of the state of which that individual or corporation holds nationality.[160] Consequently, states are considered to have obligations to other states concerning the treatment of those other states' nationals.[161] Most of the international legal obligations which states have to individuals and corporations arise through the concept of diplomatic protection *vis-à-vis* another state.[162]

The link between diplomatic protection and legal personality is a strong one. In international law the individuals and corporations which benefit from diplomatic protection are viewed as component parts of their state's personality. Consequently, they not only share in that personality but also act as extensions of it. The involvement of nationals in

---

159. *See generally supra* note 4. For a developed assertion of the international legal personality of individuals in the human rights context, see H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS (1950). On individual criminal responsibility in international law, see *Resolution Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia*, U.N. SCOR, 32d Sess., 3217th mtg. at 2, U.N. Doc. S/RES/827 (1993); *Resolution Establishing the International Tribunal for Rwanda*, U.N. SCOR, 33d Sess., 3453 mtg. at 2, U.N. Doc. S/RES/955 (1994); *I.L.C. Draft Statute for an International Criminal Court*, International Law Commission, 46th Sess., at 43–161, UN Doc. A/49/10 (1994); and see generally 1 INTERNATIONAL CRIMINAL LAW (M. Cherif Bassiouni ed., 1986).

160. *See* Mavrommatis Palestine Concessions, 1924 P.C.I.J. (ser. A) No. 2, at 12 (Aug. 30); Panevezys-Saldutiskis Railway, 1939 P.C.I.J. (ser. A/B) No. 76, at 16 (Feb. 28). *See generally* BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, *supra* note 90, at 480–94; IGNAZ SEIDL-HOHENVELDERN, CORPORATIONS IN AND UNDER INTERNATIONAL LAW 7–12 (1987).

161. It may be argued that nationality is not part of international law because it is open to any state to grant nationality as it chooses. But although the choice of whether to grant nationality is within the state's reserved domain, *see, e.g.*, Nationality Decrees in Tunis and Morocco, 1923 P.C.I.J. (ser. B) No. 4, at 24 (Feb. 7); Nottebohm Case (Liech. v. Guat.), 1955 I.C.J. 4 at 20 (Apr. 6), whether a grant of nationality is valid for the purposes of diplomatic protection has long been treated as a question of international law. *See* Nottebohm Case, *supra*, at 20–21; Mergé Claim, 22 I.L.R. 443, 454 (Ital.-U.S. Conciliation Comm'n June 10, 1955); Iran v. U.S., Case No. A/18, 5 Iran-U.S. Cl. Trib. Rep. 251, 259–66 (Apr. 6, 1984).

162. For the classic expression of this distinction see Barcelona Traction, Light and Power Co. (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5). *See generally* RUTH DONNER, THE REGULATION OF NATIONALITY IN INTERNATIONAL LAW (2d ed. 1994) (discussing nationality of claims). There are only a few exceptional cases, involving protected persons and alien members of a state's armed forces or merchant marine, where a state may provide diplomatic protection to non-nationals.

a particular area or activity may allow states to participate in the process of customary international law in a way, or to an extent, that they would otherwise be unable to do. This is because only those international legal personalities to which obligations of international law are owed are entitled to bring claims under international law, and claims are an important form of state behavior in the customary process.[163]

The involvement of nationals thus enables states to participate more effectively in the process of customary international law by giving them opportunities to make specific claims with respect to certain issues and to make those claims with greater effect than would otherwise be the case. Moreover, behavior which supports or opposes existing, emerging or potential rules may be accorded more weight in the customary process if it is engaged in for the purposes of supporting or opposing a legal claim.[164] For instance, the presence of nationals may allow states to engage in legal countermeasures, which may be more effective in contributing to the process of customary international law than similar, but illegal acts, engaged in in the absence of nationals.

One example of this phenomenon occurred with respect to the rule concerning compensation for expropriation. The fact that most of the affected corporations were incorporated in Western industrialized states enabled those states to be more involved in the customary process with respect to this rule than would otherwise have been possible. This opportunity for increased involvement was particularly important given that, from the perspective of the industrialized states, this rule was an external rule. That is, the industrialized states were already at a disadvantage because the preponderance of behavior relevant to this rule occurred within the territorial jurisdictions of non-industrialized states.[165] The principle of personality, operating in the context of diplomatic protection, thus provided a qualifying effect which at least partly counteracted the qualifying effect of the principle of territorial jurisdiction, and did so in favor of the industrialized states. The qualifying effects of different rules and principles will often work against each other, making

---

163. *See* Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174, 181–82 (Apr. 11) (advisory opinion); *see also* discussion *supra* part III.A–B. There are at least two differences between claims made by a state on its own behalf and claims involving diplomatic protection. The former, with the exception of claims involving activities in the territory of foreign states and for which the state is not entitled to immunity from foreign courts, may be made without having to establish a genuine link of nationality and without having to exhaust local remedies.

164. For an argument that only such behavior as supports or opposes claims to rights constitutes state practice for the purposes of customary international law, see Weisburd, *supra* note 32.

165. *See* discussion *supra* part IV.C.

it more difficult to assess their significance within the international political system.

Another example of the ability of the principle of personality to improve the efficacy of states' involvement in the customary process involves boundary rules.[166] For example, in the development of the rule concerning the twelve-mile territorial sea, the activities of merchant vessels flagged by the powerful maritime states in the various zones of contested jurisdiction enabled those states to be more involved in resisting the development of that rule than would otherwise have been possible. This opportunity for increased involvement was particularly important because many of the disputed areas were located at some distance from the powerful maritime states' own territories. In effect, the principle of personality here served to extend a part of those states' "territorial" jurisdictions — their merchant vessels — to those distant, disputed areas. However, the presence of those vessels enabled coastal states to participate more effectively in the customary process as well, by arresting foreign vessels rather than just making claims to extended territorial waters.

The development of the rule of restrictive state immunity, on the other hand, involved an effort to distinguish between different aspects of a state's international legal personality, namely between the state acting as a state and the state acting as a private party. Although those parts of the state which normally acted as private parties were often distinguishable from the state as such by the fact that they had separate legal personality in the state's own national legal system, incorporation also conferred nationality, thus allowing the state to participate to an increased degree in the customary process, in a manner highly analogous to the compensation-for-expropriation example.[167] This increased ability to participate was particularly important for socialist and non-industrialized states for which restrictive immunity was generally an external rule. The principle of personality thus allows states to engage in behavior with respect to existing, emerging, or potential customary rules in situations where, without the principle of personality, their ability to do so would be greatly limited. In this way, the principle of personality, like the principle of jurisdiction, can clearly qualify the application of state power in the process of customary international law.

166. *See* discussion *supra* part IV.B.

167. *See* discussion *supra* pp. 159–60.

VI. CUSTOM, POWER, AND THE PRINCIPLE OF RECIPROCITY

One of the concepts normally considered fundamental to the idea of law is that the law of any society must apply equally to all its members. In national legal systems this concept can be understood in at least two ways. First, it is possible to understand law as being imposed from above by the state or sovereign and generally applicable to all citizens.[168] Secondly, it is possible to understand law as a multitude of bilateral relationships between individual people or between individuals and the state.[169]

In international society there is no overarching sovereign, which means that international law is best understood as a multitude of bilateral relationships between states. Since there is no overarching sovereign, no part of this law necessarily has to apply to any one state, nor does this law have to apply in the same way to all states; that is, it does not need to be generalized. Instead, the application of any particular rule of international law to a state is usually regarded as being dependent on its consent, which may be either express or inferred.[170] This consent operates bilaterally, as can be seen in the requirement of consent by states parties to reservations to multilateral treaties,[171] and in the existence of regional, or special customary international law.[172]

Fundamental to bilateralism is the concept of reciprocity: the idea that bilateral relationships between at least formally equal parties are not

---

168. *See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED, 18–37 (Wilfrid E. Rumble ed., 1995); A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 70–76 (10th ed. 1959).

169. *See* Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning (Part Two)*, 26 YALE L.J. 710 (1916–17).

170. *See* discussion *supra* notes 5, 15 and accompanying text.

171. *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 20, 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (1969). This requirement is also part of customary international law. *See* ARNOLD MCNAIR, THE LAW OF TREATIES 158–77 (1961).

172. On regional, or special customary international law, see citations *supra* note 1. It may appear that this bilateralist understanding of international law is incompatible with the existence of generally applicable rules, especially those virtually immutable principles which structure the international legal system. However, if a bilateral legal relationship with respect to any particular rule is multiplied so that similar relationships with respect to the same rule exist between all states, the rule becomes general in application. Furthermore, the bilateral relationships which make up any general rule do not exist in isolation. The customary process adds weight to, and therefore increases the resistance to change of, the legal rule which grounds the various bilateral legal relationships. The process, and the behavior which drives the process, are general in scope; the bilateral relationships which connect rights with obligations with respect to rules are not. To take an extreme example: an *erga omnes* rule can be thought of as a rule which has been grounded by bilateral legal relationships between all states and as a rule which, if violated, justifies a response by the rights holder at the end of any of the many bilateral ties to the violating state which relate to that particular rule.

unidirectional, but necessarily involve at least some element of *quid pro quo*.[173] This broad social concept of reciprocity, which states apply on the basis of either short- or long-term considerations of self-interest, may be responsible for a great deal of inter-state cooperation or exchange, outside or in addition to any international legal obligations.[174] However, this general concept also finds expression in a structural principle of international law, whereby in the context of general customary international law any state claiming a *right* under that law has to accord all other states the same right.[175] Reciprocity is therefore fundamental to the process of customary international law; it allows for the generalization of rules in response to state behavior, which in turn promotes the maximization of the universalized public interest.[176]

Reciprocity also operates as an important constraint on the behavior of states with respect to existing, emerging, or potential rules of customary international law. For instance, when a state behaves in support of an emerging or potential rule of customary international law, as the United States did in 1945 when it issued the Truman Proclamation on the Continental Shelf,[177] it does so knowing that any rule which results must apply and be available equally to all other states.[178] Were the state to refuse to accept generalization of the rule, its statements and actions would carry little weight as supporting behavior. Its refusal to support generalization might, in fact, have the opposite effect by demonstrating the state's opposition to the rule. The same analysis could be made with respect to existing customary rules: support for a rule constitutes acceptance of its general applicability. A state will therefore only behave in

---

173. In some instances however, such as with respect to some unequal treaties, the *quid* might be considerably smaller than the *quo*. In addition, it may frequently be the case that reciprocity does not occur in the same, discrete situation, but is provided at another time, in another "transaction." *See* discussion of Keohane's "specific" and "diffuse" forms of reciprocity, *supra* note 76.

174. *See generally* Keohane, *Reciprocity in International Relations*, *supra* note 76.

175. This distinction between the general, social concept, and the legal principle of reciprocity is similar to that made by Michel Virally between "la réciprocité formelle" and "la réciprocité réelle." *See* Michel Virally, *Le principe de réciprocité dans le droit international contemporain*, 122 R.C.A.D.I. 1, 29–34 (1967-III); *accord* Bruno Simma, *Reciprocity*, *in* 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 400 (Rudolf Bernhardt ed., 1984). For an explanation of the general concept of reciprocity from the perspective of general legal theory, as the source of most obligations, see LON FULLER, THE MORALITY OF LAW 19–27 (rev. ed. 1969).

176. *See* discussion *supra* notes 95–98 and accompanying text.

177. *Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf*, Proclamation No. 2667, 3 C.F.R. 67 (1943–48), *reprinted in* 40 AM. J. INT'L L. SUPP. 45 (1946).

178. The explicit recognition of reciprocity found in the Truman Proclamation — and the fact that the claim was to jurisdiction, and not to the right to acquire jurisdiction through occupation — explains, in large part, its rapid acceptance as a rule of customary international law. *See* O'CONNELL, *supra* note 144, at 470–71; Crawford & Viles, *supra* note 19, at 48.

support of an existing, emerging, or potential customary rule if it is prepared to accept the generalization of that rule.

The constraints imposed by the principle of reciprocity on the application of state power in the customary process are perhaps most interesting with respect to its effects on persistent objection. Persistent objection is the term used to describe the option each state has to oppose the development of a new rule of customary international law and to continue opposing that rule once it comes into existence. This continuing objection, which may be expressed either through actions or through statements, enables the objecting state to avoid being bound by the newly developed rule.[179]

Reciprocity affects persistent objection in the following way. The objecting state remains governed by the old rule in its relations with all other states. As a result of the principle of reciprocity and despite the existence of the new, generalized rule other states may also claim the same rights *vis-à-vis* the objecting state as they were able to claim under the old rule. However, these other states are governed by the new rule as among themselves. They are thus able to benefit from the existence of the new rule without having to share any of those benefits with the objecting state. There is, in effect, no "free rider" problem, which places the objecting state at a disadvantage, since it can neither freeze the state of general customary international law so as to benefit itself nor take advantage of any benefits the new rule may offer.

In addition, most states are extremely reluctant to recognize the rights of persistent objectors. State agencies and national courts frequently are unaware of or even ignore the objection.[180] There may be

---

179. *See generally* Charney, *supra* note 15; David A. Colson, *How Persistent Must the Persistent Objector Be?*, 61 WASH. L. REV. 957 (1986); Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457 (1985). For a judicial statement see Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116, 131 (Dec. 18). The persistent objector doctrine is thus similar to the power of reservation in treaty law in that both recognize the necessity of state consent. *See* Julio A. Barberis, *Reflexions sur la coutume internationale*, 36 A.F.D.I. 9, 13 (1990). Persistent objection is also important in terms of its systemic effects. Since states are not only subject to but also creators of customary international law, *see* SCELLE, *supra* note 64, objectors play a dialectic oppositional role, much like an opposition party in a legislature. They draw attention to changes being made in the law, and to problems associated with those changes, forcing others to consider their actions and, if they can convince enough other states to join them, blocking or reversing change.

180. National courts are, in fact, fully entitled to ignore persistent objection. National courts do not deal in diplomatic relations; they are merely authorized, or have taken upon themselves, to apply the general standards of international law. When a national court applies customary international law it may therefore choose to apply that law as general law, thus precluding the possibility of persistent objection, and not as a series of bilateral legal relationships between states. If the court fails to take into account an exception to the generality of that law, it is not the court but the state of which the court is but an internal agency which is responsible *vis-à-vis* the other, exempted state. The situation is thus similar to that of the international legal responsibility of federal states for the actions of their constituent units.

little that a persistent objector can do about such treatment if the rule is applied within or in close proximity to the territorial jurisdiction of another state.[181] If the objecting state is serious about its objection, the principle of reciprocity requires that it continue to deal with other states on the basis of the old rule even if those other states are not doing the same with respect to it. If it does not, it has abandoned its position of persistent objection. The pressure created in this type of situation may be substantial. For example, the United States, the United Kingdom, and Japan eventually abandoned their positions of persistent objection to the development of a twelve-mile breadth to the territorial sea, at least partly as a result of coastal fishing and security concerns.[182] Although foreign fishing vessels and spy ships were able to operate just outside the three-mile limits of the persistently objecting states, the objecting states' vessels were excluded from those waters within twelve miles of other states' coastlines. Similarly, even the Soviet Union and other socialist states eventually accepted, at least in practice, the restrictive doctrine of state immunity.[183]

The reasons for which a national court may ignore persistent objection are many and varied, although the most important of these may well be a lack of expertise with respect to questions of international law. Furthermore, in some instances national courts will be prevented from looking at customary international law and acknowledging persistent objection as a result of statutory action on the part of national legislatures, as has been the case under the United States Foreign Sovereign Immunities Act. *See, e.g.*, United Euram Corp. v. U.S.S.R., 461 F. Supp. 609 (S.D.N.Y. 1978); Jackson v. People's Republic of China, 550 F. Supp. 869 (N.D. Ala. 1982), *dismissed on other grounds*, 596 F. Supp. 386 (N.D. Ala. 1984) (dismissed due to the non-retrospective nature of the F.S.I.A).

181. *See* discussion of the principle of territorial jurisdiction *supra* part IV.

182. On the development of the twelve-mile territorial sea, see *infra* part VII.B. For examples of statements (these from the United Kingdom) attempting to uphold the three-mile limit see E. Lauterpacht, *The Contemporary Practice of the United Kingdom in the Field of International Law*, 9 INT'L & COMP. L.Q. 253, 278–79 (1960); E. Lauterpacht, *The Contemporary Practice of the United Kingdom in the Field of International Law*, 7 INT'L & COMP. L.Q. 514, 537–42 (1958). Japan adopted a twelve-mile territorial sea in 1977, although it retained a three-mile limit in those areas adjacent to international straits. *See* Shunji Yanai & Kuniaki Asomura, Note, *Japan and the Emerging Order of the Sea: Two Maritime Laws of Japan*, 21 JAPAN. ANN. INT'L L. 48, 92 (1977). The Japanese Prime Minister, in introducing the bill in the Diet, cited increased foreign fishing in the waters around Japan as one of the reasons for the change in policy. *See* Shigeru Oda & Hisashi Owada, *Annual Review of Japanese Practice in International Law*, 28 JAPAN. ANN. INT'L L. 59, 94 (1985). The United States abandoned its position, with respect to the claims of other states, in 1983. *See Exclusive Economic Zone of the United States of America*, Proclamation No. 5030, 3 C.F.R. 22 (1984), *reprinted in* 22 I.L.M. 461, 462 (1983). It adopted a twelve-mile limit of its own in 1988, with a Presidential Proclamation which made explicit reference to national security interests. *See Presidential Proclamation on the Territorial Sea of the United States*, Proclamation No. 5928, 3 C.F.R. 547, *reprinted in* 28 I.L.M. 284 (1989). The United Kingdom abandoned its stance of persistent objection with the approval of the Territorial Sea Act, 1987, ch. 49 (U.K.). The debates on the bill made reference to fishing interests, security concerns and the problem of "pirate broadcasting" between three and twelve miles offshore. *See* Territorial Sea Bill, 484 PARL. DEB., H.L. (5th Ser.) 381–401 (1987).

183. *See generally* Emanuelli, *supra* note 137, at 37, 68; Crawford, *supra* note 138, at 824–31; J.R. Crawford, *A Foreign State Immunities Act for Australia?*, 8 AUSTL. Y.B. INT'L

Finally, by persistently objecting, the state eventually excludes itself from the customary process in the area governed by the new rule. The new rule will become the focus of new interests and correspondingly new patterns of supporting, ambivalent, and opposing behavior, while the objecting state remains locked in the past, governed by the old rule, without any opportunity to influence the continuing development of the new one.

The principle of reciprocity thus operates to discourage persistent objection. Some states will oppose an emerging rule in an effort to prevent it from coming into force. A few will continue to oppose the new rule even after it comes into force, perhaps hoping to reverse matters in the early stages before the rule gathers weight. However, no state, not even the most powerful, persistently objects for an indefinite period of time. In this way the principle of reciprocity, like the principles of jurisdiction and personality, has a qualifying effect on the application of state power in the process of customary international law.

VII. CUSTOM, POWER, AND THE PRINCIPLE OF LEGITIMATE EXPECTATION

States are generally considered not to be bound by rules of international law to which they have not consented.[184] Consent may therefore be considered a fundamental principle of international law. However, although states consent explicitly to treaty obligations through the act of signature or ratification, they usually do not consent explicitly to rules of customary international law. Instead, they are held to have consented to those customary rules to which they have acquiesced.[185]

The word consent is not a particularly accurate description of the role of acquiescence in the customary process because acquiescence often signifies ambivalence to the rule in question rather than a conscious decision to consent on the part of the acquiescing state. Furthermore, the development of new rights or obligations based on acquiescence necessarily involves other states in addition to the acquiescing state. Rights and obligations in international law are never entirely the creation of a single state's will because they exist between and among states.[186] All states understand that one state's acquiescence to a customary rule may give rise to rights or obligations having the potential to

---

L. 71, 78–80 (1983); Jill A. Sgro, Comment, *China's Stance on Sovereign Immunity: A Critical Perspective on* Jackson v. People's Republic of China, 22 COLUM. J. TRANSNAT'L L. 101, 124–31 (1983).

184. *See generally supra* note 5.

185. *See supra* note 15.

186. *See* discussion *supra* notes 168–72 and accompanying text.

affect all states in some way, either as subjects of corresponding obligations or as holders of corresponding rights. This shared understanding is based not so much on consent as it is on the legitimate, or legally justifiable, expectations of the participants in the customary process as to the legal relevance and legal effect of a certain type of behavior.[187] Consequently, acquiescence in this context is more accurately described as being based on a principle of legitimate expectation rather than one of consent, even though legitimate expectation may itself be based on some earlier, general consent to the process of customary international law.[188]

All rules of international law involve legitimate expectations. Rules of customary international law involve legitimate expectations because any change from a voluntary pattern of behavior to a rule of customary international law involves the transformation and legitimization of patterns of behavior, around which expectations of a legal character necessarily develop.[189] Treaty rules involve legitimate expectations because they are based on the general customary rule of *pacta sunt servanda*, which requires that treaty obligations be upheld in good faith.[190] In short, states expect other states to abide by their treaty obligations. This expectation is legitimate — i.e., legally justifiable — because states usually behave accordingly *and* regard their behavior as having legal relevance.

If the principle of legitimate expectation is of such importance to international law, it should also be relevant to international institutions more generally, and in particular to how international institutions are maintained, developed, and changed. This article has reviewed how regime theorists and institutionalists have tried to explain the growth and persistence of regimes and other international institutions. Keohane, for example, has convincingly demonstrated that the international trading regime, the General Agreement on Tariffs and Trade, was largely the result of a preponderance of United States power and influence in the years immediately following the Second World War.[191] That conclusion was, in itself, hardly surprising, and therefore not particularly interesting. What was interesting was that Keohane also demonstrated that the international trading regime survived far longer than an analysis of United States hegemony would suggest it should have survived.

---

187. *See* discussion of the role of shared understandings in the customary process, *supra* pp. 137–45.

188. *See* discussion *supra* note 5.

189. *See* discussion *supra* part I.C.

190. *See generally* MCNAIR, *supra* note 171, 493–505; Vienna Convention on the Law of Treaties, *supra* note 171, art. 26.

191. KEOHANE, AFTER HEGEMONY, *supra* note 69.

Keohane accounted for this finding by arguing that states sometimes maintain regimes longer than is necessary to fulfill the initial purpose for their creation — generally the advancement of a hegemonic state's power — if those regimes have come to serve other purposes. Such other purposes could include improving efficiency by removing the need to deal with situations on a case-by-case basis, and facilitating communication, negotiation, and the resolution of disputes, not necessarily for the hegemonic state alone but for other states as well.[192]

The persistence of regimes and other institutions is accentuated by something which Keohane referred to as "sunk costs," namely the irretrievable investment of an actor's time and power in creating an institution.[193] Faced with the loss of this investment, actors will sometimes choose to maintain the institution even if purely utilitarian calculations, which do not take into account that past investment, do not justify their doing so.

In international society, the various factors which contribute to the persistence of institutions may well be exaggerated due to the multitude of independent actors, meaning that sustainable institutions cannot normally be imposed by a single, powerful state but instead require extensive negotiation and compromise. Agreement on any given issue may be difficult to achieve once, let alone several times. Cognizant of the risk of failure associated with inter-state negotiation, states may sometimes choose to retain an existing institution rather than take the chances inherent in trying to create a new one.[194] All of these considerations help to explain the remarkable persistence of international institutions. However, they do so without considering the possible influence of legal rules and principles on how those institutions are maintained, developed, and changed.

The principle of legitimate expectation may be as important as the strictly non-legal factors put forward by Keohane and others in terms of its ability to explain the persistence of international institutions. Moreover, an explanation for the persistence of international institutions based on the principle of legitimate expectation is fully compatible with an understanding of the international system as largely responsive to power applications in furtherance of state interest. The principle of legitimate expectation, unlike other, non-legal factors, is largely external

---

192. *Id.* at 243–59.

193. *Id.* at 102. *See also* ARTHUR L. STINCHCOMBE, CONSTRUCTING SOCIAL THEORIES 120–21 (1968).

194. *See generally* YOUNG, *supra* note 2, at 65–67. Young wrote that "[t]he image of a dominant state or a hegemon playing the role of lawgiver is severely distorted," *id.* at 65, and that "the difficulties of putting together a winning coalition, much less achieving general consensus, in support of specific alternatives to prevailing institutional arrangements are notorious." *Id.* at 203–04.

to short-term interest calculations and power applications because it is a highly resistant, structural principle of international law.

The principle of legitimate expectation has its most interesting effects on the customary process in terms of how it relates to the relative degrees of resistance to change which different customary rules have. Earlier in this article it was explained that different customary rules attract differing degrees of supporting, ambivalent, and opposing behavior and that as a result, some rules are more resistant to change than others.[195] The degree of legitimate expectation which states hold with respect to whether a rule will continue in force is related to the degree of resistance which that rule has to being changed. If the rule's resistance to change alters as a result of changes in the relative amounts of supporting, ambivalent, and opposing behavior it attracts, the degree of legitimate expectation which states hold with respect to that particular rule continuing in force will usually change accordingly.

This statement may seem tautological. Indeed, it would be if legitimate expectation concerning the continuing in force of customary rules were in all cases firmly linked to the relative resistance to change of those rules. However, legitimate expectation concerning whether a rule will continue in force occasionally becomes detached from that rule's resistance to change, which is why it is necessary to distinguish between the two. It is in these situations, in which the principle of legitimate expectation has become detached from resistance to change, that the qualifying effects of that principle on the application of state power in the customary process are most interesting and most clearly evident.

Legitimate expectation in this context is the measure of what states consider the weight of a particular rule to be, rather than what the weight of that rule actually is. States' behavior with respect to rules depends not on what those rules are but on what states consider those rules to be. Thus, it is legitimate expectation rather than resistance to change which accounts for how states behave when they attempt to contribute to, or impede, the maintenance, development, or change of rules of customary international law.

Sometimes what most states consider to be rules of customary international law are not in fact rules at all. In such situations their mistaken belief in the existence of a customary rule has the same effect on the application of state power with respect to the development of a new rule that the resistance to change of an existing rule would normally have. Consequently, in order for state behavior to create a new customary rule it first has to overcome any widely-held mistaken belief in an existing one. Since a widely-held belief in the existence of a rule constitutes legitimate expectation, even when that expectation is misguided, the principle of legitimate expectation once again qualifies the

195. *See* discussion *supra* part III.D.

application of state power in the process of customary international law. In short, by according a resistance to change even to rules which do not exist it acts to prevent or retard the development of new ones.

A. *State Immunity from Jurisdiction*

One example of this qualifying effect at work concerns state immunity from jurisdiction. It is generally assumed that when the doctrine of restrictive state immunity from the jurisdiction of foreign courts became a rule of customary international law in the middle of the twentieth century, it did so by changing a previously existing rule that states were absolutely immune from jurisdiction.[196] However, an examination of the history of state immunity, which is primarily a history of national court judgments and national legislation, suggests that absolute immunity was not an established rule. Rather, history suggests that there was no rule regulating state immunity from jurisdiction prior to restrictive immunity becoming a rule of customary international law, and that a mistaken belief in such a preexisting rule served to retard that later development.

Belgian courts were applying restrictive immunity as early as 1857,[197] while Italian courts were doing so in 1886,[198] Swiss courts in 1918,[199] and Austrian courts in 1919.[200] Argentine[201] and French[202] courts distinguished between acts *jure imperii* (of government) and acts *jure gestionis* (of a commercial nature) from 1924, Egyptian courts from

196. *See, e.g.*, BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 550 (1991); OPPENHEIM'S INTERNATIONAL LAW, *supra* note 27, at 355–63; MALCOLM N. SHAW, INTERNATIONAL LAW 433–40 (3d ed. 1991); Sucharitkul, *supra* note 137; Trooboff, *supra* note 137. For a more cautious approach see Emanuelli, *supra* note 137.

197. Judgment of Aug. 13, 1857 (l'État du Pérou v. Kreglinger), Pasicrisie Belge 348 (Belg.).

198. Judgment of July 25, 1886 (Guttiéres v. Elmilik), Cass. Firenze, Giur. It. I 486 (Italy).

199. Judgment of Mar. 13, 1918 (K.k. Österreich. Finanzministerium v. Dreyfus), 44 Entscheidungen des Schweizerischen Bundesgerichts I [BGE] 49 (Switz.).

200. Judgment of Aug. 27, 1919 (Österreichisch-ungarische Bank v. Ungarische Regierung), 28 Niemeyers Zeitschrift für Internationales Recht [Niemeyers Z.f.Int.R.] 506 (Aus.).

201. Judgment of Nov. 19, 1924 (Cía. Introductora de Buenos Aires v. Capitan del Vapor Cokato), Cámara Nacional de Apelaciones de la Capital Federal [Fed. Ct. of Appeal of the Capital] 14 Jurisprudencia Argentina 705 (1924) (Arg.). *But cf.*, Judgment of July 16, 1937 (The Ibaf), CSJN [Supreme Court], 178 Fallos 173 (1937) (Arg.).

202. Judgment of Feb. 12, 1924 (Etat roumain v. Société A. Pascalet), Trib. Con., Dalloz 260 (Fr.).

1926,[203] Greek courts from 1928,[204] Irish courts from 1941,[205] and German courts from 1949.[206]

During this period, courts in common law states were applying absolute immunity and continued to do so until legislative changes were introduced during the 1970s and 1980s. In the United Kingdom, for example, it was not until 1977 that Lord Denning and Justice Shaw controversially applied restrictive immunity in direct contradiction to clear precedents in English common law.[207] This application of restrictive immunity was followed, for the most part, by other English judges and could have drastically altered the English common law on this issue.[208] However, before this change could become firmly established, Parliament passed the State Immunity Act of 1978,[209] which confirmed and solidified the judiciary's changing position.[210]

In the United States, absolute immunity was firmly entrenched in the common law.[211] However, a practice had developed, and had been

---

203. Judgment of Nov. 29, 1924 (Borg v. Caisse National d'Epargne Française), Trib. Civ. Alex., 16 Gazette des Tribunaux Mixtes d'Egypte [Gaz. Tribx. M. d'Egypt] 123; *see also* Judgment of Jan. 22, 1930 (Monopole des Tabacs de Turquie v. Régie co-intéressée des Tabacs de Turquie), Cour d'Appel (Appeals Ct.), 20 Gaz. Tribx. M. d'Egypt 145.

204. Soviet Republic (Immunity in Greece) Case, 4 Ann. Dig. 172 (Court of Athens 1928) (Greece); *see also* Consular Premises Case, 6 Ann. Dig. 338 (Court of Athens 1931) (Greece).

205. The Ramava, 10 Ann. Dig. 91 (High Ct. 1941) (Ir.).

206. Das sowjetische Ministerium für Aussenhandel (1949) 3 JURISTISCHE RUNDSCHAU 118, Berlin Court of Appeal (Kammergericht).

207. *See* Trendtex Trading Corp. v. Central Bank of Nigeria, 16 I.L.M. 471 (1977) (Eng. C.A.). Precedents included: The Prins Frederik, 3 Brit. Int'l L. Cas. 275 (1965) (Adm. Nov. 17, 1820); De Haber v. Queen of Portugal, 17 Q.B. 171 (1851); The Porto Alexandre, 1920 P.C. 30 (1919); Compania Naviera Vascongada v. S.S. Cristina, 1938 App. Cas. 485, 490 (1938) (judgment of Lord Atkin). It should be noted, however, that before 1977 numerous English judges had criticised, or at least been hesitant in applying, the doctrine of absolute immunity. *See*, most famously, The Charkieh (1873) 3 British Int'l L. Cas. 275, 299 (1965) (Adm. May 7, 1873) (opinion of Sir Robert Phillimore). Denning and Shaw were also faced by the somewhat dubious distinction made by the Privy Council in The Philippine Admiral, where the Council applied the doctrine of restrictive immunity, but only with respect to an action *in rem*. The Philippine Admiral v. Wallen Shipping, Ltd., 15 I.L.M. 133 (1976) (H.L. 1975).

208. *See* I Congreso del Partido, 3 W.L.R. 778 (1977) (opinion of Goff, J.); Planmount Ltd. v. Republic of Zaire, 64 I.L.R. 268 (1983) (Eng. Q.B. 1980) (opinion of Lloyd, J.); I Congreso del Partido, 64 I.L.R. 307 (1983) (Eng. H.L. 1981); *see generally* CHARLES J. LEWIS, STATE AND DIPLOMATIC IMMUNITY 14–29 (3d ed. 1990) (summarizing the English common law of state immunity).

209. State Immunity Act 1978, ch. 33 (1978), *reprinted in* 17 I.L.M. 1123 (1978).

210. *See, e.g.*, Alcom Ltd. v. Colombia, 22 I.L.M. 1307 (1983) (Eng. Q.B. 1983).

211. Chief Justice Marshall's famous words in Schooner Exchange v. McFaddon established a precedent which held for over 150 years:

> One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the

accepted as law, whereby "suggestions" from the Department of State as to the lack of immunity in specific cases were followed by the courts.[212] Then, in 1952, the Department of State announced in the so-called "Tate Letter" that as a matter of policy it would no longer favor claims of immunity for foreign governments with respect to commercial transactions.[213] This statement guided the courts in subsequent cases where the Department refused to make "suggestions." In these situations, the courts predictably held that foreign states were not entitled to immunity when engaged in activities of an essentially commercial nature.[214]

Executive action as expressed in the Tate Letter was followed twenty-four years later by legislative action in the form of the Foreign Sovereign Immunities Act of 1976.[215] After passage of this Act, the

---

> immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

11 U.S. (7 Cranch) 116, 137 (1812). Although, as Ian Sinclair has noted, this "judgment is in no way inconsistent with the theory that immunity may extend only so far as to secure the protection of the 'sovereign rights' exercisable by a foreign sovereign," the United States Supreme Court chose to apply this precedent in an absolutist manner. Ian Sinclair, *The Law of Sovereign Immunity: Recent Developments*, 167 R.C.A.D.I. 113, 122 (1980-II). In 1926 the Court wrote that the principles set out in the *Schooner Exchange* were "applicable alike to all ships held and used by a government for a public purpose" including, in this instance, a government-owned merchant vessel used to transport olive oil for commercial sale. Berizzi Bros. v. S.S. Pesaro, 271 U.S. 562, 574 (1926).

212. *See, e.g.*, Ex Parte Republic of Peru, 318 U.S. 578 (1943); Republic of Mexico v. Hoffman, 324 U.S. 30 (1945).

213. Sovereign Immunity, 6 Whiteman DIGEST § 20, at 569–7; *see* William W. Bishop, Jr., *New United States Policy Limiting Sovereign Immunity*, 47 AM. J. INT'L L. 93 (1953); Leo M. Drachsler, *Some Observations on the Current Status of the Tate Letter*, 54 AM. J. INT'L L. 790 (1960).

However, the executive did not always adhere strictly to its policy as expressed in the Tate Letter. For example, in the 1970 case of *Isbrandtsen Tankers*, the United States Court of Appeals stated that it would have applied the doctrine of restrictive immunity had it not been for the provision, by the State Department, of a written "suggestion" of immunity. Isbrandtsen Tankers v. President of India, 446 F.2d 1198 (2d Cir. 1971), *cert. denied*, 404 U.S. 985 (1971). Similarly, the United States continued throughout the 1950s to claim immunity whenever it was sued in foreign courts. In the 1960s the United States restricted its claims of absolute immunity to those situations in which it was sued in the courts of states adhering to that doctrine. Only in the 1970s did it stop claiming absolute immunity altogether. *See* Trooboff, *supra*, note 137, at 270.

214. *See, e.g.*, National City Bank of New York v. Republic of China, 348 U.S. 356 (1955); Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964); Ocean Transport Co. v. Government of the Republic of the Ivory Coast, 269 F. Supp. 703 (E.D. La. 1967).

215. Foreign Sovereign Immunities Act (F.S.I.A.), 28 U.S.C. §§ 1330, 1602–11 (1976), *reprinted in* 15 I.L.M. 1388 (1976). For a review of the key provisions of the F.S.I.A., as well as a brief outline of the history of state immunity in the United States see Monroe Leigh, *Address*, *in* Proceedings of the 1978 International Law Association Conference on State Immunity: Law and Practice in the United States and Europe, 7. *See also* Robert B. von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33 (1978); Charles N. Brower et al., *The Foreign Sovereign Immunities Act of 1976 in Practice*, 73 AM. J. INT'L L. 200 (1979).

Department of State largely discontinued its practice of making "suggestions" of immunity, thus leaving this question for the courts to decide on the basis of the Act.[216]

Developments similar to those in the United Kingdom and the United States took place in Singapore,[217] Pakistan,[218] South Africa,[219] Canada,[220] and Australia.[221]

The difference between common law and civil law jurisdictions in terms of their willingness to incorporate the doctrine of restrictive state immunity into national law can be explained on at least three different grounds. First, common law courts remained bound by the doctrine of crown immunity ("sovereign immunity" in the United States) long after civil law courts began to distinguish between immune and non-immune acts of their own sovereigns. Second, courts in common law systems felt

---

216. *But see, e.g.*, United States v. County of Arlington, 669 F.2d 925 (4th Cir. 1982). In this case the Department of State had taken the view that Section 1610(a)(4)(B) of the F.S.I.A. applied and that the property of the foreign state in question was therefore immune from execution. The Court noted that although the views of the Department were not conclusive, they carried great weight and could only be rejected if deemed to be unreasonable. *Id.* at 934.

217. State Immunity Act (1979) (Sing.), *reprinted in*, MATERIALS ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY, at 28, U.N. Doc. ST/LEG/SER.B/20 (1982) [hereinafter MATERIALS ON JURISDICTIONAL IMMUNITIES].

218. State Immunity Ordinance (1981) (Pak.), *reprinted in* MATERIALS ON JURISDICTIONAL IMMUNITIES, *supra* note 217, at 20.

219. Foreign Sovereign Immunity Act (1981) (S. Afr.), *reprinted in* MATERIALS ON JURISDICTIONAL IMMUNITIES, *supra* note 217, at 34; *see also* W. Bray & M. Beukes, *Recent Trends in the Development of State Immunity in South African Law*, 7 S. AFR. Y.B. INT'L L. 13 (1981); Gerhard Erasmus, *Proceedings Against Foreign States — The South African Foreign States Immunities Act*, 8 S. AFR. Y.B. INT'L L. 92 (1982).

220. Act to Provide for State Immunity in Canadian Courts (1982), *reprinted in* 21 I.L.M. 798 (1982). The doctrine of absolute immunity had been established as common law by the Supreme Court of Canada in Dessaules v. Poland, 4 D.L.R. 1 (1944) (Can.). However, in Flota Maritima Browning de Cuba S.A. v. S.S. Canadian Conqueror, 1962 S.C.R. 598 (Can.), that same court left the matter open, while leaning towards a restrictive approach. The decision in Congo v. Venne, 1971 S.C.R. 997 (Can.), was similarly inconclusive. In more recent years the doctrine of restrictive immunity was applied by several lower courts. *See* Zodiak Int'l Prods. v. Polish People's Republic, 81 D.L.R. (3d) 656 (Que. C.A.)(1977); Smith v. Canadian Javelin, 68 D.L.R. (3d) 428 (Ont. H.C.)(1976). For comment on the Act, see H.L. Molot & M.L. Jewett, *The State Immunity Act of Canada*, 20 CAN. Y.B. INT'L L. 79 (1982). It is also interesting to note that section 43(7)(c) of the Federal Court Act stated that: "No action *in rem* may be commenced in Canada against any ship owned or operated by a sovereign power other than Canada, or any cargo laden thereon, with respect to any claim where, at the time the claim arose or the action is commenced, such ship was being used exclusively for non-commercial governmental purposes." Federal Court Act, ch. 1, 1970–1972 R.S.C. 113–14 (Can.). Thus, in 1970, the new Federal Court Act implicitly granted jurisdiction to the Federal Court over foreign state-owned ships used for non-governmental, commercial activities.

221. Foreign States Immunities Act 1985, *reprinted in* 25 I.L.M. 715 (1986); *see also* AUSTRALIAN LAW REFORM COMMISSION, REPORT NO. 24: FOREIGN STATE IMMUNITY (1984) (providing background to the development of the Australian Act and a comprehensive survey of the international law of state immunity).

bound by the doctrine of *stare decisis* not to abandon their earlier applications of absolute immunity. Third, common law states had a less acute interest in the development of a rule of restrictive immunity than most civil law states. The common law states were either large, such as the United States, or part of the former British Empire — with its internal cohesiveness and historic, political, and commercial ties. By contrast, the small civil law trading states of Europe, such as the Netherlands, Belgium, and Italy, were dependent to a far greater extent on trade between fully sovereign states.

However, it seems that the principle of legitimate expectation may also have played an important role. In every common law jurisdiction, absolute immunity was viewed as the previously applicable rule of customary international law. Consequently, the changes in national laws were regarded as responses to a change in the existing customary rule rather than as responses to the development of a new rule, even though it is apparent, from the earlier developments in civil law jurisdictions, that a customary rule of absolute state immunity could not have existed at any date after the very early twentieth century.[222] This widely-held mistaken belief would seem to have been at least partly responsible for retarding the acceptance of the doctrine of restrictive immunity in common law states and therefore the development of restrictive immunity as a new rule of customary international law.

B. *The Breadth of the Territorial Sea*

Another particularly good example of the principle of legitimate expectation at work through a mistaken belief in a preexisting rule concerns the breadth of the territorial sea. Until the early 1980s, the behavior of states was sufficiently inconsistent to prevent any particular breadth from becoming a rule of customary international law. However, faced with a variety of claims in excess of three nautical miles, as well as improvements in ordinance which extended the breadth covered by the "cannon-shot rule," maritime states and scholars from maritime states succeeded in convincing themselves, and others, that a customary rule already existed, to the effect that the breadth of the territorial sea was in fact three miles. This mistaken belief, in turn, imposed a serious restraint on the development of a new, more extensive rule.

Disagreement as to the breadth of the territorial sea had existed for centuries. For instance, although in 1782 Ferdinando Galiani asserted

222. *See generally supra* notes 197–206.

that the three-mile limit was part of international law,[223] Norway, Sweden, and Finland had been claiming a four-mile limit since earlier in the eighteenth century.[224] In 1794, the United States Congress felt it necessary to enact the Neutrality Act to grant jurisdiction to the district courts to hear cases arising out of the capture of foreign ships "within the waters of the United States, *or* within a marine league [three miles] of the coasts or shores thereof."[225] The nineteenth and very early twentieth centuries saw a number of states claim three-mile limits,[226] although most continental European states continued to regard the breadth of the territorial sea as being determined solely on the basis of the "cannon-shot rule."[227] Then, in 1921, the Soviet Union became the first state to assert a twelve-mile limit, although it did so only with respect to fishing rights along its arctic coast and in the White Sea.[228]

Faced with this variety of claims and improvements in ordinance, maritime states and scholars from maritime states argued that a rule of customary international law, to the effect that the breadth of the territorial sea was three miles, already regulated the issue. For example, in 1928 Thomas Baty wrote that:

> [D]uring the nineteenth century it [the three-mile limit] has been virtually unchallenged in practice, and it has been asserted as law

---

223. FERDINANDO GALIANI, DEI DOVERI DEI PRINCIPI NEUTRALI (2d ed. 1942).

224. Sweden did so in 1779, Norway did so before that date. *See* Daniel Bardonnet, *La largeur de la mer territoriale*, 66 R.G.D.I.P. 34, 67 n.121 (1962).

225. Neutrality Act of 1794, 1 Stat. 369 (1794), 18 U.S.C. §§ 960–62 (1982) (emphasis added).

226. These states included the United Kingdom (1800–1805), Austria (1846), Chile (1855), Brazil (1859), Japan (1870), Argentina (1871), Ecuador (1889), The Netherlands (1889), Liberia (1902), and Mexico (1902). *See* BROWNLIE, *supra* note 90, at 188 n.47; O'CONNELL, *supra* note 144, at 131–32.

227. *See generally* O'CONNELL, *supra* note 144, at 134–35, 151–53. In the years immediately preceding World War I, France, Italy, Russia, Spain, and the Ottoman Empire all claimed the right to exercise jurisdiction up to any distance from shore within the actual range of artillery, as long as the exercise of that jurisdiction was reasonable for the control of specific activities such as fishing or smuggling. *See* R.R. CHURCHILL & A.V. LOWE, THE LAW OF THE SEA 66 (rev. ed. 1988). The confusion as to the breadth of the territorial sea was reflected in the writing of legal scholars. O'Connell notes that:

> during the critical period from 1876 to 1914, thirty-three jurists believed that the territorial sea expanded with the evolving range of artillery; twenty-six believed that state practice had established it at three miles; five proposed other fixed limits; five argued for different limits for different purposes; eight ambiguously referred to both the three-mile limit and the cannon-shot; and seven thought that there was no consensus on the matter.

O'CONNELL, *supra* note 144, at 153–54.

228. O'CONNELL, *supra* note 144, at 155. Legislation implementing a twelve-mile limit along all parts of the Soviet Union's coastline did not follow until 1960. *Id.*

> by the most eminent statesmen and in the most formal documents. Few if any countries have ever formally contradicted it during that period, and none has ever successfully enforced a different rule on unwilling contemporaries.[229]

Many other scholars, and groups of scholars, expressed similar views during the inter-war period.[230]

In 1930, state representatives met at The Hague to codify three areas of customary law, including the breadth of the territorial sea.[231] They grouped themselves in three different camps. Some advocated a three-mile limit without a contiguous zone; others wanted a three-mile limit with a contiguous zone; and a third group sought a territorial sea, either with or without a contiguous zone, with a breadth in excess of three miles. In the end, a narrow majority supported the three-mile limit, but a two-thirds majority was needed to carry the proposal forward.[232]

Following the 1930 Hague Conference, jurists "defected *en masse* from the three-mile principle, while being increasingly unable to agree

---

229. Thomas Baty, *The Three Mile Limit*, 22 AM. J. INT'L L. 503, 503 (1928).

230. *See, e.g.*, CHARLES G. FENWICK, INTERNATIONAL LAW 250–52 (1924); PHILIP C. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION 62–66 (1927); C.J. Colombos, *Territorial Waters*, 9 TRANSACTIONS GROTIUS SOC'Y 89, 96 (1924); Martin Conboy, *The Territorial Sea*, 2 CAN. BAR REV. 8, 18 (1924); Baron de Staël-Holstein, *Le Régime Scandinave des Eaux Littorales*, 3(5) REVUE DE DROIT INT'L & DROIT COMPARÉ [R.D.I.D.C.] 630 (1924) (asserting that the Scandinavian four-mile limit was an exception to an otherwise general rule). For contemporaneous criticism of the three-mile limit see Philip M. Brown, *The Marginal Sea*, 17 AM. J. INT'L L. 89 (1923). In 1926, the International Law Association accepted the three-mile limit, Draft Convention: Laws of Maritime Jurisdiction in Time of Peace, *in* INTERNATIONAL LAW ASS'N, REPORT OF THE 34TH CONFERENCE 101, art. 5 (1926), as did the American Institute of International Law, 20 AM. J. INT'L L. SUPP. 136, 136–37, Art. I (1926), and the Deutsche Gesellschaft für Völkerrecht (Küstenmeerentwurf, Resolution of 15 Oct. 1926), 8 Mitteil.d.G.V. 116 (1927). The Institut de droit international, which in 1894 had adopted a resolution in favor of a six-mile limit, *Règles adoptées par l'Institut de droit international sur la définition et le régime de la mer territoriale*, 1894–95 ANNUAIRE 328, 329, accepted the three-mile limit in 1928. *Projet de règlement relatif a la mer territorialé en temps de paix*, 1928 ANNUAIRE 755, 755 art. 2. The Harvard Research Project adopted the three-mile limit in 1929. Draft Convention on Territorial Waters, *in* 23 AM. J. INT'L L. SUPP. 243, Art. 2 (1929).

231. The other two areas were nationality and state responsibility. The conference produced the Convention on Certain Questions Relating to the Conflict of Nationality Laws, Apr. 12, 1930, 179 L.N.T.S. 89 (1937). For a brief discussion of this convention see BROWNLIE, *supra* note 90, at 386. The area of state responsibility remains uncodified.

232. Of the nineteen states which supported the three-mile limit, seven asserted that a contiguous zone should extend outward from it. In the end, the Conference considered "that the discussions had made apparent divergences of opinion with respect to certain fundamental questions which, for the moment, do not permit the conclusion of a convention relative to the territorial sea." *See Extrait du Compte Rendu Povisoire de la Treizième Séance Tenue le Jeudi 3 Avril 1930*, and *Résolution Concernant la Continuation des Travaux sur les Questions Afférentes aux Eaux Territoriales*, *in* GUSTAVE GUERRERO, LA CODIFICATION DU DROIT INTERNATIONAL Annex 5, 204, 208 (1930) (author's translation).

on an alternative."[233] Many authors, including Alfred Verdross, Hans Kelsen, Charles Rousseau, Paul Reuter, and Alejandro Alvarez, asserted that no rule of international law existed to regulate the breadth of the territorial sea.[234] Georg Dahm suggested that the situation constituted a "vollständige Anarchie."[235] Only a few scholars continued to insist on the applicability of the three-mile rule.[236]

The fact that many of these writers assumed that a rule had existed,[237] and that that rule had been three miles, was due above all "to the influence exerted by Great Britain and the United States."[238] Only when it became clear to these scholars that their best efforts could not arrest the development of a customary rule establishing the breadth in excess of three miles did they abandon their support for the supposed three-mile rule.

As this brief review of the history of the breadth of the territorial sea demonstrates, "it is meaningless to speak of a single limit for territorial sea claims existing at any one time."[239] Nevertheless, Robert Jennings has argued that the three-mile limit, while having become a minority position was nonetheless a minimum limit, and therefore the only standard available against the world. This meant that any claim exceeding three miles was valid with respect to other states only on an individual basis through their acquiescence or express consent.[240]

Jennings' position may, however, be questioned in light of the fact that the breadth of the territorial sea is a boundary rule.[241] As has already been explained, any rule of customary international law concerning the breadth of the territorial sea is the result of a stabilizing of the tension between the principles of territorial jurisdiction and freedom of

---

233. O'CONNELL, *supra* note 144, at 159.

234. *See* ALEJANDRO ALVAREZ, LE DROIT INTERNATIONAL NOUVEAU 533 (1959); HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 220 (1952); PAUL REUTER, DROIT INTERNATIONAL PUBLIC 217 (1958); CHARLES ROUSSEAU, DROIT INTERNATIONAL PUBLIC 437 (1953); 1 ALFRED VERDROSS, VÖLKERRECHT 215 (3d ed. 1955).

235. A "complete anarchy." DAHM, *supra* note 56, at 655.

236. *See, e.g.*, C. JOHN COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 110 (6th ed. 1967).

237. A notable exception is Charles De Visscher, who asserted that the three-mile limit had never acquired universal authority. *See* CHARLES DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 211–12 (P.E. Corbett trans., 1957).

238. O'CONNELL, *supra* note 144, at 165. This influence, it should be noted, had never been strong enough to alter the claims and policies of the "dissenting" states.

239. CHURCHILL & LOWE, *supra* note 227, at 66.

240. R.Y. Jennings, *General Course on Principles of Public International Law*, 121 R.C.A.D.I. 323, 383 (1967-II).

241. *See* discussion *supra* part IV.B.

the high seas. The rule therefore creates rights and obligations in both directions at the same time, towards the coastal state in the use of its coastal waters, and towards all other states in their use of the high seas.[242] Consequently, the breadth of the territorial sea cannot be a minimum standard in only one direction. Although each state will have minimum obligations, there can be no such thing as a minimum "rule." In a boundary situation, indeterminacy does not result in the rule shifting to one side or the other; it remains indeterminate. Only in situations involving non-boundary rules will the rule settle, in effect, to the bottom, below any confusion of dissenting and disparate state practice. By not distinguishing between the two types of situations, Jennings sought to provide a rule where one never existed. The development of the twelve-mile rule should be regarded as just that — a development — and not a change of customary international law.[243]

This territorial sea example and the state immunity example which preceded it have important implications for understanding the process of customary international law. Suppose that a three-mile rule had existed, by virtue of the fact that a sufficient degree of supporting behavior and a sufficient absence of opposing behavior had given rise to a customary rule. In that case, actions contrary to that rule would have been violations of customary international law, forcing a state wanting to oppose the rule to choose between violating international law or using the less effective means of statements to support a change to that rule. In addition, actions or statements contrary to that old rule would have to be regarded as contributions to its desuetude before they could be considered as contributions to a new rule. Therefore, if an old rule exists, the threshold for the creation of a new rule is higher than if no old rule exists.

This requirement can have important consequences for those states which oppose the development or change of a customary rule. As the threshold for change is higher than it is for development, objections to change will have a greater effect in terms of arresting or retarding that change than will objections to development. In other words, the degree of uniformity of behavior which is sufficient to result in the develop-

---

242. This is not the case with non-boundary rules which, in any given situation, create rights in only one direction and obligations in another, with reciprocity occurring in another, discrete situation.

243. This is not to say that states which excluded others from the waters less than three miles off their coasts were violating international law. Although there was no rule as to breadth, coastal states could legally exercise jurisdiction over that area because no state had ever claimed that the breadth of the territorial sea was less than three miles. Nevertheless, this was not a minimum rule, but rather a right to exercise jurisdiction in an area where the right to do so had never been disputed.

ment of a rule may not be sufficient to change an existing rule. Objectors to the change of a rule will therefore be more likely to arrest that change than objectors to a development, which are more likely to end up as persistent objectors to the new rule.[244]

Consequently, by believing or causing others to believe in the preexistence of a three-mile rule and a rule of absolute state immunity, states and scholars were making it more difficult for new rules to develop in these areas. In this respect the belief in "rules" that never existed is a good example of the principle of legitimate expectation qualifying the application of state power in the process of customary international law.

There are, of course, other possible motives for wanting to believe in the existence of a rule. Given that international actors seem to prefer stability and determinacy to instability and indeterminacy, it is understandable that many states and jurists preferred to think that rules existed with respect to the breadth of the territorial sea and state immunity, even when rules did not exist.[245] Indeed, although international law has traditionally included a presumption in favor of state freedom to act, many states are uncomfortable with an absence of rules because such an absence implies that there are no constraints on other states' behavior.[246]

---

244. *See* discussion of persistent objection, *supra* notes 179–83 and accompanying text.

245. Despite the operation of legitimate expectation, in situations where the threshold created by a fictional rule is relatively low, the mistaken belief might sometimes promote change. It may be psychologically easier to change or modify an existing rule than it is to create a rule in an area where none exists. Lawyers certainly are more comfortable with modifying laws than they are with creating them. By believing in fictional rules, international lawyers may enable those rules to be "changed" by state behavior, "progressive development" through "codification" (which implies that there is something to codify), the contributions of scholars, the arguments of lawyers, and the determinations of courts. Law creation, on the other hand, is something lawyers may prefer to leave to diplomats and statesmen, who may not be as aware as lawyers of the need for new or "modified" rules.

An example of this phenomenon might be the recent expansion of the "right" to humanitarian intervention. Article 2(7) of the U.N. Charter prohibits intervention except in situations where, in terms of Chapter VII, there is a threat to or breach of international peace and security. The situations in northern Iraq, Somalia, Haiti and Rwanda, with the possible exception of the problem of refugees, do not seem to fall within this context as it has traditionally been understood. However, instead of changing the rule, or creating a new rule to allow intervention for humanitarian purposes in situations not threatening to international peace and security, the international community has chosen to view these as unique situations justifying *ad hoc* enlargements of the international peace and security concept. In short, the international community's interpretation of Chapter VII has arguably been modified without the text of the Charter having been changed. However, with respect to pre-existing rules having a higher threshold, as a result of having attracted relatively more supporting behavior, the pre-existence of the rule will have more of an effect in deterring change than it will have in promoting it.

246. With respect to the presumption in favor of state freedom to act, see, most famously, Steamship Lotus, *supra* note 5, at 18.

It is, however, striking that with respect to the breadth of the territorial sea the strongest and most widespread assertions as to the existence of a three-mile rule were made only once it had become apparent that a more expansive breadth might become law. One possible explanation is that states see little need to articulate and defend the assumptions they hold and the practices they engage in when there is no threat of a new rule arising. Only once those assumptions and practices are challenged, when a potential rule appears which may threaten state interests, do previously unarticulated beliefs rise to the surface. The principle of legitimate expectation, in this sense, may be used not so much to oppose new rules as to give legal value to understandings and practices which previously had not been seen as requiring legal status.

CONCLUSION

This article has sought to demonstrate that the customary process and certain fundamental, structural principles of international law act to qualify the self-interested application of power by frequently unequal states. By examining certain effects of the principles of jurisdiction, personality, reciprocity, and legitimate expectation, this article has provided four examples of how the application of state power is qualified in the process of customary international law. Rules of customary international law are not strictly the result of short-term, self-interested applications of state power, but are instead the result of a complex interaction of shared understandings, different forms of state behavior, and rules and principles of international law. Power is an important, but not an exclusive, determining factor in the maintenance, development, and change of customary rules.

This demonstration of the interactive relationship between law and power has significant implications for the discipline of international law. To be truly effective, international lawyers must understand how the rules with which they work are maintained, developed, and changed. International lawyers must realize that they can examine the role of state power and other non-legal factors without jeopardizing the inherent stability and determinacy of international law. This realization, in turn, may enable international lawyers to resolve many of the more intractable problems traditionally associated with their discipline, such as determining how to prove the existence of customary rules, and whether treaty obligations can be modified through the subsequent behavior of states. This realization may also enable international law to reestablish itself as a serious social science discipline — one that examines an important sphere of social activity with a view to understanding better the social process as a whole. International law has much to contribute

to our knowledge of international relations. Rigorous studies of how international law affects the behavior of states are long overdue.

This article's demonstration that the customary process and certain fundamental structural principles of international law act to qualify applications of state power also has significant implications for the discipline of international relations. International relations scholars who have previously dismissed and derided the role of international law may wish to reevaluate the accuracy of their essentially anarchical picture of international society. Similarly, for those international relations scholars who have begun to explore the role of international institutions and international law, the ideas expressed in this article may confirm their intuitions and encourage them to join international lawyers in a cooperative study of the complex issues which separate, yet bind, international politics to international law.

Cooperation is required between the two disciplines because neither international lawyers nor international relations scholars are independently capable of exploring the full extent to which international politics and international law influence, engage, and interact with one another. The strengths, experience, and insights of both disciplines are required. This article, by reevaluating the process of customary international law from an interdisciplinary perspective, has offered but one possible starting point for this larger joint venture.