

CUSTOMARY INTERNATIONAL LAW: A RECONCEPTUALIZATION

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INTRODUCTION

The two traditional building blocks of customary international law, state practice and *opinio juris*, are increasingly proving inadequate in explaining the process of norm formation¹ on the international level. The current conceptualization of the primitive or “customary” element of international law has, within the past thirty years, become increasingly obsolete as the international legal system has begun to resemble its national counterparts. The growth of transnational actors² such as, in-

1. In this article, norms are defined as “a standard of appropriate behavior for actors with a given identity.” See Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 891 (1998).

2. The most widely accepted definition of what constitutes a transnational actor is the one first offered by Robert O. Keohane and Joseph S. Nye in 1971. Keohane and Nye define transnational actors as forces engaged in “contacts, coalitions, and interactions across state boundaries.” See Joseph S. Nye

international criminal tribunals, has resulted in a degree of institutionalized and hierarchical norms that have had no historical precedent in the international system. Although these international criminal tribunals were designed as self-contained legal regimes, their jurisprudence has, nevertheless, begun to be elevated into norms of customary international law.³ Couple this phenomenon with the increasing rise and influence of other non-state transnational actors within the international system, and a complex picture of actors and institutions emerges. This article proposes that to understand the new realities of the international system, one must turn to socio-legal studies (alternatively referred to as legal sociology or law and society), and to the new groundbreaking work within that field on norm formation, implementation, and interaction.

Socio-legal studies explore the effect of social forces on the law.⁴ Rather than being interested solely in the internal rules and doctrines that form a specific doctrinal body of law, socio-legal scholars instead look to how law can be, in part, a social construction and, in this way, interact with wider historical, institutional, and cultural forces within society.⁵ Socio-legal scholarship has identified, with great precision, the emergence of global norms and the causal mechanisms that accompany their implementation. Most important amongst this scholarship (for the present conversation) is the work of Terence Halliday and Bruce Carruthers. Halliday and Carruthers have examined how global norms can be exchanged and transferred between the transnational governmental, quasi-governmental, and nongovernmental institutions within the international community as a whole, and domestic states.⁶ According to Halliday and Carruthers, lawmaking and implementation, on both

& Robert O. Keohane, *Introduction to TRANSNATIONAL RELATIONS AND WORLD POLITICS*, at xi (Robert O. Keohane & Joseph S. Nye eds., 1972).

3. For a detailed description of this phenomenon see Roozbeh (Rudy) B. Baker, *Customary International Law in the 21st Century: Old Challenges and New Debates*, 21 EUR. J. INT'L L. 173 (2010).

4. KITTY CALAVITA, *INVITATION TO LAW & SOCIETY: AN INTRODUCTION TO THE STUDY OF REAL LAW 4* (2010).

5. *Id.* at 3–5.

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

the system (international) and national level, can act as an iterative and recursive process.⁷

As Gregory Shaffer and Tom Ginsburg have noted, international law scholarship must move beyond normative debates regarding its utility and instead evolve towards more empirical work studying “the conditions under which international law is formed and has effects.”⁸ With this guiding principle in mind, this article will demonstrate how Halliday and Carruthers’ model of lawmaking and implementation as an iterative and recursive process (“legal recursivity”) is a more apt description of how, in a new international system dominated by norm-generating transnational actors, international norms both develop and operate.

Part I of this article will provide a brief overview on the general history of customary law and then move towards a more specific discussion on the traditionally understood elements of customary international law, state practice and *opinio juris*. Part II presents a summary of the recent debates that have taken place within the field of international law. Part III will examine the current uncertainty rife within the field of international law over the role of state practice and *opinio juris* within the customary element. It will then briefly survey and discuss new theories of customary international law that have emerged in order to try and address his uncertainty. Although these new theories are both novel and original in their thinking, they all ultimately fail to offer either an empirically established or convincing picture of how international norms operate. Part IV will introduce the idea of “conceptual stretching” from the social sciences, and demonstrate how a discussion and understanding of this idea is key to overcoming the current state of confusion within international law over the necessary foundations of customary international law. “Conceptual stretching” describes the distortions that result when established concepts are introduced to new cases without the required accompanying adaption.⁹ A comprehension of how “conceptual stretching” occurs, and the tools that can be utilized to overcome it, is key in understanding why the current field of

7. Halliday & Carruthers, *supra* note 6, at 1135–38.

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

9. See generally Giovanni Sartori, *Concept Misinformation in Comparative Politics*, 64 AM. POL. SCI. REV. 1033 (1970).

international law is in such an uncertain state. Part V will demonstrate the weakness of the current conceptualization of customary international law, one which holds state practice and *opinio juris* as the main foundational elements of international custom. Part VI shall present a detailed introduction to the idea of “legal recursivity” and demonstrate how, in an era of norm generating transnational actors, it presents a more logical and empirically rooted explanation of how norms develop in the international system. This article will conclude with its own modest suggestions of how future international law scholarship can, utilizing an approach that harnesses the theoretical rigor of “legal recursivity” and the numerous empirical methods¹⁰ it lends itself to, move the field of international law forward.

I. CUSTOMARY LAW IN CONTEXT

Customary law has a long history in human culture and society. From the most primitive of societies, to the most advanced, customary law has played a role in human development. From detailed anthropological studies of tribal cultures, to more nuanced historical surveys of republican and later imperial Rome, customary law has emerged as both a seemingly universal and resilient human impulse.¹¹ Evolving out of this heritage has been customary international law, whose conceptualization has traditionally firmly been rooted in the sources of its earlier, mainly Roman, heritage.¹² For example, although the Roman law of the early Republic already recognized custom as a source of law, many customary norms were later formally codified into statute.¹³

One of the questions that plagued early Roman jurists was how usage could transform into a binding norm.¹⁴ The answer that emerged in Roman jurisprudence was the idea that what transformed an observed practice into a binding obligation was a sense of legal obligation by those following the practice.¹⁵

10. In this article, “methodology” is defined as “a concern with the logical structure and procedure of scientific enquiry.” See Sartori, *supra* note 9, at 1033.

11. See DAVID J. BEDERMAN, CUSTOM AS A SOURCE OF LAW 16–26 (2010).

12. See *id.* at 17–26.

13. *Id.* at 17–18.

14. *Id.* at 19.

15. *Id.*

This idea was encapsulated by the Latin maxim *opinio juris sive necessitates* (an opinion of law or necessity), which has come to be shortened to simply *opinio juris*.¹⁶ It is from this early heritage that customary international law is traditionally based. Renaissance scholars, most notably Francisco Suárez, sought to place the study of the creation and development of customary international norms away from the naturalist bent of predecessors such as Hugo de Groot, and rather towards a more positivist basis rooted in customary law with its associated elements of usage and *opinio juris*.¹⁷

Customary international law¹⁸ finds its source in the widespread consistent practice of states coupled with the belief (on the part of the acting state) that they are acting out of a sense of legal obligation or *opinio juris*.¹⁹ When enough of these states act in a consistent manner, out of a sense of legal obligation, for a long enough period of time, a new customary international norm is said to be created.²⁰ Much then, as was seen in the earlier general discussion of customary law, states are in effect creating a rule by acting in conformance to said rule over a period of time out of a sense of some sort of legal obligation. Accepted evidence of state practice and *opinio juris* has traditionally been taken to include domestic diplomatic correspondence and statements, domestic governmental reports and statements, domestic legislation, and domestic judicial deci-

16. *Id.* at 20–21.

17. *See id.* at 138–43.

18. It should be noted here that international law traditionally comes in two main forms, customary international law and the no less important treaty-based conventional international law. As the main topic of this article is customary international law, conventional international law will only be mentioned in passing.

19. PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 44 (7th ed. 1997); ANTHONY AUST, *HANDBOOK OF INTERNATIONAL LAW* 6–7 (2005); *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 102(2) (AM. LAW INST. 1987) [hereinafter *RESTATEMENT*].

20. Note also that, in relation to conventional international law, multilateral treaties can transform into sources of customary international law, binding on all states in the international system, whether they are parties to the particular treaty or not, if a large enough portion of non-signatory states in the international system adhere to their provisions out of a sense of legal obligation, i.e. *opinio juris*. *See Baker, supra* note 3, at 177.

sions.²¹ Customary international law is said to depend upon the consent of nation states—and is thus, at least in the traditional understanding presented here, very state-centric.²² As such, a nation state that would not wish to be bound by a new rule of customary international law could, in theory, vocally object and announce to the international community of its fellow states that it does not view itself as bound.²³ This objection must be consistently reiterated, lest it be lost.²⁴

It is important to note that there are certain rules of customary international law considered so vital that they cannot be contracted out by individual states—such preemptory rules are labeled *jus cogens* norms.²⁵ *Opinio juris* plays a key role in elevating a regular customary international norm into a *jus cogens* norm,²⁶ for only when the majority of states in the international system believe that a regular customary international norm cannot be persistently objected to, or contracted out of, does this regular norm achieve elevation to *jus cogens*.²⁷ Running parallel to *jus cogens* norms are what are called obligations *erga omnes*. Obligations *erga omnes* are obligations con-

21. MALANCZUK, *supra* note 19, at 39–40; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 6–7 (7th ed. 2008).

22. For example, if a rule of customary international law is emerging and a nation state remains silent, then this can be seen as giving implicit consent that the nation state will be bound by the new customary rule. See MALANCZUK, *supra* note 19, at 43 (“Even silence on the part of states is relevant because passiveness and inaction with respect to claims of other states can produce a binding effect creating legal obligations for the silent state[.]”).

23. See *generally* Fisheries Case (U.K. v. Nor.), Judgment, 1951 I.C.J. Rep. 116 (Dec. 18); RESTATEMENT, *supra* note 19, § 102, cmt. d.

24. MALANCZUK, *supra* note 19, at 46–48.

25. Vienna Convention on the Law of Treaties arts. 53, 64, 71, May 23, 1969, 115 U.N.T.S. 331.

26. A list of generally recognized *jus cogens* norms include the right to self-determination as well as prohibitions against aggression, genocide, slavery, racial discrimination, crimes against humanity, and torture. See Int’l Law Comm’n, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries*, Fifty-Third Session, art. 26, U.N. Doc. A/56/10 (2001).

27. ROSALYN HIGGINS, PROBLEMS AND PROCESSES: INTERNATIONAL LAW AND HOW WE USE IT 22 (1995). Other commentators, however, depart from this vision of *jus cogens* as a clear cut idea. See *e.g.* Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT’L & COMP. L. REV. 411, 414–16 (1989) (demonstrating the difficulty in determining the meaning of *jus cogens* through a discussion of the variety of definitions it has been given.).

sidered so vital and important within the international system (usually in the form of *jus cogens* norms), that any state (whether directly affected or not) may sue another state in order to compel that the obligation be met.²⁸ In this way obligations *erga omnes* can be seen as a determinant in questions concerning jurisdiction and standing in international law.²⁹

II. MODERN CUSTOM VERSUS TRADITIONAL CUSTOM IN INTERNATIONAL LAW

Although the terms “modern custom” and “traditional custom” to describe alternative interpretations of customary international law are recent,³⁰ the debate itself between these two viewpoints has existed throughout at least the past forty years.³¹ At its core “modern custom” challenges “traditional custom’s” reliance on the state practice prong in the test for customary international norms.³² Instead, “modern custom” seeks to de-emphasize state practice in exchange for a heightened reliance on *opinio juris*, and in this sense is more deductive in its logical reasoning where “traditional custom” is more inductive.³³ The emergence of these two alternative interpretations of customary international law has generated much debate within the field.

A. Modern Custom’s Counterpoint to Traditional Custom

Redrawing the role of state practice and *opinio juris* in the formation of customary international law, adherents of “modern custom” have posited that, far from being a slow moving cautious process, the formation of customary international norms can be dynamic, with the a possibility of occurring near-

28. *Barcelona Traction, Light & Power Co., Ltd. (New Application) (Belg. v. Spain)*, Judgment, Second Phase, 1970 I.C.J. Rep. 4, 33–34 (Feb. 5).

29. YITIHA SIMBEYE, IMMUNITY AND INTERNATIONAL CRIMINAL LAW 59–60 (2004).

30. The term first gained widespread use in the wake of Anthea Elizabeth Roberts’s influential article in the *American Journal of International Law*. See Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757 (2001).

31. See Baker, *supra* note 3, at 178–84.

32. Roberts, *supra* note 30, at 758–59.

33. *Id.*

ly overnight.³⁴ The key proposition stressed by “modern custom” is that *opinio juris* alone formulates the foundational source of customary international law.³⁵ State practice is viewed as an imprecise idea, with no exact model for the extent and regularity of state practice needed for the formation of a customary international norm.³⁶ State practice, if it has any role at all to play, is more a secondary factor in customary international norm formation,³⁷ in that it can be thought of as composed of a general acceptance rather than the expressed will of individual states.³⁸ Indeed, taking this view further, the premise has been forwarded that it is impossible to determine whether states in the international system are aware of their obligations—for how can the attitudes and beliefs of a state which is, after all, a collective political institution, be determined?³⁹ Under this reasoning, international treaties, long held to be a separate source of international law,⁴⁰ have been held to

34. Bin Cheng, *Custom: The Future of State Practice in a Divided World*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW* 513, 531–32 (R. St. J. Macdonald & Douglas M. Johnston eds., 1983); Ted Stein, *The Approach of a Different Drummer: The Principle of the Persistent Objector in International Law*, 26 *HARV. INT'L L.J.* 457 (1985).

35. See Bin Cheng, *United Nations Resolutions on Outer Space: “Instant” International Customary Law?* 5 *INDIAN J. INT'L L.* 23 (1965); Cheng, *supra* note 34, at 532; Jonathan I. Charney, *Universal International Law*, 87 *AM. J. INT'L L.* 529, 546 (1993).

36. See MICHAEL BYERS, *CUSTOM, POWER, AND THE POWER OF RULES* 156–62 (1999).

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

38. See Alain Pellet, *The Normative Dilemma: Will and Consent in International Law-Making*, 12 *AUSTL. Y.B. INT'L L.* 22, 37–46 (1992). There are, however, contrary views to this line of reasoning within adherents of “modern custom.” See, e.g., Hiram E. Chodosh, *An Interpretive Theory of International Law*, 28 *VAND. J. TRANSNAT'L L.* 973, 1052–56 (1995) (proposing 4/5 quorum of states adopting a treaty provision before it could be elevated into a customary norm).

39. ANTHONY D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 82–85 (1971).

40. See *supra* note 22.

potentially generate customary international norms.⁴¹ The key claim here by adherents of “modern custom” is that as long as international treaties are, to a certain extent, widely ratified, then the *opinio juris* that this wide ratification represents is enough to seamlessly transform the treaty provisions (binding on the signatories) into customary international law (binding on all).⁴²

B. Traditional Custom's Response

“Modern custom” has provoked a serious response from adherents of “traditional custom,” who have viewed the de-emphasis of the coequal natures of state practice and *opinio juris* in customary international norm formation with alarm.⁴³ At its core, this critique argues that the reinterpretation of customary international law advocated by adherents of “modern custom” poses a danger to the entire idea of customary international law.⁴⁴ The critique continues that “modern custom,” in its emulation of *opinio juris* over state practice, often reflects aspirational goals rather than set standards,⁴⁵ and as such reveals itself to be highly normative in nature.⁴⁶

The interpretation of customary international law advocated by the adherents of “modern custom” is, according to those who oppose it, one that seeks to move the sources of customary in-

41. D'AMATO, *supra* note 39, at 104, 110, 164; Louis B. Sohn, *The International Law of Human Rights: A Reply to Recent Criticisms*, 9 HOFSTRA L. REV. 347, 352–53 (1981); Anthony D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1129 (1982); Louis B. Sohn, “Generally Accepted” *International Rules*, 61 WASH. L. REV. 1073, 1076 (1986).

42. Sohn, “Generally Accepted” *International Rules*, *supra* note 41, at 1077–78.

43. Although note that some scholars have characterized “traditional custom” as not viewing state practice and *opinio juris* as coequal but rather as state practice as having precedence over *opinio juris* which is described as a “secondary consideration.” See Roberts, *supra* note 30, at 758.

44. See, e.g., Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT'L L. 82, 83 (1989); Robert Y. Jennings, *The Identification of International Law*, in INTERNATIONAL LAW, TEACHING AND PRACTICE 5 (Bin Cheng ed., 1982) (claiming that what adherents of “modern custom” elevate to customary international law is “not only not customary law: it does not even faintly resemble a customary law”).

45. Daniel Bodansky, *Customary (and Not So Customary) International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 105, 110–12 (1995).

46. See generally Roberts, *supra* note 30, at 761–70

international law (i.e. state practice and *opinio juris*) away from their “practice-based” methodological orientation, and instead employ methods which are more normative in nature.⁴⁷ Adherents of “traditional custom” hold that international treaties or resolutions of international bodies such as the United Nations should be seen as possible starting points in the development of international custom, not norm-generating acts in of themselves.⁴⁸ Adherents of “traditional custom” claim that many of the resolutions the U.N. General Assembly votes upon are aspirational in nature and are not intended to be embraced fully and unconditionally by those states voting for them.⁴⁹ Given this point of fact, according to adherents of “traditional custom,” the act of using state practice and *opinio juris* together as the yardsticks of custom formation, gains all the more importance, for only then can aspirational or symbolic acts be separated from those intended to be lawmaking.⁵⁰ As such, in the absence of state practice, adherents of “traditional custom” claim that anything labeled as a customary norm of international law lacks legitimacy.⁵¹

III. THE CURRENT STATE OF AFFAIRS WITHIN CUSTOMARY INTERNATIONAL LAW

The current state of international law is one of deep confusion over the role of state practice and *opinio juris* within the customary element.⁵² The radically different interpretations of

47. G.J.H. VAN HOOF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* 107-108 (Kluwer Academic Publishers 1983); Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 425-26 (1983).

48. Simma & Alston, *supra* note 44, at 89-90.

49. Thomas M. Franck, *Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits)*, 81 AM. J. INT'L L. 116, 119 (1987).

50. See, e.g., A. Mark Weisburd, *American Judges and International Law*, 36 VAND. J. TRANSNAT'L L. 1475, 1505-06 (2003) (criticizing international law scholars who, when purporting to make claims about what constitutes customary international law, do not refer to state practice).

51. See generally Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L L. 1 (1988). *Contra* Anthony D'Amato, *Custom and Treaty: A Response to Professor Arthur A. Weisburd*, 21 VAND. J. TRANSNAT'L L. 459 (1988) (responding to Weisburd's line of reasoning).

52. See, e.g., Jörg Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems*, 15 EUR. J. INT'L L. 523 (2004).

state practice and *opinio juris* have led to uncertainty over what the precise meanings of these two components of customary international law actually are. Ultimately the result has been a gradual amalgamation of these two formerly distinct ideas. New theories have emerged in an attempt to resolve the uncertainty, but these new theories have proved inadequate, and thus the confusion within the field remains.

A. Uncertainty Over the Role of State Practice and Opinio Juris

The role of state practice and its relationship to *opinio juris* in customary international norm formation has been the subject of much uncertainty in current scholarship. One key point of confusion is whether state practice is a separate element in customary international norm formation or rather folded into *opinio juris*. The lack of clarity finds its source in the observation that for the state practice requirement to truly reflect that which it purports to reflect (state practice), there must be a distinction made between those situations where a state has made an affirmative claim (which would then count as state practice) versus simple government statements (which would not count as state practice)—the key stressed here is that affirmative claims followed by action are very different things from statements that are not followed up by an act.⁵³ The problem that then arises, however, is what to do with the government statements—if they do not count as state practice, then how are they to be classified? One problematic answer seems to be that they can be thought of as possible evidence of *opinio juris*,⁵⁴

53. See generally D'AMATO, *supra* note 39; H.W.A. THIRLWAY, *INTERNATIONAL CUSTOMARY LAW AND CODIFICATION: AN EXAMINATION OF THE CONTINUING ROLE OF CUSTOM IN THE PRESENT PERIOD OF CODIFICATION OF INTERNATIONAL LAW* 58 (1972); KAROL WOLFKE, *CUSTOM IN PRESENT INTERNATIONAL LAW* 42, 84 (2d ed. 1993). These views have been challenged by other scholars who point out that customary international norms include not only affirmative rules but also restrictions on certain conduct—as such then what states do not do (omissions), and the reasons they provide for this, can be just as important in ascertain state practice as overt acts. Given this, what states say can indeed qualify as state practice. See MALANCZUK, *supra* note 19, at 43.

54. See generally D'AMATO, *supra* note 39; Rein Müllerson, *The Interplay of Objective and Subjective Elements in Customary Law*, in *INTERNATIONAL LAW: THEORY AND PRACTICE* 161–64 (Karel Wellens ed., 1998); Maurice H. Mendelson, *The Formation of Customary International Law*, 272 *RECUEIL DES COURS*

which then has the potential of rendering the entire state practice/*opinio juris* divide as meaningless.⁵⁵

Though the lack of clarity in what state practice must truly reflect has contributed to the gradual amalgamation of the former state practice/*opinio juris* divide, confusion over the exact meaning and parameters of *opinio juris* has also contributed to this problem. The confusion here stems from what some scholars have labeled as the “*opinio juris* paradox.”⁵⁶ The “*opinio juris* paradox” refers to the fact that if the idea refers to the belief that a practice has already become a binding obligation, then the initial belief in an emerging norm is always a mistaken one.⁵⁷ How one views the implications of this paradox depends on whether *opinio juris* is seen as a law-creating fact or as a law-distinguishing one.⁵⁸ If *opinio juris* is a tool to distinguish between a mere usage or practice and a binding obligation, then the issue becomes moot.⁵⁹ If however, *opinio juris* is something more, then the “*opinio juris* paradox” becomes highly problematic. As scholars have researched and demonstrated, international jurisprudence has issued conflicting and contradictory opinions that have at times supported both viewpoints—*opinio juris* as law creating and law distinguishing.⁶⁰ The paradox matters because if *opinio juris* is a law creating fact then it no longer can have a role independent of state practice.⁶¹

155, 206 (1998) (cautioning, however, against treating affirmative government action as evidence of both state practice and *opinio juris*).

55. See, e.g., *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. U.S.)*, Judgment, 1984 I.C.J. Rep. 246, 299 (Oct. 12) (holding that *opinio juris* could be confirmed by “the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas.”).

56. See Kammerhofer, *supra* note 52, at 534–35.

57. See Olufemi Elias, *The Nature of the Subjective Element in Customary International Law*, 44 INT’L & COMP. LAW Q. 501, 502–03 (1995); Kammerhofer, *supra* note 52, at 534–35; BEDERMAN, *supra* note 11, at 149.

58. See generally Elias, *supra* note 57.

59. See e.g. MALANCZUK, *supra* note 19, at 45 (“*Opinio juris* is sometimes interpreted to mean that states must believe that something is already law before it can become law. However, that is probably not true; what matters is not what states believe, but what they say. If some states claim that something is law and other states do not challenge that claim, a new rule will come into being, even though all the states concerned may realize that it is a departure from pre-existing rules.”).

60. See, e.g., Elias, *supra* note 57, at 506.

61. *Id.* at 508–10.

B. Do New Theories of Customary International Law Offer Possible Solutions?

The past several years have seen an exponential growth in new theories designed to address the current confusion rife within customary international law over the meaning and utility of its sources. Frederic Kirgis has suggested viewing state practice and *opinio juris* as a single idea but along a “sliding scale.”⁶² The “sliding scale” refers to the idea that, in situations where there is an excess of state practice, a great deal (if any) *opinio juris* would not be required for the establishment of a customary international norm.⁶³ In situations where there is a dearth of state practice, *opinio juris* would suffice for the establishment of a customary international norm.⁶⁴ Moving away from state practice and *opinio juris* as points of departure, Andrew T. Guzman has proposed viewing the compliance with customary norms as a key factor in understanding the binding character of customary international law.⁶⁵ Utilizing a rational actor model borrowed from economics, Guzman posits that states value their international reputation (to the extent that it allows them a stronger negotiating position vis-à-vis other states) and that customary international norms emerge from states judgments over whether (a) an international norm exists, and (b) if their international reputation (and hence future negotiating position) will be harmed by a possible failure to honor said norm.⁶⁶ Taking a different approach, Brian D. LePard, taking “modern custom” and its de-emphasis of state practice in favor *opinio juris* as his starting point, has proposed viewing customary international norms as having their source in a belief in the desirability (on the part of states) of having certain international norms (this would suffice as *opinio juris*); which are then subsequently interpreted utilizing universally recognized ethical principles.⁶⁷

62. See Frederic L. Kirgis, *Custom on a Sliding Scale*, 81 AM. J. INT'L L. 146 (1987).

63. *Id.* at 149.

64. *Id.*

65. See Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002).

66. *Id.* at 1840–51.

67. BRIAN D. LEPARD, *CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS* 8, 77–94 (2010). For a similar call to take ethical principles into account in the formation of customary international norms,

Though novel and original in their thinking, the new theories of customary international law surveyed above all ultimately fail to offer either an empirically established or convincing picture of how international norms operate. Though seemingly logical in its description of state practice and *opinio juris* as single ideas along a “sliding scale,” Kirgis’s theory is hampered by the fact that it keeps the amalgamation of state practice and *opinio juris* as a single idea intact, thereby open[ly] rendering the “sliding scale” essentially meaningless, for without definite distinctions between state practice and *opinio juris*, the “sliding scale” can be gamed to offer whatever answer is normatively desired.⁶⁸ Guzman’s theory has the advantage of largely abandoning state practice and *opinio juris* and instead focusing on a rational actor model. Conceiving customary international law through a rational actor model, and in the process abandoning the twin lenses of state practice and *opinio juris*, opens the door to the use of empirical methods and at the same time sidesteps the problems associated with the collapse of the state practice/*opinio juris* divide. The problem with Guzman’s theory, however, is that, as he himself readily admits, viewing state compliance through a reputational lens limits the range of cases to which the theory applies, for in cases where the stakes are high, states will theoretically look to their national interests.⁶⁹ In this sense, Guzman’s conception of international law risks ceding the entire field to the classical realist position within international relations. Lepard’s theory is promising in that, similar to Guzman, he largely abandons state practice and *opinio juris* and thereby avoids falling into the conceptual swamp that has emerged with their amalgamation as a single idea. The key drawback of Lepard’s theory is that Lepard is not empirically observing the international system and presenting a theory for what empirically is occurring. He is instead mak-

see John Tasioulas, *Customary International Law and the Quest for Global Justice*, in *THE NATURE OF CUSTOMARY LAW: LEGAL, HISTORICAL, AND PHILOSOPHICAL PERSPECTIVES* 307 (Amanda Perreau-Saussine & James Bernard Murphy eds., 2007).

68. See Simma & Alston, *supra* note 44, at 96 (making a similar observation regarding Kirgis’s theory.).

69. Guzman, *supra* note 65, at 1883-1886.

ing a normative argument for how customary international norms *ought* to be conceptualized.⁷⁰

IV. CONCEPTUAL STRETCHING AND CUSTOMARY INTERNATIONAL LAW

“Conceptual stretching” is a term that originates from the social sciences and describes the distortions that result when established concepts are introduced to new cases⁷¹ without the required accompanying adaption. Understanding how “conceptual stretching” occurs, and the tools that can be utilized to combat it, may offer a possible solution out of the current state of confusion within international law.

A. Conceptual Stretching Defined

First proposed and developed by social scientist Giovanni Sartori, “conceptual stretching” refers to the distortions that result when established concepts are introduced to new cases without the required accompanying adaption.⁷² Sartori developed his ideas in response to the methodological problems that had emerged in the social sciences as the range of phenomena and institutions it concerned itself to study had expanded.⁷³ As social scientists undertook to compare these various phenomena, Sartori’s key concern was with what could happen when established concepts were introduced to new cases without the required adaption, for according to Sartori when this occurs, “conceptual stretching” is very often the probable result.⁷⁴ “Conceptual stretching” is problematic because it leads to “undefined conceptualizations” and “pseudo-equivalence.”⁷⁵ For example, take the example of a “rape” which, depending on one’s jurisdiction, has a fairly well established set of attributes

70. Such a normative track in international law is the very thing that Prosper Weil famously argued against. *See* Weil, *supra* note 47.

71. A note for lawyers—“cases” here are defined as the “units of analysis in a given study” and the “political, social, institutional, or individual entities or phenomena about which information is collected and inferences are made.” *See* Jason Seawright & David Collier, *Glossary*, in *RETHINKING SOCIAL INQUIRY: DIVERSE TOOLS, SHARED STANDARDS* 315 (Henry E. Brady & David Collier eds., 2d ed. 2010).

72. *See generally* Sartori, *supra* note 9.

73. *Id.* at 1034.

74. *Id.*

75. *Id.* at 1035.

(see Figure 1 below). If the concept of “rape” is stretched to mean any form of “sexual assault” then the distinction itself becomes meaningless and structured comparison and analysis impossible. The problem of “conceptual stretching” does not mean that scholarship should shy away from comparing phenomena or run away from generalization, but it does mean that scholars must be aware of the problem so that they can then look to techniques to combat it.

To understand how concepts function, one must realize that they are composed of two governing characteristics—intension and extension.⁷⁶ Intension refers to the assortment of properties, which assign meaning to the concept, while extension refers to the range of entities to which the concept can refer.⁷⁷ The more general a concept is, the less intension it has and the more extension; conversely, the more specific a concept is the more intension it has and the less extension.⁷⁸ *Intension* and *extension* can be thought of existing along a continuum that Sartori labels “the ladder of abstraction.”⁷⁹ One can either climb up the ladder and make a concept more abstract (through reducing its intension but broadening its extension), or climb down the ladder and make a concept less abstract (through broadening its intension but reducing its extension).⁸⁰ Intension can only be reduced through “diminishing its attributes or properties” that are associated with a concept, and in same vein can only be broadened through augmenting the attributes or properties associated with a concept.⁸¹ Observe the following example:

76. Sartori, *supra* note 9, at 1041.

77. *Id.*

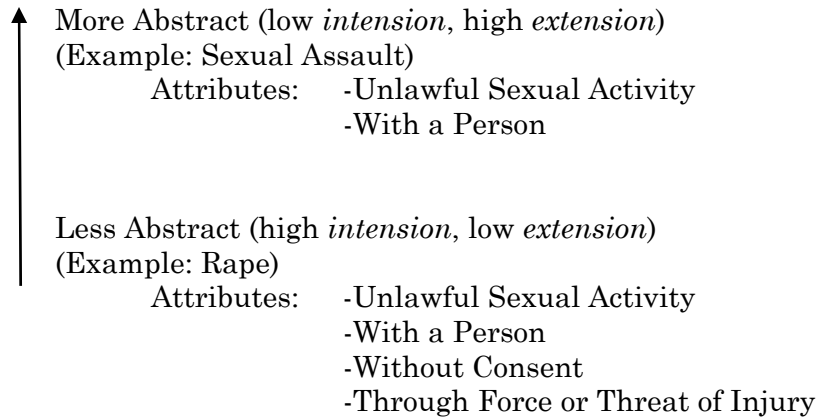
78. *Id.*

79. *Id.* at 1040–41.

80. *Id.* at 1041.

81. *Id.*

Figure 1: Sartori's Ladder of Abstraction



In the example illustrated in Figure 1, the more abstract concept (“sexual assault”) is associated with a smaller set of attributes, while the less abstract concept (“rape”) is associated with a larger set of attributes. Intension here was reduced only through the reduction of attributes (while in the same way it was broadened only through the addition of attributes). The problem of “conceptual stretching” emerges out of imprecise definitions (and the mislabeling that results) that can then lead to “pseudo-classifications” that make any generalization possible.⁸² Such imprecision can result from definitions (of concepts) that are simply vague and under defined, but also emerge by design out of attempts to make a concept more abstract (and thus open to more comparisons across cases) *without* reducing the intension. It is along these lines that Sartori counsels that, to avoid “conceptual stretching,” when climbing up/down the ladder of abstraction, one should always keep in mind the attributes of the conceptualizations under study and diminish/augment them accordingly.

B. Customary International Law: A Concept that has Become Conceptually Stretched?

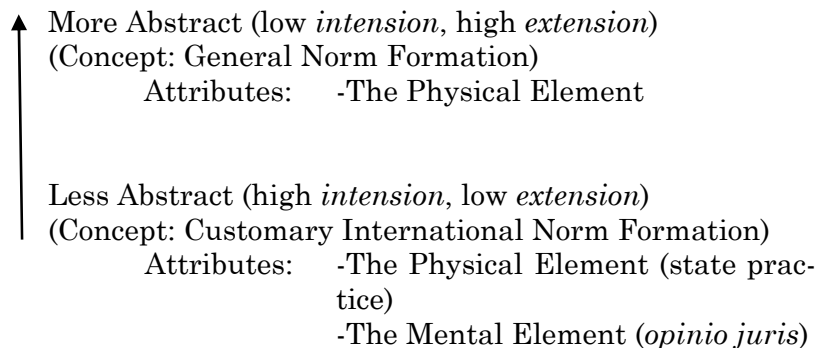
The current conceptualization of customary international law, relying as it does on the dual attributes of state practice

82. Giovanni Sartori, *Comparing and Miscomparing*, 3 J. THEORETICAL POL. 243, 248–49 (1991).

and *opinio juris*, is “conceptually stretched.” It is this fact that has led to the confusion rampant in the field and opened the door to a whole spectrum of contradictory generalizations.⁸³ The debate between adherents of “modern custom” and those of “traditional custom” has led to radically different interpretations of state practice and *opinio juris*, which have then worked to lead to the gradual amalgamation of these two formerly distinct ideas. Part of the problem can be attributed to the fact that customary international law suffers from a heavily state-centric bias that fails to take into account the very real effects non-state forces, such as norm-generating transnational actors, have on the international system. The attempt of “modern custom” to de-emphasize state practice in favor of *opinio juris* can perhaps be seen then as a way to broaden the array of actors that contribute to the development of international norms but, shackled to the state-centric biases of international legal theory, “conceptual stretching” has been the only result.

A possible solution to the chaos would be to move up Sartori’s “ladder of abstraction.” By simplifying things and making the object of study how norm formation operates, the discussion can be extended beyond simply the nation state and instead also include transnational actors. Through looking instead to more sociological approaches of how norms develop, new and empirically testable frameworks for norm formation from the social sciences can be introduced into the discussion. A possible outcome of this could be the following:

Figure 2: Customary International Norms up the Ladder of Abstraction



83. See *supra* Part III.

By moving up Sartori's "ladder of abstraction" and focusing on norm formation in general, distinct advantages emerge over simply studying customary international law. The reduction of intension allows for the simplification of the attributes associated with the new concept under study (general norm formation) and thus "conceptual stretching," at least as related to the concept of customary international law, can be avoided. Additionally, the broadening of extension allows for the study of a much broader group of phenomena. By making the object of study how norm formation functions, on either the system (international) or national level, the discussion can be extended to include a range of hitherto excluded actors. Simple enough, but aside from extending the objects of study beyond just state actors, what distinguishes the framework above from simply an inverse version of "modern custom" (i.e. de-emphasizing one prong of the traditional state practice/*opinio juris* formulation in favor of the other)? As will be discussed in Part VI below, part of the difference here lies with the study of how exactly the physical element gives rise to norms. How do state (and now non-state) actors create norms through their binding action? More specifically, in an era of norm generating transnational actors, can the effects of such action be modelled empirically in a sound, logical, and systematic way?

V. THE ROLE OF TRANSNATIONAL ACTORS IN THE INTERNATIONAL SYSTEM

The birth of the U.N. gave rise to a new period within the international system, which saw the proliferation and growing influence of transnational actors.⁸⁴ Given this new reality, social scientists and especially international relations scholars began to pay more attention to the role of these transnational actors⁸⁵ on the actions and behaviors of states within the international system. Though the approaches, methodologies, and indeed conclusions of this scholarship have varied, one finding

84. For example, by 2006, there were roughly three hundred international organizations and around forty international legal dispute settlement bodies in the world, and these numbers, high as they are, mostly exclude nongovernmental advocacy groups. See José E. Alvarez, *International Organizations: Then and Now*, 100 AM. J. INT'L L. 324, 325 (2006).

85. See discussion *supra* note 2.

has been universal—that transnational actors have a very real role to play in both state behavior and the formation of international norms. This empirical scholarship can roughly be divided into two categories, one which studies transnational actors on the system (international) level, and another which opens up the study to transnational actors on a national level.

A. Studies of Transnational Actors on the System Level

Studies of transnational actors on the system (international) level focus on how large-scale international governmental and nongovernmental organizations interact with states on the international level. The hallmark of this scholarship has been a focus on how the presence and influence of transnational actors within the international system affects the choices states make and the behaviors they exhibit. Looking beyond the domestic nation state, this scholarship studies how international institutions exert their own autonomous influence over the international system. Indeed, scholars of this school have directed their attention to how the emerging international system of interlinked organizations and multilateral treaty regimes is exerting direct influence on the international system without any mediation or filtration through domestic states.⁸⁶ The new “units of action” in these interactions are thus no longer domestic states but instead transnational actors who can either link together different national interest groups within a related issue and assist them in coordinating their actions,⁸⁷ or alternately create an environment where domestic state governments are unable to directly pursue their interests in a given

86. See TRANSNATIONAL RELATIONS AND WORLD POLITICS (Robert O. Keohane & Joseph S. Nye eds., 1972); RICHARD MANSBACH, YALE FERGUSON & DONALD LAMPERT, THE WEB OF WORLD POLITICS: NONSTATE ACTORS IN THE GLOBAL SYSTEM (1976); HAROLD JACOBSON, NETWORKS OF INTERDEPENDENCE: INTERNATIONAL ORGANIZATIONS AND THE GLOBAL POLITICAL SYSTEM (1979); JAMES N. ROSENAU, THE STUDY OF GLOBAL INTERDEPENDENCE: ESSAYS ON THE TRANSNATIONALIZATION OF WORLD AFFAIRS (1980); PRESSURE GROUPS IN THE GLOBAL SYSTEM: THE TRANSNATIONAL RELATIONS OF ISSUE-ORIENTATED NON-GOVERNMENTAL ORGANIZATIONS (Peter Willetts ed., 1982); Baker, *supra* note 3.

87. See Nye & Keohane, *supra* note 2, at xviii–xix; MANSBACH, FERGUSON & LAMPERT, *supra* note 86, at 41–45; JACOBSON, *supra* note 86, at 14–19, 398–414; ROSENAU, *supra* note 86, at 1–2.

issue area alone and have to instead seek the assistance of the same transnational actors and networks.⁸⁸

Though varied in the methods employed and approaches taken to the study of transnational actors, the key similarity of all of this scholarship has been its focus on how large scale international governmental and nongovernmental organizations interact with states on the international level. These findings speak to the need to include transnational actors in any discussion of how international norms are formed.

B. Studies of Transnational Actors on the National Level

Studies of transnational actors on the national level focus on how transnational social movements and advocacy groups try to push their policy preferences and affect state behavior. The hallmark of this scholarship has been its focus on the tools and processes these transnational actors utilize in order to attempt to affect state behavior and how international norms begin to emerge as a result. Early analysis within this scholarship (in the years immediately following the Second World War) was conducted on such widespread issue areas as the ability of states to shape or sabotage the creation of multilateral treaty regimes;⁸⁹ the effect of international organization membership on both the foreign policy of its member states⁹⁰ and on fostering the organic emergence of collective security arrangements between various member states;⁹¹ and the ability of international organizations to target and lobby national legislatures.⁹²

88. See Nye & Keohane, *supra* note 2, at xix-xx; JACOBSON, *supra* note 86, at 416-422; Peter Willetts, *Introduction* to PRESSURE GROUPS IN THE GLOBAL SYSTEM: THE TRANSNATIONAL RELATIONS OF ISSUE-ORIENTATED NON-GOVERNMENTAL ORGANIZATIONS 21-22, 186-187 (Peter W. Willetts ed., 1982).

89. See generally Virginia Little, *Control of International Air Transport*, 3 INT'L ORG. 274 (1949).

90. See generally Benjamin V. Cohen, *The Impact of the United Nations on United States Foreign Policy*, 5 INT'L ORG. 29 (1951); Wytze Gorter, *GATT After Six Years: An Appraisal*, 8 INT'L ORG. 1 (1954); E.B. Matecki, *Establishment of the International Finance Corporation: A Case Study*, 10 INT'L ORG. 261 (1956).

91. See generally Howard C. Johnson & Gerhart Niemeyer, *Collective Security: The Validity of an Ideal*, 8 INT'L ORG. 19 (1954).

92. See generally A. Glenn Mower, *The Official Pressure Group of the Council of Europe's Consultative Assembly*, 18 INT'L ORG. 292 (1964); ANATOMY OF INFLUENCE: DECISION MAKING IN INTERNATIONAL ORGANIZATION (Robert W. Cox et al. eds., 1973).

The findings of this early research pointed to the sometimes unique abilities of international organizations to affect behavioral change on the domestic level.⁹³ Later, more contemporary analysis within this scholarship has sought to study not only specific transnational actors and their ability to affect domestic state behavior, but to go beyond and study “networks” of such actors bound together by shared goals and values.⁹⁴ This scholarship has presented a fairly unified framework that first emphasized how both international forces and national level institutions could affect the ability of transnational actors to affect policy change,⁹⁵ and then later sought to refine it by evolving this static view of transnational behavior towards targeted states into a more fluid one (i.e. where the efforts of transnational actors within targeted states are a back and forth affair rather than a single one-shot attempt).⁹⁶

93. See e.g. Cohen, *supra* note 90 at 275–80 (Where the author discusses how the U.N., through simply existing as a forum for the potential resolution of disputes, actually exerted influence on the foreign policy decision-making of its member states.); Gorter, *supra* note 90, at 7–9 (finding that the specific institutional structures of international institutions can directly affect their ability to influence the actions of their members.); Matecki, *supra* note 90, at 266–73 (finding that the support for the creation of the International Finance Corporation in the mid-1950s by the United States was a direct result of lobbying efforts by members of other international institutions.); Mower, *supra* note 92, at 292–94 (finding that that international organizations can have the very clear capacity to specifically lobby national legislatures when the need arises.).

94. See BRINGING TRANSNATIONAL RELATIONS BACK IN: NON-STATE ACTORS, DOMESTIC STRUCTURES, AND INTERNATIONAL INSTITUTIONS (Thomas Risse-Kappen ed., 1995); MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (1998); THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE (Thomas Risse, Stephen C. Ropp & Kathryn Sikkink eds., 1999); RESTRUCTURING WORLD POLITICS: TRANSNATIONAL SOCIAL MOVEMENTS, NETWORKS, AND NORMS (Sanjeev Khagram, James V. Riker & Kathryn Sikkink eds., 2002).

95. See Thomas Risse-Kappen, *Introduction* to BRINGING TRANSNATIONAL RELATIONS BACK IN: NON-STATE ACTORS, DOMESTIC STRUCTURES, AND INTERNATIONAL INSTITUTIONS 3 (Thomas Risse-Kappen ed., 1995).

96. See, e.g., KECK & SIKKINK, *supra* note 94, at 12–16. By building on Risse-Kappen’s original 1995 framework, Keck and Sikkink create a model that they label as the “boomerang pattern.” *Id.* This model envisions a world where domestic advocacy groups can activate transnational advocacy networks who will then, through issue framing and motivating collective action, put pressure on other domestic states and relevant international organizations. *Id.* See also, e.g., Thomas Risse & Kathryn Sikkink, *The Socialization*

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

VI. TOWARDS A UNIFIED FRAMEWORK: LEGAL RECURSIVITY AND NORM FORMATION

Given the “conceptually stretched” nature of the current conceptualization of customary international law, a new framework for thinking about international norm formation is needed. This framework, in keeping to climbing up Sartori’s “ladder of abstraction” must look to general norm formation as its point of departure. As shall be seen, the model of “legal recursivity,” points the way forward.

of Human Rights Norms, in THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE 1 Thomas Risse, Stephen C. Ropp & Kathryn Sikkink eds., 1999) Building on both the original framework offered by Risse-Kappen and Keck and Sikkink’s “boomerang pattern,” *id.* at 4–5, the authors create a “spiral model” that envisions a world where, much like that in the “boomerang effect,” domestic advocacy groups can activate their transnational advocacy network that will then motivate collective action. *Id.* at 17–20. Where the two models differ is that the “spiral model” views the process as much more fluid, with the targeted state making first blanket denials, later tactical concessions, and finally rule consistent behavior. *Id.* The key in the back and forth is that each stage can result in the targeted state becoming “socialized” by conforming to preferred behaviors and norms. *Id.* Yet another group of scholars envision a world where transnational actors affect change in the international system either through taking well established “international norms” and using them to “persuade” outlying actors to conform their behavior, or attempting to establish new “international norms” where none had previously existed in a back and forth process. Sanjeev Khagram, James V. Riker & Kathryn Sikkink, *From Santiago to Chile: Transnational Advocacy Groups Restructuring World Politics*, in RESTRUCTURING WORLD POLITICS: TRANSNATIONAL SOCIAL MOVEMENTS, NETWORKS, AND NORMS 3, 3–4, 11–16 (Sanjeev Khagram, James V. Riker & Kathryn Sikkink eds., 2002).

A. Legal Recursivity

Legal sociologists Terence Halliday and Bruce Carruthers have examined how norms can be exchanged and transferred between the transnational governmental, quasi-governmental, and nongovernmental institutions within the international community as a whole, and domestic states. According to Halliday and Carruthers, lawmaking and implementation, on both the system (international) and national level, can act as an iterative and recursive process.⁹⁷ International actors such as states, but also transnational quasi and non-governmental institutions, develop legal norms that are then refracted into domestic states through exogenous processes such as economic coercion, persuasion through international institutions, and universal norms (that can then act as models to domestic states on what constitutes acceptable behavior within the international system).⁹⁸ These norms can then undergo recursive cycles, on both the national and international level, as formal law (the law on the books) goes through cycles of change as its interpreted and implemented (the law in practice),⁹⁹ refracting back and forth between the international system and national systems.¹⁰⁰ That these recursive cycles will occur is not a given, nor will these cycles necessarily occur in perpetuity,¹⁰¹ rather they are driven by four distinct identifiable mechanisms: (1) the indeterminacy of law (the ambiguities inherent in statutes, regulations, and court opinions that leads to the possible unintended consequences of their application, setting off repeated rounds of redrafting and reapplication)¹⁰²; (2) contradictions (the phenomenon that emerges ideologically when clashing vi-

97. Halliday & Carruthers, *supra* note 6, at 1135–38.

98. *Id.* at 1146–48.

99. “Legal recursivity,” following classic socio-legal theory, holds that the “conditions of lawmaking affect implementation, and the circumstances of practice influence what law gets placed on the books.” See Halliday, *supra* note 6, at 269.

100. Halliday & Carruthers, *supra* note 6, at 1144, 1146–47. For an earlier exploration of this phenomenon in the national setting, see Lauren Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531 (1992); see also Lauren Edelman, *Legality and the Endogeneity of Law*, in LEGAL AND COMMUNITY: ON THE INTELLECTUAL LEGACY OF PHILIP SELZNICK 187 (Robert A. Kagan, Martin Krygier & Kenneth Winston eds., 2002).

101. Halliday, *supra* note 6, at 274.

102. *Id.* at 281–282; Halliday & Carruthers, *supra* note 6, at 1149.

sions amongst actors leads to imperfect legal settlements, or institutionally when legal implementation is divided out between different institutions)¹⁰³; (3) diagnostic struggles (the struggle, between various actors, of diagnosing perceived shortcomings in legal norms and identifying corrective prescriptions)¹⁰⁴; and (4) actor mismatch (mismatches that occur when there is a disparity between actors who actually participate in the norm-making process in a particular issue area, and those who the norms actually effect—in other words actors whom are directly affected by a new norms implementation are not participants in its creation)¹⁰⁵. “Legal recursivity” conceptualizes norm-making as, above all else, an “exercise of power” and a “struggle among competing actors in global arenas.”¹⁰⁶ Norm-making has a beginning (time 1) when there are competing claims and conflicts and an end (time 2) when behavior and expectations have become “routinized, orderly, and predictable” by accepted and therefore authoritative norms.¹⁰⁷ Recursive cycles are what occur between time 1 and time 2.

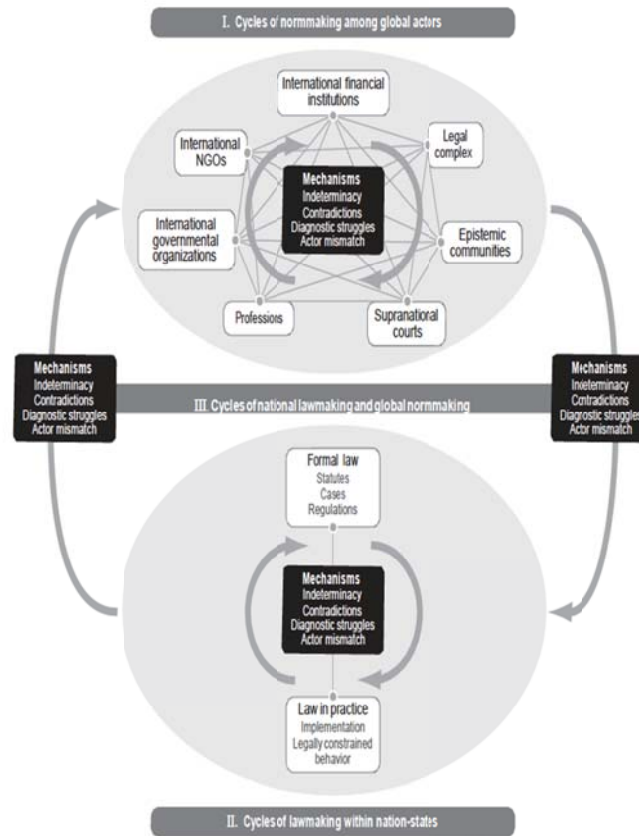
103. Halliday & Carruthers, *supra* note 6, at 1149–50; Halliday, *supra* note 6, at 280–81. There is also vast literature in public law on ideological contradiction, especially as related to the interactions between the U.S. Congress and the Federal Courts. *See, e.g.*, WILLIAM N. ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION* (1994); R. SHEP MELNICK, *BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS* (1994).

104. Halliday & Carruthers, *supra* note 6, at 1150–51; Halliday, *supra* note 6, at 278–79.

105. Halliday & Carruthers, *supra* note 6, at 1150–51; Halliday, *supra* note 6, at 277–78.

106. Halliday, *supra* note 6, at 268–69.

107. *Id.* at 274.

Figure 3: Legal Recursivity in Action¹⁰⁸

B. The Advantages of Legal Recursivity

Through their detailed description of the causal mechanisms and processes of norm formation and implementation, Halliday and Carruthers' work on "legal recursivity" is exceptional in offering a true blueprint for examining the methods through which international and national norms interact. Additionally, "legal recursivity" fits well into the literature surveyed earlier detailing the empirical work done on the effects of transnational actors in the formation of international norms,¹⁰⁹ for it provides an overarching framework that describes the constant

108. Figure replicates Figure 1 provided in Halliday, *supra* note 6, at 270.

109. See *supra* Part V.

formation, reformation, and refinement of international and national level norms, and the causal mechanisms that drive this process both within and between the two levels (international and national)¹¹⁰. As Gregory Shaffer and Tom Ginsburg have rightly noted, international law scholarship must beyond normative debates regarding its utility and instead move towards more empirical work studying “the conditions under which international law is formed and has effects.”¹¹¹ “Legal recursivity” meets this challenge by being open to a whole range of qualitative (observational) quasi-experimental¹¹² research designs and methods, including: ethnographic analysis,¹¹³ comparative analysis,¹¹⁴ case study analysis,¹¹⁵ and process tracing¹¹⁶.

110. Much of the literature surveyed earlier in Part V, though rich in theoretical insight, was somewhat inadequate in detailing the causal mechanisms that drove the relationships investigated.

111. See Shaffer & Ginsburg, *supra* note 8, at 1.

112. The term “quasi-experimental” was first coined by social scientist Donald Campbell in order to describe research environments where the researcher in question could not meet the requirements of an experimental research design (i.e. specifically isolate the variables under study or randomly manage the assignment of causes to units). Though these requirements were fairly easy to implement in the hard science world of controlled laboratories, in the soft social science world of studying social phenomena in uncontrolled environments they became next to impossible. In such situations Campbell cautioned researchers to adopt “quasi-experimental” designs where they would strive, to the extent possible, replicate the control (over the variables under study) found in experimental designs and, most importantly, also be aware that their “quasi-experimental” designs would suffer from imprecise models and partial data. See generally DONALD T. CAMPBELL & JULIAN C. STANLEY, *EXPERIMENTAL AND QUASI-EXPERIMENTAL DESIGNS FOR RESEARCH* (1966); see also Donald T. Campbell & H. Laurence Ross, *The Connecticut Crackdown on Speeding: Time Series Data in Quasi-Experimental Analysis*, 1 L. & SOC'Y REV. 33 (1968).

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

114. The comparative method involves the comparison and subsequent analysis of a set of cases. Through a systematic set of comparisons made between sets of cases, the effect of various differences across the cases under study can then be gauged. See ADAM PRZEWORSKI & HENRY TEUNE, *THE LOGIC OF COMPARATIVE SOCIAL INQUIRY* (1970); David Collier, *The Comparative Method*, in *POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE II* 106 (Ada W. Finifter ed., 1993).

115. The case study method involves the intense study of single case and serves as a useful methodological vehicle for studies looking to test and refine

“Legal recursivity” is not only especially well-suited to overcome the measurement problems inherent to any quasi-experimental research design,¹¹⁷ but to also provide the “thick” descriptive insight that only observational methods can provide because it (a) is systematic in its approach through its focus on a constantly reoccurring set of dynamics; (b) introduces hypotheses related to the actors and mechanisms that can drive normmaking;¹¹⁸ (c) identifies beginnings (time 1) and endings (time 2) in recursive cycles of norm-making; (d) is historical in outlook and takes contingent changes in institutions, based on shifts in time, seriously;¹¹⁹ and (e) is comparative and indeed

theories. The detailed descriptive analysis it demands can serve to provide for the observation of potential causal interactions between identified variables. *See generally* Arent Lijphart, *Comparative Politics and the Comparative Method*, 65 AM. POL. SCI. REV. 682 (1971); John Gerring, *What is a Case Study and What is it Good For?*, 98 AM. POL. SCI. REV. 341 (2004).

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

117. *See, e.g.*, discussion *supra* note 112.

118. In this way “legal recursivity” corrects a key flaw in international law “theory,” the lack of any clear or accepted overarching theoretical framework. *See* Kammerhofer, *supra* note 52, at 536–51.

119. By taking time and historical processes seriously, “legal recursivity” is compatible with historical institutionalist approaches. Historical institutionalism is “neither a particular theory nor a specific method,” instead it is a process or “approach to studying politics and social change” (with the associated method most often used to study this change being the case study). This process is different from others because in looking to answer empirical questions, it focuses on both the historical orientation and trajectory of institutions, and how they can change and shape behavior. Institutions then are not classic independent or explanatory variables, but rather act as mediators or filters shaping the effects of other independent variables (whatever they may be). History itself becomes a methodological tool of analysis, with institutions become the main units of said analysis. *See, e.g.*, STRUCTURING POLITICS: HISTORICAL INSTITUTIONALISM IN COMPARATIVE ANALYSIS (Sven Steinmo, Kathleen Thelen & Frank Longstreth eds., 1992); Evan S. Lieberman, *Causal Inference in Historical Institutional Analysis: A Specification of Periodization Strategies*, 34 COMP. POL. STUD. 1011 (2001); Sven Steinmo, *Historical Institutionalism*, in APPROACHES AND METHODOLOGIES IN THE SOCIAL SCIENCES: A

encourages comparisons across issue areas and levels of analysis.¹²⁰

Figure 4: Legal Recursivity and the Mechanisms that Drive It

<u>Mechanism</u>	<u>Definition</u>	<u>Causes</u>	<u>Effects in Driving Recursive Cycles of Norm-making</u>
Indeterminacy	Refers to the ambiguities that can be inherent in statutes, regulations, and/or court opinions that can then lead to unintended consequences in their application	-Ideological contention between those drafting the "law" in question can result in highly ambiguous wording that all involved can sign off on -Can be magnified by "institutional pathologies" (e.g. ineptitude and corruption)	When legal ambiguity reigns, recursive cycles may flourish, as ambiguous law can open the door to multiple interpretations of meaning
Contradictions	The phenomena that emerge ideologically when clashing visions amongst ac-	-Ideological contention between those drafting the "law" in question	

PLURALIST PERSPECTIVE 118 (Donatella della Porta & Michael Keating eds., 2008).

120. Halliday, *supra* note 6, at 269.

	tors lead to imperfect legal settlements, or institutionally when legal implementation is divided out between different institutions.	can lead to partial and unstable temporary solutions that seek to incorporate fundamentally incompatible viewpoints -Can also result from more institutional factors such as the bifurcation of implementation between rival institutions, or competition between different sets of actors for ascendancy in propagation/enforcement in a certain issue area	
Diagnostic Struggles	The struggle between various actors in terms of diagnosing perceived shortcomings in legal norms		

	and identifying corrective prescriptions.		
Actor Mismatch	Occurs when there is a disparity between actors who actually participate in the norm-making process in a particular issue area, and those who the norms actually affect		

C. Legal Recursivity and International Norm Formation: A Comparative Case Study (Crimes Against Humanity)

The emergence of “crimes against humanity” as a specific international offense has been fairly recent, starting only in the beginning of the twentieth century and developing in earnest in the years immediately following the end of the Second World War. An analysis of the origins and development of crimes against humanity that takes legal recursivity as its starting point, thereby abandoning the traditional approach that has looked to how this offense emerged from its treaty based origins and developed as a customary international norm, has many advantages. The most important of these advantages is that such a point of departure makes sense of how the initial burst of activity around the doctrinal development of the offense in the immediate years following the end of the Second World War soon came to an end, ushering in a nearly forty-year freeze. A freeze that only expired in the early 1990s, with the establishment of the ad hoc International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) by the U.N. Security Council, and the later related emergence (by treaty) of a permanent International Criminal Court (ICC). It would be these, more recent, developments that would contrib-

ute to crimes against humanity's status as a doctrine of international criminal law under constant recursive cycles of refinement and interpretation—a process that is currently still ongoing.

1. Overview

The origin of “crimes against humanity” as a specific international crime can be first traced to the Hague Peace Conferences of 1899 and 1907. Both of these international conferences had been proposed by the great powers of the day to negotiate the conduct of nations in war. Both conferences resulted in a set of international treaties/conventions (the Hague Conventions)¹²¹ that served as one of the first international attempts to codify what behavior was acceptable/unacceptable by nations during warfare.¹²² In 1919, with the conclusion of the First World War, the victorious Allied Powers established the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (the “Commission”) to explore the actions of the defeated Central Powers during the conflict. The Commission recommended that a tribunal be established to judge all members of the defeated Central Powers found to have violated the “laws of humanity.”¹²³ “Laws of humanity” were defined broadly by the Allied Powers as offenses that the Central Powers had committed against their own citizens.¹²⁴ Ultimately, the Commission’s recommendation to establish a tribunal was rejected, with the main country leading the charge being the United States, which argued that the standards for judging violations of the “laws of humanity” were uncertain and unclear.¹²⁵

121. The Hague Conference of 1899 resulted in three international treaties, while the Conference of 1907 resulted in thirteen.

122. See Hague Convention (II) with Respect to the Laws and Customs of Warfare on Land, pmbl., July 29, 1899, 32 Stat. 1803; Hague Convention (IV) Respecting the Laws and Customs of War on Land, pmbl., Oct. 18, 1907, 36 Stat. 2277.

123. Comm’n on the Responsibility of the Authors of the War and on Enforcement of Penalties, *Rep. Presented to the Preliminary Peace Conference*, Mar. 29, 1919, reprinted in 14 AM. J. INT’L L. 95 (1920).

124. *Id.* at 121–23.

125. Am. Comm’s to Negotiate Peace, *Memorandum of Reservations presented by the Reps. of the United States to the Rep. of the Comm’n on Responsibilities*, Apr. 4, 1919, reprinted in General Records of the Am. Comm’n to Negotiate Peace 1918–1931, PPC Doc. F.W.181.12302/7.

Although the United States had been opposed to establishing a tribunal to judge violations of the “laws of humanity” in the wake of the First World War, its attitude would change radically at the close of the Second World War in 1945.¹²⁶ It was at this point that the United States became one of the key advocates for the establishment of an international tribunal to try members of the defeated Nazi regime for, amongst other things, offenses against its own citizens.¹²⁷ The tribunal that was initially established, the International Military Tribunal (IMT) set in Nuremberg to try leading Nazi officials, did much to contribute to the development of crimes against humanity as a specific international offense. Article 6(c) of the IMT Charter defined crimes against humanity as “murder, extermination, enslavement, deportation, and other inhumane acts . . . or persecutions on political, racial or religious grounds” committed against a civilian population in the context of an armed conflict.¹²⁸ The importance of Article 6(c) lay in the fact that it “was the first international instrument to define crimes against humanity as a positive crime punishable under international law.”¹²⁹ As such, the IMT Charter set the trajectory of the doctrinal development of crimes against humanity as a specific international offense. The importance of the IMT Charter would remain in the decades following the Second World War as Article 6(c); in the absence of any other major international treaty or convention defining the parameters of crimes against humanity, would remain one of the main defining guides to this developing international criminal offense.

Building on the aftermath of the IMT Charter and the trial of leading Nazi leaders, in 1947 the U.N. established the International Law Commission (ILC) partly in order to bring together and codify international law—including the then developing offense of crimes against humanity.¹³⁰ In Article 2(11) of the first Draft Code of Crimes Against the Peace and Security of

126. GIDEON BOAS, JAMES L. BISCHOFF & NATALIE L. REID, *ELEMENTS OF CRIMES UNDER INTERNATIONAL LAW* 21–23 (2008)

127. *Id.*

128. *See* Charter of the Int'l Military Tribunal, art 6(c).

129. BOAS, BISCHOFF & REID, *supra* note 126, at 20. *See also* William J. Fenrick, *Should Crimes Against Humanity Replace War Crimes?*, 37 *COLUM. J. TRANSNAT'L L.* 767, 772–75 (1999).

130. *See* G.A. Res. 174 (II), Establishment of an International Law Commission (Nov. 21, 1947).

Mankind that the ILC published in 1954, the language of Article 6(c) of the IMT Charter defining crimes against humanity as “murder, extermination, enslavement, deportation, and other inhumane acts . . . or persecutions on political, racial or religious grounds” was kept,¹³¹ but the armed conflict requirement was modified and replaced with a requirement that crimes be committed under the “instigation or toleration” of state authorities.¹³² After 1954, the doctrinal development of crimes against humanity on the international level slowed down to a virtual standstill,¹³³ with much of this paralysis attributable to the fact that the ILC took nearly forty years to debate and come up with a final Draft Code in 1996.¹³⁴ Indeed, the 1996 Draft Code itself relied heavily on another set of international developments that had occurred several years earlier in 1993 and 1994, the establishment of the ad hoc ICTY and ICTR.¹³⁵

The nearly forty-year freeze in the doctrinal development of crimes against humanity came to an end in the early 1990s with the establishment of the ICTY and ICTR by the U.N. Security Council, in order to judge serious breaches of international law committed in the conflicts taking place in the former Yugoslavia¹³⁶ and Rwanda,¹³⁷ and the related promulgation of a final ILC Draft Code of Crimes Against the Peace and Security

131. The text of the 1954 ILC Draft Code specifically read “The following acts are offenses against the peace and security of mankind: . . . Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds” See *Draft Code of Offenses Against the Peace and Security of Mankind*, 2 Y.B. INT’L L. COMM’N art. 2(11) (1954). [hereinafter *Draft Code of Offenses*]

132. *Id.* Some scholars have been highly critical of the 1954 ILC Draft Code as neither fully following the IMT Charter in its modification of the armed conflict requirement nor fully breaking with it either.

133. BOAS, BISCHOFF & REID, *supra* note 126, at 28–29. Though note that during this period there were a number of national level trials for crimes against humanity.

134. *Id.*

135. See *id.* at 29–30 (“[T]he 1996 Draft Code’s definition of crimes against humanity resembles that of the ad hoc Tribunals as developed in their jurisprudence—most notably in that the punishable conduct must be committed, as the ILC draft puts it, “in a systematic manner or on a large scale.”).

136. See S.C. Res. 827 (May 25, 1993).

137. See S.C. Res. 955 (Nov. 8, 1994).

of Mankind in 1996.¹³⁸ While the ICTY and ICTR were not tasked with “making” international criminal law,¹³⁹ but rather only with applying it, it was inevitable that their establishment would have a deep effect on the development of certain international offenses, especially those such as crimes against humanity that were not very well defined at the time.¹⁴⁰

The ICTY Statute, which came out in 1993, followed in the footsteps of Article 6(c) of the IMT Charter, requiring that any listed crimes against humanity be committed in the context of an armed conflict.¹⁴¹ This armed conflict requirement, whilst keeping with Article 6(c) of the IMT Charter, went against the post-IMT Charter trials of lesser Nazi officials that had been conducted by the Allied Powers outside of the IMT Charter regime under Control Council Law No. 10 (where no armed conflict requirement had been present),¹⁴² and against the 1954

138. See *Draft Code of Offenses Against the Peace and Security of Mankind*, 2 Y.B. INT'L L. COMM'N pt. 2 (1996) [hereinafter *Draft Code of Offenses (1996)*].

139. See U.N. Secretary-General, *Rep. of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶ 29, U.N. Doc. S/25704 (May 3, 1993). With respect to states the following in regards to the establishment of the ICTY, the U.S. Secretary General stated “the Security Council would not be creating or purporting to ‘legislate’ the law. Rather, the International Tribunal would have the task of applying existing international . . . law.” *Id.*

140. See BOAS, BISCHOFF & REID, *supra* note 126, at 26–31; Baker, *supra* note 3, at 185. See generally Christopher Greenwood, *The Development of International Humanitarian Law by the International Criminal Tribunal for the former Yugoslavia*, in 2 MAX PLANCK Y.B. UNITED NATIONS L. 97 (Jochen A. Frowein & Rüdiger Wolfrum eds., 1998); William Schabas, *Customary Law or “Judge-Made” Law: Judicial Creativity at the UN Criminal Tribunals*, in THE LEGAL REGIME OF THE INTERNATIONAL CRIMINAL COURT: ESSAYS IN HONOUR OF PROFESSOR IGOR BLISHCHENKO 77 (José Doria, Hans-Peter Gasser & M. Cherif Bassiouni eds., 2009).

141. S.C. Res. 827, art. 5 (May 25, 1993) [hereinafter *Statute for the Int'l Crim. Tribunal for the Former Yugoslavia*].

142. The trial of lesser Nazi officials (i.e., outside of the main civilian and military leadership) was conducted by the Allied Powers outside of the IMT Charter regime under Control Council Law No. 10 (which provided for trials by military tribunal of the individual Allied Powers). It should be noted, however, that although Control Council Law No. 10 did not contain the requirement that crimes against humanity be committed in the context of an armed conflict, the majority of jurisprudence of the trials held under Control Council Law No. 10 still required the link. See BOAS, BISCHOFF & REID, *supra* note 126, at 24–26.

ILC Draft Code of Crimes Against the Peace and Security of Mankind which, as mentioned earlier, had replaced the armed conflict requirement of the IMT Charter with a requirement that crimes need only be committed under the “instigation or toleration” of state authorities.¹⁴³ The ICTR Statute, which came out one year after its ICTY counterpart, took the approach of Control Council Law No. 10 and the 1954 ILC Draft Code, by not requiring that the listed crimes against humanity be committed in the context of an armed conflict—the ICTR Statute instead required that the listed crime against humanity need only be committed “on national, political, ethnic, racial or religious grounds.”¹⁴⁴ The 1996 ILC Draft Code also mirrored the ICTR approach by not containing an armed conflict requirement, but only required that listed crimes against humanity be committed under the instigation of state authorities¹⁴⁵—there was no requirement for such crimes to be committed “on national, political, ethnic, racial or religious grounds” as there had been in the ICTR Statute.

Though they differed on whether an armed conflict was necessary element for the commission of a crime against humanity, both the ICTY and ICTR Statutes took identical approaches in defining crimes against humanity as consisting of the following acts (first enumerated in Article 6(c) of the IMT Charter and Article 2(11) of the 1954 ILC Draft Code): murder, extermination, enslavement, deportation, persecutions on political, racial and religious grounds, and other inhumane acts.¹⁴⁶ To this existing list, the ICTY and ICTR Statutes also then added

143. Draft Code of Offenses, *supra* note 131, art. 2(11).

144. S.C. Res. 955, art. 3 (Nov. 8, 1994) [hereinafter Statute for the Int’l Crim. Tribunal for Rwanda]. The ICTR Statute also required that a listed crime against humanity be committed “as part of a widespread or systematic attack.” Although the ICTY Statute originally did not contain this additional provision, it was later incorporated into the Statute through case law. *See* Prosecutor v. Kunarac et al., Case No. IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment, ¶ 85 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002).

145. Draft Code of Offenses (1996), *supra* note 138, art. 18.

146. Statute for the Int’l Crim. Tribunal for the Former Yugoslavia, *supra* note 141, art. 5; Statute for the Int’l Crim. Tribunal for Rwanda, *supra* note 144, art. 3.

the additional acts of: imprisonment, torture, and rape.¹⁴⁷ The 1996 ILC Draft Code closely followed this approach but expanded the definitions of rape and other inhumane acts, and then added the additional acts of institutionalized discrimination and the forced disappearance of persons.¹⁴⁸ Contributions from their Statutes aside, ICTY and ICTR also contributed to the doctrinal development of crimes against humanity through their extensive jurisprudence.¹⁴⁹ This jurisprudence established the general requirements for a listed act to qualify as a crime against humanity,¹⁵⁰ and provided detailed guidance of the required mental (*mens rea*) and physical (*actus reus*) elements¹⁵¹ each act requires.¹⁵² The experiences and lessons learned from

147. Statute for the Int'l Crim. Tribunal for the Former Yugoslavia, *supra* note 141, art. 5; Statute for the Int'l Crim. Tribunal for Rwanda *supra* note 144, art. 3.

148. Draft Code of Offenses (1996), *supra* note 138, art. 18.

149. *See supra* text accompanying notes 139, 140.

150. *See Prosecutor v. Kunarac et al.*, *supra* note 144, at ¶ 85 (Where the ICTY Appeals Chamber listed the following elements that had to be present for a listed act under Article 3 of the ICTY Statute to qualify as a crime against humanity: an attack, perpetrator(s) must be part of the attack, attack must be directed against a civilian population, attack must be widespread or systematic, and perpetrator(s) must be aware that there is a pattern of widespread or systematic attacks against the particular civilian population and intend for their attack to fit into this pattern.)

151. Under both "civil," or inquisitorial, legal systems and "common," or accusatorial ones, all crimes, at their base, require two elements: (1) the mental guilty mind, or *mens rea*, and (2) the physical guilty act, or *actus reus*. *See, e.g.*, JEAN PRADEL, *MANUEL DE DROIT PÉNAL GÉNÉRAL* 436–38. (9th ed. 1994); ZORAN STOJANOVIĆ, *KRIVIČNO PRAVO, OPŠTI DEO* 111–17, 162–64 (1st ed. 2000); RICHARD CARD, *CRIMINAL LAW* § 3.1 (15th ed. 2001); WAYNE R. LAFAVE, *CRIMINAL LAW* §§ 5.1, 6.1 (3d ed. 2010).

152. *See, e.g.*, *Prosecutor v. Delalić et al. [Čelebići]*, Case No. IT-96-21-T, Trial Chamber Judgment, ¶ 439 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) (discussing some of the elements required for the act of murder to qualify as a crime against humanity); *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, Trial Chamber Judgment, ¶¶ 227–29 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 2002) (elements required for the act of extermination to qualify as a crime against humanity.); *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Trial Chamber Judgment, ¶ 350 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 25, 2002) (elements required for the act of enslavement to qualify as a crime against humanity); *Prosecutor v. Stakić*, Case No. IT-97-24-A, Appeals Chamber Judgment, ¶ 278 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006) (elements required for the act of deportation to qualify as a crime against humanity.); *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-T, Trial Chamber Judgment, ¶ 302–03 (Int'l Crim. Trib.

the work of the ICTY and ICTR would directly affect how crimes against humanity would be defined in the Rome Statute of the ICC in 1998, which contains, to date, the most recent international iteration on crimes against humanity as an international offense.¹⁵³ The Rome Statute's approach to defining crimes against humanity would differ in several key points from the ICTY and ICTR approaches. Indeed, an analysis of the debates and disputes during the drafting of Article 7 of the Rome Statute (governing crimes against humanity) reveals a complex picture.

Whether to include an armed conflict requirement (as contained in the ICTY Statute, but absent from the ICTR Statute and 1996 ILC Draft Code) for crimes against humanity in Article 7, was a key debating point amongst the delegates to the Rome Conference.¹⁵⁴ Ultimately, the requirement was dropped from Article 7 (placing it more in line with the treatment of crimes against humanity in the ICTR Statute and 1996 ILC Draft Code). The prevailing side was of the opinion that customary international law¹⁵⁵ no longer required that crimes against humanity be committed in the context of an armed conflict, and that the inclusion of such a requirement could create "an unnecessary burden for prosecutions."¹⁵⁶ Though the view that crimes against humanity no longer required a nexus to an armed conflict prevailed at the Rome Conference, there was a significant minority on the losing end of the argument (mainly

for the Former Yugoslavia Feb. 26, 2001) (elements required for the act of imprisonment to qualify as a crime against humanity.); Prosecutor v. Kunarac et al., Case No. IT-96-23 & IT-96-23/1-T, Trial Chamber Judgment, ¶ 495 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001) (elements required for the act of torture to qualify as a crime against humanity); Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeals Chamber Judgment, ¶ 131 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004) (elements required for the act of persecution to qualify as a crime against humanity.); Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-A, Appeals Chamber Judgment, ¶ 117 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004) (elements required for other inhumane acts to qualify as a crime against humanity.).

153. In 1998, an international treaty was adopted establishing a permanent ICC to judge serious breaches of international criminal law. See Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

154. BOAS, BISCHOFF & REID, *supra* note 126, at 105–06.

155. See *supra* Part I for a discussion and explanation of the traditionally held sources of customary international law: state practice and *opinio juris*.

156. See BOAS, BISCHOFF & REID, *supra* note 126, at 105–06.

amongst the African, Arab, and Asian delegations) that felt customary international law still required the nexus,¹⁵⁷ and this view, although a minority one, is certainly not without its adherents.¹⁵⁸

Another point of debate over Article 7 of the Rome Statute involved the acts that would be defined as crimes against humanity. Both the ICTY and ICTR Statutes had contained identical exhaustive lists which the Rome Statute replicates, but with two key differences. The first difference centers on the act of persecution, which the ICTY and ICTR Statutes stated could be committed on “political, racial, or religious grounds.”¹⁵⁹ Article 7 of the Rome Statute keeps this wording but then adds that persecution can also be committed on national, ethnic, cultural, or gender grounds or any “other grounds that are universally recognized as impermissible under international law.”¹⁶⁰ This broader definition had been the subject of an intense debate between various state delegations—with some of the delegations arguing for an expansive list defining the grounds under which persecution could qualify as a crime against humanity, others arguing for more illustrative list.¹⁶¹ Yet others still arguing that persecution be removed as an act that could qualify as a crime against humanity altogether.¹⁶² Ultimately, those

157. See Herman von Hebel & Darryl Robinson, *Crimes Within the Jurisdiction of the Court*, in *THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS AND RESULTS* 94 n. 43 (Roy S. Lee ed., 1999). See also Stuart Ford, *Crimes Against Humanity at the Extraordinary Chambers in the Courts of Cambodia: Is a Connection with Armed Conflict Required?*, 24 *UCLA PAC. BASIN L.J.* 125, 129–32 (2007) (describing the debates that occurred, in the years following the end of World War II, over whether crimes against humanity in customary international law still required the armed conflict nexus.).

158. See, e.g., WILLIAM A. SCHABAS, *THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA, AND SIERRA LEONE* 187–88 (2006) (discussing how the probable explanation for the ICTY Statute’s inclusion of the armed conflict requirement for crimes against humanity in 1993 was the U.N. Secretary General’s view that to not have done so would have violated the principle of *nullum crimen sine lege* (the prohibition on the creation of any *ex post facto* law to the disadvantage of the accused)).

159. Statute for the Int’l Criminal Crim. Tribunal for the Former Yugoslavia, *supra* note 141, art. 5(h); Statute for the Int’l Crim. Tribunal for Rwanda, *supra* note 144, art. 3(h).

160. Rome Statute, *supra* note 153, art. 7(1)(h).

161. See von Hebel & Robinson, *supra* note 157, at 101.

162. See Rep. of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, ¶ 99 U.N. Doc. A/51/22 (1996).

arguing for a more expansive list won out, though this approach has not been without criticism.¹⁶³ The second difference between the ICTY/ICTR Statutes and the Rome Statute relates to the two new additional acts that the Rome Statute added to the list already established by the ICTY and ICTR—these two new acts being enforced disappearance and apartheid.¹⁶⁴ The inclusion of enforced disappearance and apartheid as acts that could qualify as crimes against humanity was mainly at the insistence of the Latin American and African delegations respectively,¹⁶⁵ and was later criticized by some scholars as being well outside the understood parameters of crimes against humanity under customary international law.¹⁶⁶

As it currently stands, Article 7 of the Rome Statute is the most recent international iteration on crimes against humanity as an international offense. In surveying the doctrinal development of crimes against humanity in the years following the close of the Second World War, a complex picture has emerged of a doctrine of international criminal law under constant refinement and interpretation.

163. See Antonio Cassese, *Crimes Against Humanity*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 376–77 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002) (Where the author criticizes the expansive definition of persecution in Article 7(h) of the Rome Statute as well beyond the standard under customary international law.).

164. See Rome Statute, *supra* note 160, arts. 7(1)(i), 7(1)(j). Technically speaking, there were actually more than two new additional acts (that could be qualified as crimes against humanity) included in the Rome Statute vis-à-vis the ICTY and ICTR Statutes, but these other acts (sexual offenses other than rape and forcible transfer) had already been incorporated into the ICTY and ICTR Statutes through case law. See BOAS, BISCHOFF & REID, *supra* note 126, at 108–09.

165. See von Hebel & Robinson, *supra* note 157, at 102 n.75. That the Latin American delegations would insist on the inclusion of enforced disappearance (given the prevalence of such crimes during by the governing right-wing military junta's in that region during the 1960s through to 1980s) and the African delegations on apartheid (given the history of apartheid in South Africa and Rhodesia by minority white governments) is perhaps understandable.

166. See Cassese, *supra* note 163, at 376; BOAS, BISCHOFF & REID, *supra* note 126, at 109. Interestingly other additional acts (that could qualify as crimes against humanity) were also proposed (but ultimately rejected) during the drafting of Article 7—these acts were: terrorism (proposed by the Indian, Sri Lankan, and Turkish delegations), mass starvation (proposed by the Costa Rican delegation), and imposition of economic embargo (proposed by the Cuban delegation). See von Hebel & Robinson, *supra* note 157, at 102–03.

Figure 5: The Development of Crimes Against Humanity as an International Offense

Crimes Against Humanity	1945 IMT Charter (Article 6(c))	The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: . . . (c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.
	1945 Allied Control Council Law No. 10 (Article II(c))	
	1954 ILC Draft Code of Crimes Against the Peace and Security of Mankind (Article 2(11))	
	1993 ICTY Statute (Article 5)	
	1994 ICTR Statute (Article 3)	

2. Crimes Against Humanity and Recursive Cycles

As previously illustrated, the Rome Statute's approach to defining crimes against humanity would differ in several key points from the ICTY and ICTR approaches. It is in exploring

these differences in detail that a complete picture emerges of whether crimes against humanity, as a specific category of international criminal offense, is currently subject to the presence of recursive cycles (indicating competing claims and conflicts as to its meaning and application), or if recursive cycles are not present (indicating acceptance and authority as to meaning and application). In observing the development of crimes against humanity as a specific international offense, especially the debates that surrounded its definition and elaboration in Article 7 of the Rome Statute, a picture emerges which indicates the presence of recursive cycles.

Crimes against humanity, as a category of international offense, is today very much the subject of competing claims and conflicts as to its meaning and application—a fact very much highlighted by the debates over its scope and application both during the drafting of Article 7 of the Rome Statute, and even before during the establishment of the ICTY and ICTR in the early 1990s. As previously discussed, the doctrinal development of crimes against humanity as an international criminal offense only began in earnest at the close of the Second World War with the IMT Charter and Control Council Law No. 10. With the publication of the 1954 ILC Draft Code of Crimes Against the Peace and Security of Mankind, the doctrinal development of crimes against humanity came to a virtual standstill for the next forty years, as the ILC became mired in debates over defining the scope and application of the offense. Part of the problem during this time originated in the fact that the ILC was working in a vacuum of sorts, as there were no international conventions or jurisprudence on the subject during this period. This vacuum would set the stage for the first mechanism driving recursive cycles of norm-making in relation to the development of crimes against humanity as an international offense—the “indeterminacy of law.”

The “indeterminacy of law” refers to the ambiguities that can be inherent in legal instruments (e.g. treaties, statutes, regulations, court opinions, etc.) that can then lead to possible unintended consequences in their application—thereby setting off repeated rounds of redrafting and reapplication.¹⁶⁷ The inability of the ILC to resolve the conflict between the IMT Charter’s insistence on an armed conflict requirement for crimes against

167. *See supra* Part VI.

humanity, and Control Council Law No. 10's insistence on not having such a requirement, combined with international silence on the subject (in the form of the absence of any international conventions or jurisprudence regarding the issue during this period), created an environment where ambiguity prevailed. When in 1993 the ICTY Statute insisted on an armed conflict requirement, in direct opposition to both the ICTR Statute that came out a year later, and the final ILC Draft Code that came out in 1996, the stage was set for redrafting and reapplication between the various actors. The majority of this activity took place in the jurisprudence of the ICTY which, through its case law, began to systematically dilute the armed conflict requirement in its Statute by declaring that customary international law no longer required the armed conflict nexus for the commission of a crime against humanity (and that the requirement in Article 5 of the ICTY Statute was for jurisdictional purposes only),¹⁶⁸ and that the requirement did not demand a material link between the crime against humanity allegedly committed and the armed conflict in question.¹⁶⁹ In this way, the ICTY, through its jurisprudence, began to bring its definition of crimes against humanity more in line with those of the ICTR and 1996 ILC Draft Code. The legal ambiguity that had existed in the forty years between the end of the Second World War and the establishment of the ad hoc Tribunals manifested itself, then, in driving recursive cycles of norm-making between these various international actors. The Rome Statute's

168. See *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 78 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) ("Since customary international law no longer requires any nexus between crimes against humanity and armed conflict . . . , Article 5 was intended to reintroduce this nexus for the purposes of this Tribunal.").

169. See *Prosecutor v. Šešelj*, Case No. IT-03-67-AR72.1, Decision on the Interlocutory Appeal Concerning Jurisdiction, ¶¶ 13–14 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 31, 2004) ("As expressed in the jurisprudence of the Tribunal, the jurisdictional requirement of Article 5 requires the existence of an armed conflict at the time and place relevant to the indictment, but it does not mandate any material nexus between the acts of the accused and the armed conflict . . . All that is required under Article 5 of the Statute is that the prosecution establish that an armed conflict is sufficiently related to the Article 5 crime with which the accused is charged . . . there is no need for the Prosecution to establish a material nexus between the acts of the accused and the armed conflict.").

exclusion of the armed conflict requirement in its definition of crimes against humanity in 1998 did not bring these cycles to an end. Indeed, if anything, the recursivity has intensified—witness the recent jurisprudence of the East Timor Special Panels for Serious Crimes (SPSC)¹⁷⁰, which although its Statute defines crimes against humanity per the Rome Statute definition (i.e. minus an armed conflict requirement),¹⁷¹ has ruled in its case law that crimes against humanity require an armed conflict nexus.¹⁷²

Recall that although the ad hoc Tribunals were purportedly designed to apply existing international law,¹⁷³ their jurisprudence inevitably had a deep effect on the development of certain international offenses, especially those such as crimes against humanity, that were not very well defined at the time. The experiences and lessons learned from the work of the ICTY and ICTR would directly affect how crimes against humanity would be defined in the Rome Statute of the ICC in 1998, but it would also set the stage for the second (and final) mechanism driving recursive cycles of norm-making in relation to the development of crimes against humanity as an international offense—“contradictions.”

“Contradictions” refer to the phenomena that emerge ideologically when clashing visions amongst actors lead to imperfect legal settlements, or institutionally, when legal implementation is divided out between different institutions.¹⁷⁴ The de-

170. Following the violence that accompanied East Timor’s independence from Indonesia in 1999, the U.N. transitional Administration in East Timor (UNTAET) set up a hybrid international–East Timorese Tribunal (composed of international and East Timorese judges) to try the serious criminal offenses that took place in 1999. The Tribunal operated from 2000 to 2006. For an excellent summary of the Tribunal’s work, see generally CAITLIN REIGER & MARIEKE WIERDA, INT’L CT. FOR TRANSNAT’L JUST., *THE SERIOUS CRIMES PROCESS IN TIMOR-LESTE: IN RETROSPECT* (2006), <https://www.ictj.org/sites/default/files/ICTJ-TimorLeste-Criminal-Process-2006-English.pdf>.

171. See *Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences*, United Nations Transitional Administration in East Timor, U.N. Doc. UNTAET/REG/2000/15 (Jun. 6, 2000), § 5.

172. See *Prosecutor v. Joni Marques et al.*, Case No. 09/2000, Trial Panel Judgment, ¶ 684 (U.N. East Timorese Transitional Admin. Special Panel for Serious Crimes Dec. 11, 2001).

173. See *supra* text accompanying notes 139, 140.

174. See *supra* Part VI.

bates referenced earlier that emerged during the drafting of the Rome Statute over the inclusion of an armed conflict requirement for crimes against humanity, and the specific acts that could be qualified as crimes against humanity, point to the Rome Statute as representing not the final conclusive international judgment on the definition of crimes against humanity as an international offense, but rather instead as a partial and unstable temporary solution that seeks to incorporate fundamentally incompatible viewpoints. Indeed, not only does debate still exist on the armed conflict nexus for a crime against humanity, even in the wake of the Rome Statute,¹⁷⁵ but the inclusion of additional acts into what had previously been a stable list of offenses (duplicated in both the ICTY and ICTR Statutes) has generated much controversy.¹⁷⁶ These debates emerged out of ideological clashed between various national delegations to the Rome Conference, who had their own idiosyncratic reasons (often rooted in very specific historical or social circumstances) for advocating the positions that they did.¹⁷⁷ As a brief concluding aside, compare this state of events to the parallel doctrinal development of genocide as an international criminal offense, which was subject to both a widely ratified international convention (the "Genocide Convention")¹⁷⁸ and expansive jurisprudential development in the International Court of Justice (the "1951 ICJ Advisory Opinion").¹⁷⁹ Unlike the situation with crimes against humanity, the definition and elaboration of genocide as a specific category of international criminal offense that emerged in the wake of the Genocide

175. See *supra* text accompanying notes 170, 171.

176. See *supra* text accompanying notes 159–66.

177. See *supra* text accompanying notes 160–66.

178. See Convention on the Prevention and Punishment of Genocide art. II, Dec. 9, 1948, 78 U.N.T.S. 277. This Convention defines genocide as the targeting of a national, ethnic, racial, or religious group with the following acts: murder, causing serious bodily/mental harm, deliberately inflicting conditions designed to destroy the targeted group, preventing births within the targeted group, and transferring children from the targeted group to another group. *Id.* art. II. For such acts to constitute genocide, they must be committed with the intent to destroy the targeted group "in whole or in part." *Id.*

179. See Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. Rep. 15 (May 28).

Convention and 1951 ICJ Advisory Opinion (on the Convention) has remained remarkably stable.¹⁸⁰

The status of crimes against humanity today as an international offense is well established and not in doubt—the years following the Second World War, especially the last two decades following the establishments of the ICTY and ICTR, saw the status of crimes against humanity as a specific type of international crime solidify. What the preceding section has shown, however, is that the specific doctrinal development of crimes against humanity is still today very much in flux and subject to repeated recursive cycles of norm-making. Perhaps once the ICC begins trying cases in earnest and building a body of case law, these cycles will dissipate as norm-making episodes settle and come to an end (indicating acceptance as to application of meaning). Time will tell, although the imperfect legal settlement that is the Rome Statute may not bode well for such a clear outcome in the future. This analysis departs radically from more typical international legal scholarship charting the development of crimes against humanity. Instead of centering the investigation on an imprecise methodology charting the practice of states in the immediate aftermath of the Second World War, and then coupling with a study of “why” states exactly behaved in this manner, the investigation presented above takes a more empirical approach focusing on the reality of the international system as it operates. Instead of ignoring transnational actors or relegating them to the background, the analysis presented above recognizes them as the key actors (within the international system) that they have become.

180. Indeed, the main development in the doctrine in the years following the Genocide Convention and 1951 ICJ Advisory Opinion has not been on its definition and elaboration as a specific category of international offense applying to individual responsibility, but rather on whether genocide operates as a category of international civil offense that can hold entire states (rather than individuals) liable. *See* Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn.-Herz. v. Yugo.), Preliminary Objections Judgment, 1996 I.C.J. Rep. 595, 616 (Jul. 11) (Where the ICJ held that claims for state responsibility for genocide were admissible under the Genocide Convention.); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn.-Herz. v. Serb. and Montenegro), 1997 I.C.J. Rep. 43, 237-40 (Feb. 26) (Where the ICJ held that Serbia-Montenegro, as a state, was not responsible for genocide committed in the state of Bosnia-Herzegovina during the conflict that erupted there in the 1990s.).

An analysis of international norm formation anchored in a framework of legal recursivity, as the example with crimes against humanity presented above demonstrates, opens up the study to a whole host of empirical methods. With the example presented above, one sees a comparative case study¹⁸¹ looking at comparing the many iterations of crimes against humanity as an international offense, married with an approach that charts how the lack of a widely ratified international treaty and/or accompanying International Court of Justice jurisprudence created an environment where the doctrinal development of the offense lacked an institutionalizing component¹⁸² that could centrally filter and control the developing elements of the offense.¹⁸³ What one had with crimes against humanity's development was a situation where the struggle between different actors, both state and transnational, set the stage for "indeterminacy" and "contradictions" to emerge and drive recursive cycles of norm-making across time and space.

CONCLUSION

This article has surveyed the ways in which current interpretations of customary international law are flawed and the deep uncertainty and confusion over the role of state practice and *opinio juris* within the customary element. It has also illustrated how new theories of customary international law have proved inadequate in clarifying the current state of the field, and how the heavily state-centric bias of customary international law, as currently conceptualized, fails to take into account the very real affects norm-generating transnational actors have on the international system. This article has also discussed "conceptual stretching," an idea coined by the social scientist Giovanni Sartori to describe the distortions that result when established concepts are introduced to new cases without the required accompanying adaption, and has suggested that the current confusion rampant in customary international law can be traced to how its current conceptualization, relying as it

181. See *supra* text accompanying notes 114, 115.

182. By taking a view that conceptualizes institutions as both shaping behavior and mediating outcomes, the analysis of the doctrinal development of crimes against humanity presented very much keeps in line with classically historical institutionalist approaches from political science. See discussion *supra* note 119.

183. See *supra* text accompanying notes 177–80.

does on the dual attributes of state practice and *opinio juris*, is “conceptually stretched.” Utilizing Sartori’s “ladder of abstraction,” a new framework for studying customary international norms has been suggested, one that looks to general theories of norm formation. In pursuing this line of inquiry, the idea of “legal recursivity” proposed by legal sociologists Terence Halliday and Bruce Carruthers has been suggested as a more apt description of how, in a new international system dominated by norm-generating transnational actors, international norms develop and operate. “Legal recursivity” examines how norms can be exchanged and transferred between the transnational governmental, quasi-governmental, and non-governmental institutions within the international community as a whole, and domestic states. In short, the framework proposed is the following:

Figure 6: A Recursive Framework of Norm Formation

More Abstract (low *intension*, high *extension*)

(Concept: General Norm Formation)

Attributes: - The Physical Element (driven by cycles
of “legal recursivity”)

Less Abstract (high *intension*, low *extension*)

(Concept: Customary International Norm Formation)

Attributes: - The Physical Element (state practice)
- The Mental Element (*opinio juris*)

“Legal recursivity,” as a description of how international norms develop and operate (and indeed interact with national norms) points a way forward for international scholarship towards a more rigorous, scientific, and thus empirical approach, as evidenced in the case study presented documenting the development of crimes against humanity as an international offense. The international system is on pace to become ever more complex as transnational actors both continue to expand their areas of jurisdiction and persist in their efforts to influence state behavior. Under such circumstances, research into the development and operation of individual international norms becomes all the more vital. Individual issue areas aside, system level questions also still abound as to how and why norms

change character (e.g. from “hard” law to “soft”), why norm-making shifts between different actors in the international system, what factors precede a norm-making episode (and whether they are important), and what the implications (if any) of different timing sequences in norm-making episodes are.¹⁸⁴ International legal scholarship could have much to contribute in the exploration of these phenomena were it to adopt a more empirically based approach.

184. Halliday, *supra* note 6, at 271, 276.