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Custom's Future

INTERNATIONAL LAW IN A CHANGING WORLD

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To Kathy, my beloved wife, for her patience and support during this project.

3

Customary International Law as a Dynamic Process

Brian D. Lepard

Today there is great debate about just how long customary international law takes to form, and how it can be changed. Ranged on one side are those "traditionalists" who maintain that customary law requires both (1) consistent state practice, and (2) *opinio juris sive necessitatis*, a belief among states that a customary practice is legally binding.[1] Moreover, these traditionalists argue that both elements must persist over some extended period of time. That is, state practice must be longstanding, and even the *opinio juris* must be well-grounded and consistent through time. This long gestation period, in turn, gives customary norms permanence and rootedness. This same quality of rootedness can make customary law norms difficult to change. That is because for a norm to change, both elements must be modified, and this modification, too, ought to take some time under the traditional view.

According to the traditional view, customary international law is like a giant ocean liner. It takes a long time to get up to cruising speed, and once it is headed in a particular direction, much effort is required to cause it to change course. Furthermore, the traditional view also is not merely a jurisprudential one about what characteristics customary international law "has." It also incorporates a normative dimension, and traditionalists argue that there are good reasons for making customary international law difficult to create, and difficult to modify.

Ranged against this traditional view is an army of new approaches to customary international law, all of which view it as a more dynamic process and as more susceptible to change. According to some of these theories, a new consistent state practice can arise very quickly; no particular duration of the practice is required to establish a corresponding new norm of customary international law. Likewise, *opinio juris* can be formed in an "instant," or at least very quickly. And some theories minimize or dispense with either the state practice requirement or the *opinio juris*

1 See, for example, the formulation in North Sea Continental Shelf Cases (*F.R.G. v. Denmark*; *F.R.G. v. Neth.*), 1969 I.C.J. Rep. 3, 44, para. 77 (Feb. 20), discussed presently.

requirement, thus making it even easier for customary norms to be created, or changed, since only one element needs changing.

This clash of approaches and theories has left customary law in a jurisprudential crisis. We might dismiss this as just another academic conundrum, of little interest to practitioners, except that customary international law is assuming enormous importance practically in a wide variety of fields. The traditional theory as well as new theories are appearing with increasing frequency in judicial opinions, and therefore must be taken into account by ministries of foreign affairs and legal advisers to governments. While, as Joel Trachtman points out in his chapter, treaties have proliferated and occupied more legal "terrain" that used to be covered only by customary law,[2] treaties only bind states that have ratified them. Many states are not bound by particular treaty norms. Moreover, nonstate actors are not bound by them. This is why customary law plays a key role in the mandates and decision making of international criminal tribunals like the International Criminal Court (ICC) and the criminal tribunals for the former Yugoslavia and Rwanda.[3] Furthermore, treaties have many "gaps" that can be filled by customary law. And treaties must be interpreted in a broader legal context, with customary law often providing that context. For all these reasons, it is critical to resolve the crisis in customary law.

This chapter argues that customary international law is, and ought to be, conceived of as a dynamic method of lawmaking. It also argues that the essence of customary international law is *opinio juris*, and that state practice is best viewed as evidence of *opinio juris*. In particular, the chapter contends that *opinio juris* should be reconceptualized as a belief by states generally that it is desirable now or in the near future to have an authoritative legal principle or norm prescribing, permitting, or prohibiting certain conduct, apart from treaty obligations.[4] Their beliefs can and should be ascertained through examination of a wide range of evidence, including the text of treaties, statements by states about their views (including the significance of the treaties they enter into), the provisions of national legislation, and national judicial decisions, among others. Moreover, state beliefs ought to be evaluated in the context of certain fundamental ethical principles that states themselves have endorsed. These perspectives mean that a customary norm can emerge fairly quickly, and be changed fairly quickly, if there is sufficient evidence of such a belief of states in the desirability of creating or modifying an authoritative legal norm,

2 *See* Joel P. Trachtman, "The Growing Obsolescence of Customary International Law" (in this volume).

3 However, some scholars have argued that the role of customary international law in the decision making of international criminal tribunals is now declining in favor of "codification" of international crimes, as exemplified by certain provisions of the ICC Statute. *See* Larissa van den Herik, "The Decline of Customary International Law as a Source of International Criminal Law" (in this volume).

4 *See* BRIAN D. LEPARD, CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS 8 (2010).

and particularly where the change promotes the realization of fundamental ethical principles.

In the following sections, the chapter explores the traditional view and its justifications and weaknesses, modern approaches and their benefits and shortcomings, and the proposed new perspective on the dynamic quality of customary international law. It also explains how this perspective reinforces, but is also distinct from, some of the intriguing views offered by other contributors to this volume.

CUSTOMARY INTERNATIONAL LAW AS "EMBEDDED" LAW

The traditional view of customary international law is that it evolves over a long period of time, and thus becomes "embedded" in the society of states. Under this perspective, there is a static quality to customary international law. It is rooted in interstate society, and serves, indeed, as a kind of legal base or foundation for a network of international legal rules. Moreover, not only is it difficult to change, but normatively, viewed through this lens, it *should* be difficult to change. Without this quality of rootedness, of permanence, the argument goes, customary international law would be like shifting sands, and any legal edifice constructed on it runs the risk of toppling over.

Historical Evolution of the Traditional View

It is evident that certain patterns of behavior by states developed over time. These "customs" were transmitted from state to state, and from generation to generation of state leaders. But were these customs law? Judges and lawyers eventually arrived at a view that custom becomes international law when there is "*opinio juris sive necessitatis*" – a belief by those states subject to the rule that it *is* a legal rule. This led to the traditional bipartite definition of customary international law as a consistent practice among states accompanied by *opinio juris*.

In short, as relations among nations grew in size and complexity, it was natural that states would develop certain practices and accept them as legally binding in order to achieve a variety of goals, including the facilitation of trade and the maintenance of peace, and when war occurred, the minimization of its harmful effects. These customary norms supplemented those developed by contract in the form of treaties. Of course, treaties themselves could also give rise to customary norms that took on a life of their own apart from the treaties. As Hans Kelsen has famously pointed out, even the law of treaties began as customary rules, and therefore customary international law is the foundation of the international legal order.[5]

[5] *See* HANS KELSEN, GENERAL THEORY OF LAW AND STATE 369 (Anders Wedberg trans., 1945).

The bipartite definition of customary international law just described did not develop in a vacuum. As Emily Kadens helpfully explores in her chapter, Roman lawyers as well as medieval European jurists were quite familiar with the concept of customary law and endorsed some form of the two-element definition.[6] It is also notable, as she underscores, that going back to these early conceptions, customary law has always sat uneasily alongside written law, because it is "fluid, uncertain, equitable, and communitarian."

Growing out of these early precedents, customary local or national law has long been applied in common law countries, at least in discrete types of cases. William Blackstone's famous *Commentaries on the Laws of England* established various criteria for the recognition of customary law by common law courts.[7] Moreover, a number of countries with a civil code permit a judge to decide a case by resort to customary law as a fallback method if there is no governing written law.[8] Some codes explicitly adopt the bipartite definition. For example, the Louisiana Civil Code affirms in Article 3 that "custom results from practice repeated *for a long time* and generally accepted as having acquired the force of law."[9]

In both common law and civil law systems, there traditionally has been a requirement of longstanding practice. Thus, English common law requires that a custom be "immemorial." Indeed, one of Blackstone's requirements for customary law is that the custom "have been used so long, that the memory of man runneth not to the contrary."[10] In addition, some of the civil codes referred to here, such as the Louisiana Code, specify that a practice must be of long duration.

The treatise writers of international law, and governments, too, eventually adopted these ideas about customary law drawn from national law and elevated them to the level of international law. Not surprisingly, the jurists who began to codify international law, and especially the members of the Advisory Committee of Jurists who drafted Article 38 of the Statute of the Permanent Court of International Justice (PCIJ) in 1920, which became verbatim Article 38 of the Statute of the International Court of Justice (ICJ), drew on their knowledge of the operation of customary law at the domestic level in articulating its longstanding function at the international level.

[6] *See* Emily Kadens, "Custom's Past" (in this volume).

[7] For a discussion of his criteria and their application by modern courts, see David Callies, "How Custom Becomes Law in England," in THE ROLE OF CUSTOMARY LAW IN SUSTAINABLE DEVELOPMENT 158 (Peter Ørebech et al. eds., 2005).

[8] *See, e.g.*, Swiss Civil Code, art. 1, para. 2, *available at* http://www.admin.ch/ch/e/rs/2/210.en.pdf.

[9] Louisiana Civil Code, art. 3, Acts 1987, No. 124, §1, *available at* http://www.legis.la.gov/legis/Law.aspx?d=110037 (emphasis added).

[10] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 76–77 (1st ed.), *quoted in* Callies, "How Custom Becomes Law in England," at 166. On the requirement of immemoriality, see generally *id.* at 166–70.

Thus, Article 38(1)(b) allows the ICJ to apply, in addition to treaties, "international custom, as evidence of a general practice accepted as law."[11]

International courts, like their domestic counterparts, eventually formulated the well-known bipartite definition of customary international law, which has been expressed on a number of occasions by the ICJ.[12] Notably, the ICJ has insisted that a practice must be "settled" before it can become law.[13] Many, if not most, scholars have also emphasized the traditional requirements of both state practice and *opinio juris*. They adopt the view that state practice is essential to the formation of a customary rule. For example, Sir Michael Wood, in his second report presented in 2014 to the International Law Commission as special rapporteur, concluded that "to determine the existence of a rule of customary international law and its content, it is necessary to ascertain whether there is a general practice accepted as law."[14] Moreover, most publicists still insist that practice be of long duration. However, they take the view that no particular length of time is required for the formation of customary law.[15]

Even if no particular duration is necessary, under the traditional view, customary international law should require a fairly long period of gestation to emerge. And similarly, once a rule becomes entrenched, there ought to be a fairly long following period of contrary practice to change or overturn it. In this connection, legal scholar Karol Wolfke has affirmed that more practice and greater uniformity of practice are required to terminate "an old, well-settled customary rule" than to create a new one.[16]

Two initial points are worth noting here about the *opinio juris* element of the traditional view of customary international law. First, even if a very long period of practice relating to some issue exists among states, *opinio juris* is an essential requirement for the formation of a customary rule. Why? Because a custom, even an ancient one, is not by itself a rule. As a pattern of behavior, rather, it could be described as "consistent with" a variety of incipient or potential rules. To give but one example, a pattern of states not arresting ambassadors of other states could be equally consistent with a rule forbidding any arrests of ambassadors, a rule only

[11] I.C.J. STATUTE, art. 38(1)(b).

[12] *See, e.g.*, Continental Shelf Case (*Libya v. Malta*), 1985 I.C.J. Rep. 13, 29, para. 27 (June 3) (stating that the substance of customary international law must be "looked for primarily in the actual practice and *opinio juris* of States").

[13] *See* North Sea Continental Shelf Cases, 1969 I.C.J. Rep. 3, 44, para. 77; Jurisdictional Immunities of the State (*Germany v. Italy*), 2012 I.C.J. Rep. 99, 122, para. 55 (Feb. 3) (observing that "the existence of a rule of customary international law requires that there be 'a settled practice' together with *opinio juris*").

[14] Michael Wood, Special Rapporteur of the International Law Commission, Draft Conclusion 3, *in Second Report on Identification of Customary International Law*, U.N. Doc. A/CN.4/672 (2014), at 65.

[15] *See, e.g.*, Draft Conclusion 9, para. 3; in *id* at 67 ("Provided that the practice is sufficiently general and consistent, no particular duration is required.").

[16] KAROL WOLFKE, *CUSTOM IN PRESENT INTERNATIONAL LAW* 65 (2d rev. ed. 1993).

allowing arrests of ambassadors for certain crimes (which no ambassadors happen to commit), a rule requiring states to give "due consideration" to the sanctity of ambassadors and embassies, or a rule allowing states freely to arrest ambassadors (which states choose not to take advantage of in the interests of promoting good diplomatic relations).

Second, although some notion of *opinio juris* is essential, the traditional definition of *opinio juris* manifests a "paradox."[17] How can a belief by states that a custom *already* reflects a legal rule be considered a precondition for recognition of a *new* legal rule? Certainly the definition could work well enough for existing legal rules. But it is wholly unsatisfactory for explaining or justifying the creation of new customary law. This is because before the custom becomes a legal rule it is not a legal rule. Yet in order for it to become a legal rule, the participants must erroneously believe that it already is one. This chapter will propose a solution to this paradox.

Advantages of the Traditional View

A number of arguments can be made in support of the traditional view that international customary norms ought to be difficult to create, and difficult to change, some of which were just touched upon. First, clear, longstanding, and resilient rules can solve interstate coordination problems very well, so long as the nature of those problems does not change. Many issue areas governed by international law can be viewed as coordination dilemmas, such as rules on maritime navigation (i.e., ships approaching head-on at sea must pass on the right)[18] and problems involving delimitation of the continental shelf. The same is true for norms designed to solve prisoners' dilemmas, where every state has a self-interested preference for cheating. A "hard," entrenched rule may be necessary to combat these incentives and prevent all states from winding up with their least-favored outcomes. Many issues addressed by international law could be reasonably perceived as prisoners' dilemmas, where a clear, stable rule enforced by sanctions is desirable to counteract the incentives for defection and avoid the worst results for states.

Furthermore, the traditional view of customary international law can help ensure that societal rules enforcing minimum moral rules of social conduct are enduring and cannot easily be overturned. Just as the prohibition of murder, which originated

[17] On this paradox, see, among other sources, DAVID J. BEDERMAN, *CUSTOM AS A SOURCE OF LAW* 20, 149 (2010).

[18] This rule is now codified as Rule 14(a) of the International Regulations for Preventing Collisions at Sea, *in* Convention on the International Regulations for Preventing Collisions at Sea (1972), Annex, 1050 U.N.T.S. 17, entered into force 15 July 1977 (providing that "when two power-driven vessels are meeting on reciprocal or nearly reciprocal courses so as to involve risk of collision, each shall alter her course to starboard so that each shall pass on the port side of the other").

as a customary rule in societies before statutory criminal enactments,[19] ought to be entrenched because of its morally compelling character and not made susceptible to easy change through contrary practice, so also norms regarding basic human rights that are recognized at the international level should be difficult to modify. For example, there are good normative reasons for treating the prohibition of torture as an embedded norm and not allowing it to be changed easily, including by recent practices of "enhanced interrogation" by Western and other powers.

Indeed, many norms of customary international law qualify as peremptory norms (*jus cogens*) in large part (or exclusively) because of their compelling moral character. *Jus cogens* norms enjoy a privileged status. Even states that persistently object to these rules cannot exempt themselves from their reach.[20] And these rules are not easily susceptible to change, by design. They cannot, for example, be modified simply by treaty; indeed, any treaty that conflicts with them is considered entirely void.[21] In the words of Article 53 of the 1969 Vienna Convention on the Law of Treaties, "A peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted *and which can be modified only by a subsequent norm of general international law having the same character*."[22] Of course, many human rights norms are now properly regarded as *jus cogens*, and therefore have an entrenched character. They are "super norms" that can only be changed by other "super norms."[23]

At the same time, law is not always the best means of dealing with international problems generally. There are many other means, including voluntary persuasion of states to behave in a certain way. Setting high barriers to the formation of customary rules in the first place, according to this perspective, rightly favors "non-law" over law in influencing behavior. It may be desirable to allow members of the society of states as much freedom as possible, unrestrained by legal obligations unless absolutely necessary. Given that state sovereignty itself is a fundamental and well-recognized norm of customary international law, it is important not to burden states with "too much law." Certainly, the traditional view of customary international law helps restrain its reach. It also allows a wider sphere of operation for "soft law," which could encompass legal norms (including customary norms) that impose only persuasive obligations rather than binding ones, as well as norms that are not legal

[19] On the development of customary laws against homicide, see BEDERMAN, *supra* note 17, at 13–14.

[20] *See* LEPARD, *supra* note 4, at 250–52.

[21] *See* Vienna Convention on the Law of Treaties, art. 53.

[22] *Id.* (emphasis added).

[23] For a discussion of *jus cogens* norms and their relationship to moral values, see LEPARD, *supra* note 4, at 243–60. On the recognition of some *jus cogens* norms as a "form of natural law 'super-custom,'" see BEDERMAN, *supra* note 17, at 159.

in character at all. Many commentators have argued that soft law norms can provide unique benefits because of their ability to encourage desirable state behavior and cooperation without the burdens of strict legal obligation. One example of an area of law where soft law norms play an important role is the law of outer space.[24]

A related merit of the traditional view of customary international law is that its restraints on the creation of new law help to make customary international law more representative of the will of states, and in this sense, more "democratic." Insistence on widespread and enduring state practice and *opinio juris* ensures that asserted customary norms are not merely the whims and wishes of international judges who are pursuing their personal policy agendas. Given that states always have the option of entering into treaties with their explicit consent, according to this perspective it is desirable to limit the scope of customary law, to which states typically consent either not as explicitly or not at all. A number of academic commentators have criticized modern views of customary international law for being "undemocratic" in this way.[25]

By insisting on the recognition only of rules that develop over a long time, the traditional view also has the benefit of making it more likely that states know what the law is and are not surprised by novel assertions about customary international law. This is arguably fairer to states.[1] Where international courts are applying international criminal law to individual defendants, it is also critical that the law respect the fundamental principle of *nullem crimen sine lege*, holding that one cannot be punished for an act that was not a crime when the act occurred. For example, the ICTY has generally been careful to insist on clear evidence of state practice before convicting defendants for violations of customary international criminal law. Theodor Meron has defended the state practice requirement for this reason.[26] Larissa van den Herik also refers to the problem of legality in her chapter.[27]

Disadvantages of the Traditional View

Despite these apparent advantages of the traditional view of customary international law, it also possesses its share of weaknesses. Here again, for example, the problem of interpretation arises. *Opinio juris* is essential to identify the rule that states believe exists (or should exist) and is consistent with a pattern of practice. Moreover, the

[24] For a study of soft law norms involving outer space, see the essays collected in SOFT LAW IN OUTER SPACE: THE FUNCTION OF NON-BINDING NORMS IN INTERNATIONAL SPACE LAW (Irmgard Marboe ed., 2012).

[25] *See, e.g.*, J. Patrick Kelly, "The Twilight of Customary International Law," 40 VA. J. INT'L L. 449, 518–23 (2000).

[26] *See* Theodor Meron, "Editorial Comment: Revival of Customary Humanitarian Law," 99 AM. J. INT'L L. 817, 821–34 (2005).

[27] *See* van den Herik, *supra* note 3.

well-accepted formulation of customary law again raises the paradox of *opinio juris*. It should be noted just how difficult it can be to legitimately recognize a new customary international law rule under the traditional definition of custom plus *opinio juris* as belief in the existing legal character of a rule. While some commentators tend to minimize the importance of the paradox of *opinio juris* in practice,[28] the doctrinal formulation nevertheless can be a barrier to judges or other decision makers finding that a new customary international law norm has been created.

The traditional view can also make it difficult for customary international law to adapt to new global problems. The pace of technological developments, such as those related to computing, the Internet (including cyber security and data privacy), trade, and advanced weaponry, can make longstanding international law rules obsolete in the blink of an eye. States need a mechanism to allow them to create rules quickly to solve these new problems, and without having to resort to the often laborious and time-consuming process of multilateral treaty drafting. Similarly, the increasing paralysis of certain international bodies, such as the UN Security Council, makes it desirable to allow customary international law to evolve quickly to fill these normative voids.

Thus, entrenched customary international law norms designed to solve coordination problems of a prior era may no longer work when the fundamental nature of the problem has changed. For example, businesses routinely trade across international borders, raising challenging problems of coordination among the world's many national taxing authorities that require new legal rules.[29] Likewise, situations that previously were not prisoners' dilemma situations internationally may evolve into them. A simple example involves pollution. Centuries ago, a customary practice may well have developed according to which every state bore none of the cost of externalities of the pollution caused by its inhabitants to inhabitants of other states. However, this situation quickly evolved into a prisoners' dilemma given the increase in the number of polluters and the broad extent of transboundary harm, requiring new rules to prevent defection and prevent worst outcomes. Accordingly, customary rules such as the "good neighbor" principle and the "polluter pays" principle were developed in response to this prisoners' dilemma.[30]

[28] *See, e.g.*, ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 73–74 (1971) (referring to the paradox of *opinio juris* as "harmless" in the case of existing customary norms, but acknowledging problems with the paradox in the recognition of new norms).

[29] One particular coordination issue, involving transfer pricing, is discussed in LEPARD, *supra* note 4, at 285–305.

[30] On the development of these principles in customary international law, see Catherine Redgwell, "International Environmental Law," in INTERNATIONAL LAW 687, 695 (Malcolm D. Evans ed., 3d ed. 2010).

The traditional theory can also impede recognition of new customary international law rules consistent with more progressive trends in moral thinking. For example, prior to the adoption of the UN Charter in 1945 and the Universal Declaration of Human Rights in 1948, customary international law apparently permitted a state to mistreat its citizens as it wished, with a few potential exceptions such as for crimes against humanity. Had this centuries-old rule been treated as sacrosanct and embedded, it might well have taken another century to modify, even in the face of a plethora of human rights instruments like the Charter and the Universal Declaration.

In this connection, while the ICJ has at times seemed too eager to embrace modern views of customary international law and to recognize new norms based primarily on changing moral perspectives, at other times it has staunchly upheld longstanding rules of customary international law even though they run counter to ethical principles found in contemporary international law. For example, in the 2002 *Arrest Warrant Case*,[31] the court stated that under a longstanding rule of customary international law ministers of foreign affairs enjoy absolute immunity from criminal prosecution in other states for all official acts, including those constituting war crimes and crimes against humanity, even after leaving office.[32] The court explicitly discounted principles in the Rome Statute of the International Criminal Court and other treaties establishing international criminal tribunals that allow national courts to exercise jurisdiction over persons suspected of having committed war crimes and crimes against humanity, including ministers of foreign affairs, in its assessment of customary international law. The court reasoned that "jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction."[33] This kind of approach, which is supported by the traditional view, may be too backward-looking and conservative, ignoring important trends in state practice and views evidenced by the aforementioned treaties.

Moreover, while sovereignty is generally a value worthy of protection, the resistance of the traditional view to recognizing new limitations on state discretion can have, as just noted, deleterious effects on the realization of competing moral values, such as respect for human rights and protection of the environment. Thus, "non-law" is not always to be preferred to "law." There are good reasons to allow customary international law to change and grow quickly, but in a measured way, to prevent serious affronts to fundamental moral values under the banner of state "sovereignty."

[31] Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), 2002 I.C.J. Rep. 3 (Feb. 14).

[32] *See id.* at 24–26, paras. 58–61.

[33] *See id.* at 24, para. 59.

The traditional view of customary international law may also not be so "democratic." Customary international law is often the product of the behavior and attitudes of the most powerful states. Indeed, critics have pointed out that many norms recognized as customary law under the traditional definition are simply the policies favored by Western powers.[34] The practices of less-powerful states typically have been ignored or discounted in the assessment of state practice, and likewise their views on the legality of a practice have often been given short shrift.

It may also not be true that the traditional view of customary international law makes it easier for states to know their obligations. There are still many uncertainties lurking in the concepts of longstanding consistent practice and *opinio juris*. States may have to undertake extensive studies to ascertain whether a practice is widespread and longstanding or *opinio juris* is similarly of long duration. And they may not know just when the magic time period required to achieve a "settled" state practice has been traversed. In other words, the advertised objective certainties of the traditional view may often be illusory.

Finally, the static, and even backward-looking, quality of the traditional bipartite formulation lends itself to a narrow conception of the legitimate range and sphere of operation of customary international law. The higher the bar that is set for the two requirements of practice and *opinio juris*, the more difficult customary international law is to find in the first place. Furthermore, there would appear to be a need for a sufficiently high quantity of discordant practice and contrary *opinio juris* to change an entrenched rule. Any discordant state practice would first, by necessity, be labeled a "violation" rather than treated as an "experiment" in favor a revised norm. Similarly, if *opinio juris* about the existing legal character of a norm must be widespread and convincing in the first place for the norm to be recognized, then discordant views expressed afterward would be regarded with suspicion and contrary action in accordance with these views would be regarded as violations of the rule. This is the so-called "first mover" problem.[35] It could take a rather significant mass of contrary opinion to force the rule to be revisited.

CUSTOMARY INTERNATIONAL LAW AS ADAPTABLE

In an effort to address some of these disadvantages of the traditional view of customary international law, scholars and some judges have proposed a number of alternatives.

[34] *See, e.g.*, J. Patrick Kelly, "Customary International Law in Historical Context: The Exercise of Power Without General Acceptance," in REEXAMINING CUSTOMARY INTERNATIONAL LAW (Brian D. Lepard ed., forthcoming 2016) (affirming that the history of customary international law "suggests that to a large degree publicists and powerful nations ignored inconvenient state practice and generated customary international law norms based on prior assumed values or perceived self-interest irrespective of the general acceptance of that norm").

[35] *See* BEDERMAN, *supra* note 17, at 149.

According to these modern views of customary international law, customary law should be flexible and relatively easy to modify.[36] Proponents of these new views have justified them based on the acceleration of development of new technologies, and new shared moral sensibilities, that require innovative rules to achieve coordination or solve prisoners' dilemmas, ensure respect for basic moral values, or even avoid the destruction or disintegration of states.

Survey of Modern Views

Some of these views maintain adherence to the traditional twofold requirements for customary law of state practice and *opinio juris*, but argue that it may not take a long period of practice for a customary norm to emerge, or that *opinio juris* similarly need not be longstanding. In this vein, legal scholar Michael Scharf has proposed that some rules of customary international law can arise quickly based on new *opinio juris*, and with less state practice, in what he calls a "Grotian Moment."[37] As he explains:

> The Grotian Moment concept illuminates how and why customary international law can sometimes develop with surprising rapidity and limited state practice. The concept reflects the reality that in periods of fundamental change, whether by technological advances, the commission of new forms of crimes against humanity, or the development of new means of warfare or terrorism, rapidly developing customary international law may be necessary to keep up with the pace of developments.[38]

Regarding the traditional requirement of a "settled" practice, some observers believe that in the case of some norms we cannot wait for a significant time for substantial and nearly universal state practice to accrete. Thus, for example, the advent of nuclear weapons that could be launched from space necessitated the rapid establishment of a rule prohibiting such weapons in space and binding all space-faring nations.[39] Another example of customary norms that have developed quickly involves the continental shelf. It is generally accepted that rules on jurisdiction of states over the shelf evolved rapidly after the Truman Proclamation of 1945.[40]

[36] On so-called modern theories of customary international law, see, for example, Anthea Elizabeth Roberts, "Traditional and Modern Approaches to Customary International Law: A Reconciliation," 95 AM. J. INT'L L. 757 (2001).

[37] *See* MICHAEL P. SCHARF, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE: RECOGNIZING GROTIAN MOMENTS (2013).

[38] *Id.* at 8.

[39] On the rapid development of customary international space law as a "Grotian Moment," see *id.* at 123–37.

[40] *See id.* at 107–122.

Similarly, advocates of modern views have argued that *opinio juris* can likewise develop rapidly. They observe that since the creation of the UN in 1945, its organs, and especially the General Assembly, can provide a centralized forum for the expression of views of states about the existence or desirability of particular legal rules. Thus, General Assembly resolutions can, under certain circumstances, serve as a kind of "shortcut" in evidencing *opinio juris*. According to many commentators, it is no longer necessary to pore over diplomatic documents and statements of governments, state by state, and establish that these many documents, over some length of time, evidence a view that particular rules are law. Rather, a single General Assembly resolution, or a series of them, can provide the same level of evidence of government views in "one fell swoop." Even the ICJ has emphasized the ability of General Assembly resolutions to rally and encapsulate *opinio juris*. For example, in its judgment in the 1986 *Nicaragua Case*, the Court affirmed that

> *opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions.... The effect of consent to the text of such resolutions ... may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves. The principle of non-use of force, for example, may thus be regarded as a principle of customary international law.[41]

Some commentators have further allowed for the rapid development of customary norms by discounting either one of the two elements. Some have taken an "agnostic" position about which is the more important, arguing, instead, that increased evidence of consistent state practice can compensate for little evidence of *opinio juris*, or conversely that significant evidence of *opinio juris* can compensate for a paucity of evidence of consistent state practice. This view is represented by Frederick Kirgis's famous "sliding scale" theory.[42] This kind of approach can allow for the speedier recognition of customary law norms to the extent that it minimizes the need to establish longstanding practice or *opinio juris*, as the case may be.

Of course, other commentators have systematically diminished the importance of a particular element. Their single-minded focus on one element can permit the quicker recognition of customary law rules. For example, the International Law Association has taken the position that evidence of *opinio juris* is not essential to establish a customary law norm.[43] That may allow a norm involving state practices

[41] Military and Paramilitary Activities in and against Nicaragua (*Nicar. v. U.S.*), 1986 I.C.J. Rep. 14, 99–100, para. 188 (June 27) [hereinafter *Nicaragua Case*].

[42] *See* Frederick L. Kirgis, Jr., "Custom on a Sliding Scale," 81 AM. J. INT'L L. 146 (1987).

[43] *See* International Law Association, London Conference (2000), Committee on the Formation of Customary (General) International Law, *Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law*, sect. 1, Commentary, para. (b)

that accumulate rapidly to be recognized even though there is little evidence of *opinio juris* in favor of the norm. Conversely, some scholars have argued that the essence of customary law is *opinio juris*, and that state practice is either entirely unnecessary to prove, or that it at least serves as desirable, but not essential, evidence of *opinio juris*.[44] John Tasioulas, among others, appears to adopt this view in his contribution to this volume.[45] Such a view means that customary norms can be recognized as soon as there is sufficient evidence of *opinio juris*, and without waiting for concordant state practice to accumulate.[46] Moreover, this evidence of *opinio juris* can itself appear rapidly, perhaps in the form of a single General Assembly resolution. Bin Cheng espoused this view, arguing that customary law could be created instantaneously with the appropriate evidence of *opinio juris*. He declared: "There is no reason why an *opinio juris communis* may not grow up in a very short period of time among all or simply some Members of the United Nations with the result that a new rule of international customary law comes into being among them."[47]

All of these approaches have found favor in various judicial opinions, including those issued by the ICJ. For example, the ICJ, while doctrinally adhering to the definition of customary international law as arising from consistent practice and *opinio juris*, has in dictum recognized that practices need not be of long duration. In the 1969 *North Sea Continental Shelf Cases* it affirmed:

> Although the passage of *only a short period of time* is not necessarily, or of itself, a bar to the formation of a new rule of customary international law ... an indispensable requirement would be that within the period in question, *short though it might be*, State practice, including that of states whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked.[48]

In the 1986 *Nicaragua Case*, the ICJ ruled that a state has no right under customary international law to participate in collective military action based on a right of collective self-defense in response to an opposing military activity falling short of an armed attack.[49] In doing so, it relied primarily on Articles 2(4) and 51

(4) (affirming that "it is not *usually* necessary to demonstrate the existence of the subjective element [*opinio juris*] before a customary rule can be said to have come into being") (emphasis in original).

[44] *See, e.g.*, Bin Cheng, "United Nations Resolutions on Outer Space: 'Instant' International Customary Law?" in INTERNATIONAL LAW: TEACHING AND PRACTICE 237 (Bin Cheng ed., 1982); ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 200 (2008).

[45] *See* John Tasioulas, "Custom, *Jus Cogens*, and Human Rights" (in this volume).

[46] *See also, e.g.*, GUZMAN, *supra* note 44, at 200 ("If CIL requires only *opinio juris*, then customary rules can change as quickly as *opinio juris* changes").

[47] Cheng, "United Nations Resolutions on Outer Space," at 252.

[48] North Sea Continental Shelf Cases, 1969 I.C.J. Rep. 3, 43, para. 74 (emphasis added).

[49] *See Nicaragua Case*, 1986 I.C.J. Rep. 14, 99–103, paras. 188–93; 110–11, paras. 210–11.

of the UN Charter and two UN General Assembly resolutions,[50] The decision was widely criticized by commentators for focusing solely on *opinio juris*, as evidenced by the UN Charter and the UN resolutions, and ignoring state practice – including a long history of the use of forceful "reprisals" against low-scale military and terrorist activities not rising to the level of an armed attack.[51] The court evidently took the position that the UN Charter and the UN resolutions had demonstrated a clear *opinio juris* that changed the prior practice, thus resulting in the relatively rapid formation of a new, more prohibitive, customary law rule.

Similarly, some international criminal tribunals have invoked customary law primarily based on treaties and resolutions as evidence of *opinio juris*, and without imposing strict requirements for a showing of longstanding and consistent state practice. For example, in the case of *Prosecutor v. Kupreškić*, decided in 2000, the trial chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) found that there was a customary law prohibition of reprisals against civilians, despite a paucity of state practice.[52] Earlier, in its 1995 decision in *Tadic*,[53] the ICTY had likewise expanded the scope of customary international humanitarian law relating to noninternational armed conflicts based primarily on *opinio juris* (and moral considerations). As both Larissa van den Herik and Monica Hakimi point out in their chapters for this volume, while these decisions have been widely criticized, they underscore a trend in judicial decision making toward focusing on *opinio juris* rather than practice.[54]

Some theorists of international law have, moreover, argued that the customary lawmaking process – whether based on state practice, *opinio juris*, or both – should be opened up to non-state actors to take account of the important role played by these actors in international affairs. For example, Jordan Paust has affirmed that, "contrary to false myth perpetrated in the early twentieth century, the subjective element of customary international law (*i.e., opinio juris* or expectations that something is legally appropriate or required) is to be gathered from patterns of generally shared legal expectation among humankind, not merely among official State elites."[55] Tasioulas in his chapter similarly argues that the practices and *opinio juris* of non-state actors

[50] *See* Declaration on Principles of Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV) (1970); Definition of Aggression, G.A. Res. 3314 (XXIX) (1974).

[51] For a representative critique of the opinion, see Anthony D'Amato, "Trashing Customary International Law," 81 *Am. J. Int'l L.* 101 (1987).

[52] *See Prosecutor v. Kupreškić*, 14 January 2000, IT-95-16-T, para. 527, available at http://www.refworld.org/docid/40276c634.html.

[53] *See Prosecutor v. Tadic*, 2 October 1995, Case No. IT-94-1-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction.

[54] *See* van den Herik, *supra* note 3; Monica Hakimi, "Custom's Method and Process: Lessons from Humanitarian Law" (in this volume).

[55] Jordan J. Paust, *International Law as Law of the United States* 4 (2d ed. 2003).

should be taken into account where appropriate.[56] And Hakimi notes that customary international lawmaking in the field of international humanitarian law includes claims by a wide variety of non-state actors with their own normative agenda, and that these claims may ultimately influence the evolution of customary law norms.[57]

Disadvantages of Modern Views

There is no doubt that these modern theories introduce flexibility into the recognition of customary international law. They all allow it to adapt to changing circumstances far more quickly than application of the traditional model. Treaties can take years, if not decades, to negotiate; they often fail to "keep up" with the needs of the time. In the meantime, states can be bereft of legal rules to guide their behavior. Modern views of customary law allow it to be created and be modified rapidly to fill this void. For example, in the area of space law, states rushed to adopt a rule that space can only be used for "peaceful purposes"; arguably, this rule became part of customary law in a short time frame, despite the fact that only a few states had the capacity to send objects into orbit.[58]

On the other hand, all of the modern views have certain weaknesses. Most importantly, they can lead to uncertainty about the existence and content of particular norms of customary law. Without certain safeguards, they could result in violations of the principle of *nullem crimen sine lege* in the application of international criminal law. Furthermore, the new theories can make it more difficult to separate legal norms from moral norms – or law as it is (*lex lata*) from law as it ought to be (*lex ferenda*). There can be legitimate concerns that these theories, while allowing the "law" to change more easily, mask moral or political agendas on the part of those scholars or practitioners who promote them. They can result in what legal scholar Fernando Tesón has called "fake custom."[59] In effect, these theories can lead to the claim that new norms are customary law even though the norms constitute nothing more than a legal "wish list" on the part of the proponents (which can include certain governments).

Moreover, some of the specific new views about how customary law can evolve exhibit their own particular vulnerabilities. The view according to which both elements of consistent practice and *opinio juris* are required, but can be generated in a short period of time, may seem like the most benign of the modifications of

[56] *See* Tasioulas, *supra* note 45.

[57] *See* Hakimi, *supra* note 54.

[58] *See, e.g.*, Frans G. von der Dunk, "Customary International Law and Outer Space," in *Reexamining Customary International Law* (Brian D. Lepard ed., forthcoming 2016).

[59] *See* Fernando R. Tesón, "Fake Custom," in *Reexamining Customary International Law* (Brian D. Lepard ed., forthcoming 2016).

the traditional view and the one most likely to maintain its advantages. However, this view suffers from the fact that it continues to perpetuate the paradox of *opinio juris*. It also has the potential to allow modest changes in practice and rather thin evidence of *opinio juris* to be used to declare the existence of a new customary norm. It is noteworthy that the ICJ has cautioned against the easy extrapolation of customary law from prior treaty norms, affirming that while treaty norms might evidence *opinio juris* and help create customary law over time, "this result is not lightly to be regarded as having been attained."[60]

Furthermore, the modified traditional view, by requiring at least some changes in state practice, can still decline to recognize new norms that win wide, if not universal, support among states, simply because their practice has not yet "caught up" with these norms that they clearly endorse. Human rights norms offer a prime example of this problem. States may use treaties or declarations to articulate new human rights norms they intend to be universally legally binding, thus serving as clear evidence of *opinio juris*. At the same time, practice may continue to lag, and may not even have changed at all immediately prior to or after adoption of the treaty or declarations evidencing the *opinio juris*. Thus, even the more flexible two-element view shares some of the change-inhibiting features of the traditional view.

The view under which only consistent state practice is required for a new norm to form, without evidence of *opinio juris*, runs into a number of hurdles. Most importantly, as emphasized above, state practice always needs to be interpreted. Practice itself is not a norm, and any given practice may be consistent with a variety of norms, many of them contradictory. To illustrate, let us return to the prohibition of torture. It appears to be the case, especially in the post-9/11 world, that many states have sometimes employed torture. At the same time, they have laws against it and it is prohibited in international human rights instruments. And there are many punishments inflicted that fall short of torture. So which practice "counts"? It is not easy to say. One might look at the widespread practice of torture and declare that a new norm has evolved allowing states to use it in extreme circumstances, particularly against suspected terrorists. Or one might infer a rule that torture is always allowed if states deem it useful. Or one might characterize the widespread use of torture as simply the rampant violation of an absolute rule against it. We need some concept of *opinio juris* to tell us which rule is most defensible.

Another failing of the "state practice only" school of thought is that it can make existing practice-based norms particularly difficult to change – not easier to change. Why? Because if one does not take *opinio juris* into account, any modification of an existing widespread practice could be viewed as a violation of that practice. This is not necessarily the case if we factor *opinio juris* into the customary law equation.

[60] North Sea Continental Shelf Cases, 1969 I.C.J. Rep. 3, 41, para. 71.

That is because the new practice might well be endorsed by various evidences of *opinio juris*. This endorsement would mean the practice could be viewed as in conformity with a new or revised norm, rather than simply a violation of the existing norm.

On the other hand, we cannot take the position that there is really no such thing as a violation because in apparently violating an existing customary norm a state is always making a "bid" for a new norm.[61] We have to evaluate that apparent violation in a wider context, and ask such questions as how the state itself views its own conduct and how other states react to it.[62] These views are evidence of *opinio juris*. The key point is that we cannot evaluate the significance of the new practice without reference to *opinio juris*. In short, while "state practice only" theories superficially appear to allow for the more dynamic evolution of customary law, they can lead to confusion about the content of new norms because of the need to interpret practice. And they can actually impede the formation of new or revised norms.

Theories that emphasize *opinio juris* and downplay consistent practice would appear to cure these defects. To the extent *opinio juris* clearly states a rule, there is no problem interpreting practice. And similarly, if ample evidence of *opinio juris* endorses a new practice, the practice does not have to first overcome the challenge of being labeled a violation of a preexisting customary norm. That is to say, new *opinio juris* could precede new state practice – contrary to the traditional view that *opinio juris* can only endorse a preexisting practice.[63] This would seem to allow for much greater flexibility in the evolution of customary international law.

On the other hand, "*opinio juris* only theories" exhibit their own unique weaknesses. First, if they adopt the traditional definition of *opinio juris*, they are marred by the paradox of *opinio juris* just described. This paradox can impede recognition of new norms if courts take the traditional definition of *opinio juris* seriously.

Another potential drawback of these views is that they can hinder the formation of new norms through changing state practices if they insist on relying on "old" evidence of *opinio juris*. That is, in some cases new norms are created through the way states behave, which can be strong evidence of a new *opinio juris*, while for various reasons states may be slow or reluctant to endorse rhetorically a revised rule consistent with their new behavior. One example is the concept of humanitarian intervention – the right of one or more states to intervene militarily to protect victims of mass atrocities in a third state where the third state is unwilling or unable

[61] Anthony D'Amato has argued in this vein that "an 'illegal' act by a state contains the seeds of a new legality." D'AMATO, *supra* note 28, at 97.

[62] *See* LEPARD, *supra* note 4, at 278.

[63] On this point, see *id.* at 277.

to protect them or is itself the perpetrator of the atrocities. In the last twenty-five years the global community has witnessed a number of potential examples of such intervention, including in Serbia and Kosovo in 1999 by NATO forces without Security Council approval, in Libya in 2011 with the blessing of the UN Security Council, and in 2014 and 2015 in Syria and Iraq against the Islamic State without Security Council endorsement. Could this pattern of interventions have already resulted in a new customary rule? This is at least plausible, even though UN member states have been manifestly reluctant to articulate any such new norm that would carve out an exception to the rules in Articles 2(4), 39–42, and 51 of the UN Charter. These rules provide that state uses of force on the territory of another state are permissible only in self-defense against an armed attack or as part of Security Council-authorized action. Although the UN General Assembly has accepted the idea of a "responsibility to protect" victims of mass atrocities,[64] it has stopped well short of endorsing any general doctrine conferring a unilateral right of humanitarian intervention, and few states have lent their support to such a doctrine, as well. Without prejudging the issue, here, then, is an example where practice may well "lead the charge" toward creation of a new customary law norm, while formal evidence of *opinio juris* lags.

Perhaps the biggest problem with *opinio juris*-focused theories is that they risk treating *lex ferenda* as *lex lata*. They are particularly prone to "wishful thinking." Without the confirmation of consistent state practice, there is at least the possibility that states do not actually endorse the norm as a legal norm that should or does bind them; it may be merely aspirational.

The weaknesses of theories that emphasize either state practice or *opinio juris* also besmirch the "sliding scale" theory propounded by Kirgis and others, for similar reasons. Such a theory invites confusion about how customary norms evolve. For example, just what is "ample" state practice that can compensate for "thin" *opinio juris*? This is not clear. Moreover, state practice of one form or another (including abstentions from acting) can always be characterized as "widespread." So just when is strong evidence of *opinio juris* required?

Conversely, it is not always the case that little evidence of consistent practice need be demonstrated if there is strong *opinio juris*. For example, one could argue that there is strong *opinio juris*, based on a number of General Assembly resolutions, but especially Article 24 of the Universal Declaration of Human Rights, in favor of a human right to take holidays with pay and a binding obligation on the part of all states to require that workers enjoy such a right.[65] But the practice on this point

[64] *See* United Nations World Summit Outcome Resolution, G.A. Res. 60/1 (2005), paras. 138–39.

[65] Article 24 of the Universal Declaration asserts: "Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay." Universal Declaration of Human Rights, G.A. Res. 217A(III) (1948), art. 24.

is conflicting; some states require paid holidays, while others do not. If we turn our back on this unclear record of state practice, we may be missing important information about states' true views concerning recognition, as customary law, of the norm endorsed by the *opinio juris*.

As to theories that introduce a role for the practice or opinions of non-state actors, there is no doubt that these actors – whether political groups, armed opposition groups, nongovernmental organizations, or intergovernmental organizations, among others – are playing a much more important and multifaceted role in international affairs. The question is whether their practices or views contribute to international law. As a social construct, international law is understood as a law created *by states*. To accept a coequal role in customary law formation or change by non-state actors would be to transform international law into some other kind of law. The better view is that an approach to customary international law must be state centered, as the traditional view presupposes,[66] while acknowledging that there can be important influences of non-state actors on the practices and beliefs of states that can affect the evolution of customary international law.[67] As noted, Monica Hakimi appears to endorse this latter perspective in her contribution.

CUSTOMARY INTERNATIONAL LAW AS A DYNAMIC PROCESS

This chapter now proposes a new approach that sees customary law as a dynamic process and attempts to integrate the advantages of both the traditional and modern views. This approach begins with the proposition that customary international law is, in essence, an informal method of lawmaking among states. We saw that customary international law arises over time as states come to believe that certain norms are desirable and act in conformity with those norms. Sometimes articulation of the norm precedes the behavior, but more commonly there is a coincidence of behavior that in time results in more conscious recognition of a norm requiring or permitting it.

A New Approach to Opinio Juris

Here again, however, we encounter the problem of the paradox of *opinio juris*. The traditional definition works well enough for existing norms, but is indeed problematic in justifying the recognition of new norms if courts apply it rigorously.

[66] In keeping with this view, Michael Wood concludes that "the requirement, as an element of customary international law, of a general practice means that it is *primarily the practice of States* that contributes to the creation, or expression, of rules of customary international law." Michael Wood, Draft Conclusion 5, in *Second Report*, *supra* note 14, at 66 (emphasis added).

[67] *See* LEPARD, *supra* note 4, at 185–87.

Accordingly, consistent with the views of certain other scholars, the chapter proposes that in the case of new customary international law norms, *opinio juris* be defined as a general belief shared by states that *it is desirable, now or in the near future, to have an authoritative legal rule prescribing, proscribing, or permitting certain conduct.* In other words, the focus is on beliefs about the desirability of a new rule rather than beliefs that a particular rule already exists. The conception proposed here is one in which states are constantly evaluating what rules should govern their relations and behavior outside of contractual obligations formed through treaties. Accordingly, states' beliefs about what the law *should* be can help the law change.

Moreover, the chapter maintains that in ascertaining state beliefs, decision makers must take into account particular "fundamental ethical principles" that have been recognized by states themselves in a variety of modern-day instruments. Fundamental ethical principles are defined for this purpose as principles identified in these instruments, including the UN Charter and the Universal Declaration, that are in turn rationally related to a preeminent ethical principle of "unity in diversity." This principle of unity of diversity affirms that "all states and individuals form part of global communities of states and human beings that ethically should be united at the same time that they take pride in their fundamental autonomy and diversity of culture, ethnic origin, religion, and belief."[68]

For example, the Universal Declaration supports the concept of unity in diversity by referring in its preamble to "recognition of the inherent dignity and of the equal and inalienable rights of *all members of the human family*."[69] The declaration also endorses respect for individual and cultural diversity, protecting freedom of belief, freedom of expression, freedom of association, and freedom to participate in the cultural life of one's community.[70] In short, the declaration promotes as a core value "unity in diversity." A number of principles merit the status of "fundamental ethical principles" that are logically related to this principle of unity in diversity. These include principles of human dignity and human rights, significant state autonomy, a trust theory of government, limited state sovereignty, the right to freedom of moral choice, punishment of criminals, open-minded consultation, the existence of a global community of states that promotes fundamental ethical principles, and the duty of states to honor treaties.[71] It should be emphasized that these are ethical principles, *not* norms of customary international law, although they may be relevant in determining whether or not particular norms of customary law should be recognized.

[68] *Id.* at 8.
[69] Universal Declaration, preamble (emphasis added).
[70] *See id.*, arts. 18–20, art. 27, para. 1.
[71] *See* LEPARD, *supra* note 4, at 82–92.

This reformulation of *opinio juris* has a number of merits. Most importantly, it gives *opinio juris* a dynamic quality, allowing explicitly for the recognition of new norms and the revision or termination of existing ones, without any false beliefs on the part of states. Even if the practical impact on judicial or government decision making of the current conception of *opinio juris* is difficult to gauge, there is no doubt that at the margins a requirement that states believe a norm already to be the law can be a disincentive to the recognition of new or modified law. This new concept of *opinio juris* removes this barrier to dynamism in the evolution of customary law. Other scholars have similarly suggested that the traditional definition of *opinio juris* needs to be modified along the lines suggested here. For example, in his chapter in this volume, Curtis Bradley argues that a rule of customary international law "can be recognized when it is evident – from state practices, statements, and other evidence – that the rule is something that the relevant community of states *wishes to have as a binding norm going forward* and that it is socially and morally desirable."[72]

There is another critical element to the theory proposed here – namely, that *opinio juris*, rather than state practice, is at the center of customary law, and that consistent state practice is evidence of *opinio juris*, but not an essential requirement in its own right for every type of norm. Indeed, one element of this theory is that it distinguishes different types of norms designed to solve different types of problems, rather than adopting a "one size fits all" approach. It draws distinctions regarding the amount of consistent practice that should be demanded as evidence of *opinio juris* based on these different problem types. For example, it distinguishes norms designed to solve coordination problems (in which case practice is normally very important evidence of *opinio juris*, since coordination without coordinated practice is impossible to achieve) from norms designed to uphold fundamental human rights (in which case practice is less important evidence of *opinio juris* because any practice of respecting human rights furthers the moral goals of the norms).[73] That said, in most cases lawyers and jurists would be hard pressed to conclude that there is sufficient *opinio juris* (as redefined) in favor of a putative norm in the absence of any state practice in support of it.

This perspective obviously resonates with some of the *opinio juris* only theories described, but it is different from them in a number of important respects, as discussed next. Most importantly, it sets a high bar for finding the requisite *opinio juris* in favor of a new or revised customary norm, one carefully formulated to distinguish *lex lata* from *lex ferenda*.

[72] Curtis A. Bradley, "Customary International Law Adjudication as Common Law Adjudication" (in this volume) (emphasis added).
[73] *See, e.g.*, LEPARD, *supra* note 4, at 122–26.

Importance and Role of Opinio Juris

Before further exploring this conception of customary law as a dynamic process, some further explanation of the emphasis on *opinio juris* is necessary. At first blush, it seems to fly in the face of the normal understanding of "customary" international law, which apparently originates with "customs." To take the "custom" out of customary international law would seem to convert it into a different animal altogether – at best, to "general principles of law" described in Article 38(1)(c) of the ICJ Statute, or at worst, to an indeterminate category of norms based on wishful thinking, but detached from the actual practices of states.

As a matter of historical fact, customary law has typically been born out of customs among peoples and among states. However, these customs did not become *law* unless and until those peoples or states *recognized them as binding* and *articulated a norm that explained and justified them*. That process of societal recognition of the norm became the "tipping point" – the critical and essential factor – that led to the recognition of a custom as something more than a mere coincidence of behavior, and indeed as the expression of a legal norm. If our focus is on identifying legal norms, then, this critical belief, or *opinio juris*, must be viewed as the most important component of customary law.

Of course, this focus on *opinio juris* is totally consistent with the traditional bipartite definition of customary law. It does not by itself negate the relevance of consistent practice. As just pointed out, the fact is that historically much of customary law did originate with widespread local or international practice. One reason is that many foundational norms within a local or national society or within the global community of states are coordination norms that depend on consistent state practice to establish a desired convention that solves the coordination problem. These include, for example, many norms involving international transportation and trade.

However, as the society of states has developed, it has moved beyond simple coordination norms and begun to address a series of more complex problems, including protection of the environment and fundamental human rights, among many others. These problems do not involve simple coordination dilemmas; they may involve prisoners' dilemmas and they have a strong moral content. And like many morality-based norms, their demands almost by definition will exceed current practice. That is to say, one feature of a moral norm is that its very purpose is to require behavior that is not motivated by self-interest alone and that asks more of states than what they are already practicing. To require consistent state practice *prior to* recognition of these norms as binding law might well prevent them from ever being recognized as law.

Some observers might say this is a good thing; after all, such moral norms not supported by practice are the classic category of *lex ferenda* – norms that ought to be

the law, but are not yet the law. And to recognize them as law before states "put their money where their mouth is" degrades the very concept of law. That is no doubt a legitimate concern. The problem is that taken to its logical conclusion this critique could prevent the formation of virtually all moral-based norms at the global level. To return to the example of torture, if almost every state tortures some of the time, how could a customary law prohibition of torture ever be recognized under a view demanding a widespread and consistent state practice of *not* torturing?

Moreover, the drafters of Article 38 of the Statute of the PCIJ appear to have been well aware of these difficulties. Indeed, the text itself of Article 38(1)(b) supports the evidentiary role for practice suggested here. First, that text plainly refers to custom as "evidence" of a "general practice accepted as law." The word "evidence" appears explicitly in the Statute. It is instructive to note, furthermore, that an early draft of Article 38(1)(b) prepared by Baron Descamps of Belgium, which became the basis of the final version, did not contain the word "evidence." The drafters consciously added this word to the final version, suggesting its importance.[74] Furthermore, while the clause also refers to a "general practice accepted as law," thus appearing to require a "general practice," the clear import of this phrase, alongside the word "custom," is to emphasize the need for *opinio juris* – acceptance as law. And as Curtis Bradley underscores in his chapter, the drafters may well have been influenced by the "historical school" of jurisprudence propounded by Friedrich Carl von Savigny, according to which custom was evidence of a deeper and preexisting norm or obligation.

Naturally, the drafters had in mind that normally there would be some consistent practice. However, the language they adopted provides strong support for the conclusion that they viewed the "heart" of customary law to be acceptance of a norm as law (*opinio juris*) and believed that the primary function of a custom, or general practice, was to evidence this view. While not a model of clarity, the language they chose was an advance over earlier, more simplistic formulations of the "state practice plus *opinio juris*" concept, and one intended to clarify the evidentiary role of practice. It is also worth underscoring that the drafters were not strict "positivists"; they consciously adopted the language in Article 38(1)(c) referring to "general principles of law" that could exist without the need for practice. This at least opens the door to a more flexible interpretation of the language they agreed upon in Article 38(1)(b), as proposed here. It also implies the possibility of referring to ethical principles that were widely accepted at the time as "general principles of law," including the principle, for example, of "good faith."[75]

[74] *See id.* at 129.

[75] On good faith as a general principle of law recognized by the ICJ, see JAMES CRAWFORD, *BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 36 (8th ed, 2012).

Several other points are important to note about the evidentiary role of state practice. This role is implied in actual decisions of the ICJ. Thus, in the *North Sea Continental Shelf Cases*, the Court stated that a practice must be "*evidence* of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*."[76] In many cases, like the *Nicaragua Case*, the Court has emphasized *opinio juris* without any serious inquiry into state practice, apparently treating the latter as only one source of evidence of the former.

Furthermore, both international and national courts in general, when considering the existence of a customary norm, pay far more attention to *opinio juris* than to state practice, as documented empirically by Stephen Choi and Mitu Gulati's chapter in this volume.[77] Moreover, Choi and Gulati's preliminary findings suggest that courts tend to apply something like the normative version of *opinio juris* advocated here. As they report, courts analyzing customary law "are generally engaged in a forward-looking or aspirational exercise." In other words, regardless of the traditional doctrine, what courts are doing in practice is treating *opinio juris* as the core of customary law, and state practice as important, but not always essential, evidence of that *opinio juris*. For all these reasons, other scholars, such as Andrew Guzman, have similarly urged that state practice "is best considered as evidence of *opinio juris*."[78]

Finally, it should be emphasized that this view is simply an *interpretation* of the traditional doctrine long propounded by jurists and scholars; it does not dispense wholesale with the concept of either state practice or *opinio juris*. It represents a refinement of the conventional view informed by judicial and practical experience with applying it, and that better accords with what courts actually do than does the old doctrine. All international legal doctrines have been revised, and should be susceptible to revision and refinement, over time, better to serve the needs of states; that is an undeniable process that has kept international law relevant over the centuries. To take but one example, the doctrine of absolute state sovereignty has, over the last 100 years, gradually been refined so that sovereignty, while important, is no longer unqualified. One might even go so far as to argue that the very science of jurisprudence involves constant reexamination and refinement of existing legal doctrine.

[76] North Sea Continental Shelf Cases, 1969 I.C.J. Rep. 3, 44, para. 77 (emphasis added).

[77] Stephen J. Choi & Mitu Gulati, "Customary International Law: How Do Courts Do It?" (in this volume).

[78] GUZMAN, *supra* note 44, at 200. In their contribution to this volume, Guzman and Hsiang adopt the even stronger view that "state practice is irrelevant.... The only place for state practice is as evidence that states hold some kind of belief about a rule." Andrew T. Guzman & Jerome Hsiang, "Reinvigorating Customary International Law" (in this volume).

In short, the view advanced here is that the society of states is now grappling with such complex problems, many involving moral considerations, that the old method of customary lawmaking in which widespread practice always precedes *opinio juris* cannot be viewed as a requirement for every type of customary norm. Rather, customs are best viewed as evidence of *opinio juris*, the weight of which will depend on the nature of the problem states are trying to solve. And at the end of the day, a customary norm is created by the sincere belief by the generality of states that the norm ought to be instituted as an authoritative legal norm now or in the near future.

Preserving the Benefits of the Traditional View

The proposed reformulation of *opinio juris*, and conception of state practice as evidence of *opinio juris*, incorporate many of the benefits of the traditional view of customary law just explored. Most importantly, the traditional view gives customary law a rootedness that allows state expectations to converge around norms and puts states on fair notice about what is expected of them under those norms. The strict requirements proposed here for *opinio juris* are intended to fulfill similar objectives. For example, the definition of *opinio juris* looks to the beliefs of states, not those of scholars, nongovernmental organizations, or judges. Thus, the focus is on what states themselves believe should be the rules and not on the wishful thinking of others. This feature of the proposed definition is similar to that of the traditional view.

Second, the definition requires that states "generally" believe that a given rule is desirable. This means that there must be a minimum of majority support among states for a rule to be created or changed. This is concordant with the traditional requirement of "consistent" or "widespread" practice and *opinio juris* among states. This requirement prevents a minority of states from changing an established rule (unless they ultimately win over a majority). However, it is appropriate to "weight" states' views based on a variety of factors, including the extent to which they take into account views of their citizens as part of their policymaking.[79]

Third, the definition requires that states generally believe that a rule would be desirable to implement "now or in the near future" – not at some distant time. This requirement is intended to help distinguish *lex lata* from *lex ferenda*. States must believe that they should be subject to the rule now or soon; that is, they must be willing to abide by it in the present. This is an important qualification that may eliminate many aspirational norms from recognition as new customary law.

Fourth, states must believe that it is desirable to implement an "authoritative" legal rule. This means they believe that it is appropriate to limit their own decision making in some way. The authoritative character of the rule might be binding (and

[79] *See* LEPARD, *supra* note 4, at 155–56.

thus preempt states' own consideration of how to act), or it might be persuasive in nature (requiring states to give great weight to the norm in their decision making). In either event, no customary rule is created under this test if states merely believe that "it is desirable for states to act in a particular way." To give an example, no customary rule on limitation of greenhouse gas emissions can arise under this test for *opinio juris* simply because states believe it is desirable for them to take measures to reduce these emissions. Rather, they must believe it is desirable to constrain their own decision making and force themselves to either limit emissions or give great weight to the limitation of emissions in their policymaking. Again, this sets a high barrier to recognition of new or revised customary law norms.

Finally, the test requires that states believe it is desirable to implement an authoritative "legal" rule – not a moral, social, or political one. That is an important qualification. It means that states must believe that there should be some legal remedy for states, individuals, or other persons who are victims of violations of the rule. In many cases, states well might endorse a rule as a moral one (as is the case with many rules or principles upheld in UN General Assembly resolutions), but not as a legal one.

All of these requirements serve as a "check" on what might be called "reckless" lawmaking under the guise of customary law. All of them introduce a key element of objectivity into what otherwise might be a wildly subjective enterprise. Taken together, they should help prevent abuses of this new interpretation of the two-part test for customary law. All of them also help ensure that customary law norms recognized by the definition have a quality of stability, while allowing for change. And customary law norms cannot change without the concurrence of the generality of states. In this sense, it honors states' legitimate expectations and does not thrust upon them rules not of their own making.

Moreover, while at first glance this definition may appear very subjective compared to, for example, a mechanical evaluation of state practice, thus placing states in a situation of uncertainty about the rules that bind them, in fact it is "fairer" to states than the traditional definition of customary international law. Why? Because the strict requirements just referred to, and the insistence of the definition on clear evidence of *opinio juris*, mean that states can more easily identify norms that so qualify. Indeed, the relegation of state practice to an evidentiary role is a benefit to states in this regard. They can rely, in general, on what are generally public and easily acceptable sources of evidence of *opinio juris*, including UN General Assembly resolutions, treaties, and public declarations of other states. Of course, they must also consult state practice, but they do not face the hurdle of having to "prove" the existence of some undefined quantum of practice as an essential element of recognizing a customary rule binding on them, as under the traditional view.

Avoiding the Disadvantages of the Traditional View

At the same time, the proposed theory avoids the pitfalls of the traditional view. Most importantly, it views customary law as a dynamic process, and gives states the opportunity to change existing customary law rather quickly if they view it as so desirable. States do not have to wait for decades or centuries to demonstrate some longstanding practice and *opinio juris* before they can benefit from a new rule. A new rule can emerge simply from their views about the desirability of that rule – but only with all of the safeguards just described.

The approach also takes into account the context of a particular problem area as perceived by states, rather than applying a blanket doctrine bluntly to all issues. It demands that we ask whether states reasonably perceive an issue to constitute a simple coordination problem, or a prisoners' dilemma, or one in which moral values are directly affected. It makes certain presumptions about states' views concerning the desirability of a legal norm based on the nature of the problem. For example, in the case of a prisoners' dilemma, it presumes that states desire a legal norm to prevent defectors, but only if they can be assured of adequate enforcement, and only if there is a high degree of consensus in favor of the proposed legal norm.

To take one example, the issue of climate change could reasonably be perceived as a prisoners' dilemma, as noted by Niels Petersen in his chapter.[80] This might mean that states believe a legal rule regulating emissions is desirable apart from a treaty, but only if there is adequate enforcement. Without enforcement and supervision (such as that provided by the Kyoto Protocol), states may not in fact want binding limitations on emissions. All evidence of state views must be considered, including views expressed during negotiations on the Kyoto Protocol and on its implementation.

Of course, in this respect, the theory proposed in this chapter shares the virtues of the modern theories described here. It allows customary international law to respond to new technologies and solve new problems. It focuses on and strengthens the key advantage of customary law compared to treaties – namely, its flexibility and adaptability, not to mention its ability to bind all states other than states qualifying as persistent objectors.

Avoiding the Disadvantages of Other Modern Views

At the same time, the proposed theory seeks to remedy some of the deficiencies in modern views. The most promising modern view might be the one according to which both consistent state practice and *opinio juris* are required for a customary

[80] *See* Niels Petersen, "Customary International Law and Public Goods" (in this volume).

law rule to emerge or change, but both can arise over a much shorter period of time than was conventionally believed. This would certainly remedy the problem with the traditional view impeding the rapid development of norms. The difficulties with this modern view, however, include its insistence that there must be consistent state practice in every case, and its reliance on the traditional definition of *opinio juris*, which is overly broad and paradoxical. The proposed approach avoids these obstacles.

As already explained, an exclusive focus on state practice can lead to confusion about customary law norms, since practice must always be interpreted. And it can also impede the development of new norms by insisting that a change of practice must precede recognition of those norms. This is definitely not a requirement under the theory proposed here. New norms can be created simply through states' beliefs that they should be recognized, before practice changes. Of course, the *opinio juris* only theories share this benefit, too, and the dynamic approach advanced here might well be described as such a theory. There are a variety of ways, however, in which it is distinct from those approaches and can help overcome some of their weaknesses.

First, the dynamic approach avoids the paradox of the traditional view of *opinio juris*, which is usually adopted by proponents of these *opinio juris*-focused theories. The traditional definition can act as a brake on the recognition of new norms that states strongly desire to see implemented. A number of authors contributing to this volume allude to problems with the traditional definition of *opinio juris*, requiring states to act out of a belief that an international norm *already* binds them. For example, Larissa van den Herik believes that there can be no legitimate *opinio juris* supporting customary international criminal law because states do not adopt national criminal laws "with the belief that this is mandated by an international rule."[81] That may well be true, and it shows a problem with the traditional definition of *opinio juris*. On the other hand, consistent with the revised understanding of *opinio juris* proposed here, it is very possible that states believe that concepts in their national criminal laws *ought to be* the law internationally and bind other states as well as themselves.

Second, the proposed theory does not regard state practice as irrelevant to the determination of customary international law. Quite the contrary. In the case of most kinds of norms it will be very important evidence of state views. Thus, in this regard, the proposed theory is not an *opinio juris* only theory. This continued attention to state practice allows the theory to find a new *opinio juris* in cases where approaches that rely on traditional evidence of *opinio juris* might find it lacking.

For example, again without prejudging the issue, it is possible that the recent practice of humanitarian intervention, at least with some kind of direct or indirect

[81] *See* van den Herik, *supra* note 3.

endorsement by United Nations organs, might be good evidence of a new *opinio juris* allowing for such intervention under limited circumstances. This might be the case even though longstanding documents such as the UN Charter would appear to evidence an *opinio juris* against it. In other words, what states "really" believe should be the law may be better evidenced by their actions than their words. Indeed, it is important to examine all evidence of state views beyond just formal written documents such as the UN Charter or General Assembly resolutions, including the "action" of states tacitly accepting unilateral interventions by other states without protest, or even if they do protest, their "action" of expressing approval of the underlying humanitarian goals of the interventions.

Third, the definition of *opinio juris* proposed here contains many safeguards, as already explained. Existing *opinio juris*-based approaches may not share these protections. They may allow aspirational norms endorsed in UN General Assembly resolutions to be recognized as customary law even where there is clear evidence that states supporting the resolutions had no belief that the norms in them should be treated as authoritative legal rules now or in the near future. Thus, the theory prevents recognition of "fake custom" and rules that are mere wishes on the part of their advocates. At the same time, it maintains a distinction between customary international law and general principles of law, based primarily on the degree of generality of the rule in question and whether it establishes binding or persuasive obligations.[82]

Fourth, existing *opinio juris*-based approaches typically do not include an explicit and specific ethical test, as does the theory proposed here, although they may refer to ethics generally as a factor in finding *opinio juris*. This is the case with the approach proposed by John Tasioulas, both in his contribution to this volume and elsewhere.[83] By contrast, the view proposed in this chapter insists that an evaluation of state beliefs be made in the context of what this chapter has called "fundamental ethical principles" – allowing for the possibility that it is appropriate *not* to find an *opinio juris* in favor of a norm if it would directly contravene fundamental ethical principles. Thus, for example, the many resolutions adopted by the UN Human Rights Council calling for criminal laws prohibiting the "defamation of religion" should be discounted as evidence of *opinio juris* because they would violate the essential human right to freedom of expression.[84]

[82] For a fuller discussion of the relationship between customary international law and general principles of law, see LEPARD, *supra* note 4, at 162–68.

[83] *See, e.g.*, John Tasioulas, "Customary International Law and the Quest for Global Justice," in THE NATURE OF CUSTOMARY LAW 307, 310 (Amanda Perreau-Saussine & James Bernard Murphy eds., 2007).

[84] On the defamation of religion resolutions, see Brian D. Lepard, "Parochial Restraints on Religious Liberty," in PAROCHIALISM, COSMOPOLITANISM AND THE FOUNDATIONS OF INTERNATIONAL LAW 225, 231–32, 245–46 (M. N. S. Sellers ed., 2012).

In addition, the approach proposed here differs from that proposed by Tasioulas in that it continues to focus on the *views of states* about what norms should be law in the context of ethical principles endorsed by states themselves. Tasioulas argues that in evaluating *opinio juris* we should make reference to ethical principles that are objectively determined, apart from the views of states. After all, states might choose to endorse as "ethical" certain principles that are, according to some external yardstick, quite immoral (like an "ethical" norm of absolute state sovereignty that could allow for mass human rights violations). While Tasioulas' proposal might lead to recognition of a kind of objective "moral law," this would not be customary international law as historically understood. International law is itself a social construct; it is ultimately dependent on the views of states. Of course, states may opt to incorporate some kind of moral law into international law, as they arguably have done with respect to both customary law and general principles. Moreover, part of the proposed test for a "fundamental ethical principle" is the existence of a rational and objective relationship with the foundational principle of unity in diversity. Nevertheless, if we are to ascertain "international law," it is important to take into account in some way the attitudes of states – and even the concept of unity in diversity has been endorsed by them.

Furthermore, the theory advanced here addresses some of the deficiencies of sliding scale theories. It offers a coherent explanation of why the core of customary international law is *opinio juris*, and when and why state practice should be considered important evidence of *opinio juris*. It distinguishes among different categories of norms, rather than lumping them all together. More importantly, it better addresses the needs of states by asking important questions about why they believe a norm is desirable and whether or not they believe it ought to be instituted as an authoritative legal norm.

Finally, as noted, some scholars, such as Curtis Bradley in this volume, have courageously argued that we ought to formulate a doctrine of customary law "from scratch" based on what adjudicators actually do. Bradley proposes a "common law" model of customary international law finding, under which adjudicators' choices about how to interpret practice and *opinio juris*, and identify a customary law rule, "are shaped by assessments of state preferences as well as social and moral considerations."[85] Bradley's reasons for such an innovative proposal resonate with some of the arguments made here for a reinterpretation both of the *opinio juris* test and the state practice requirement. So how is the theory presented here different? One way is that it proposes an ethical background system for evaluating state beliefs about the desirability of norms and attempts to specify relevant ethical principles. While Bradley's approach allows for "moral considerations" to be taken into account

[85] Bradley, *supra* note 72.

by an adjudicator, it does not give much detail about how the adjudicator should find, specify, or rank those moral considerations. Of course, identifying relevant ethical principles does not make the inquiry into the customary status of a norm easy, but it sharpens and focuses that inquiry.

Furthermore, the theory presented here entails an interpretation of existing customary law doctrine, thus preserving its character as *customary* law. It does not dispense with state practice altogether, instead viewing it as evidence of state beliefs about what the law is or should be. It maintains that we should not discard the bipartite definition altogether in favor of some wholly new model of customary law because the *opinio juris* concept is a critical one in the formation of law, and because state practice is, most often, a very important source of evidence about states' beliefs.

CONCLUSION

In short, the proposed approach does not merely "allow for" change in customary international law as a kind of safety valve, and only after major and enduring shifts in practice and *opinio juris*, as does the traditional view. Rather, it fundamentally conceptualizes customary international law as a dynamic process. It sees states as engaged in a constant dialogue about the rules that should govern their relations and behavior apart from treaties. Parts of this "dialogue" are nonverbal, and take the form of practice, which is why state practice should be viewed as evidence of *opinio juris*. But of course this dialogue also involves verbal exchanges. In every case, it is critical to evaluate the content of states' communications to determine their views about the desirability of recognizing a new norm, or modification of an existing norm, as an authoritative legal rule for all states now or in the near future. This involves a rigorous inquiry, we have seen, and high hurdles must be cleared to find that the requisite *opinio juris* exists.

Nevertheless, this conception of an ongoing dialogue can allow for a new dynamism in customary international law. It can permit new rules to be recognized quickly to solve urgent problems, a common goal of all the modern views described here. The proposed approach is more inclusive, recognizing a place for the views of all states, including the less powerful, and for opinions expressed in more representative bodies, such as the UN General Assembly. It thus acknowledges that customary international law can, and should, no longer be made just by the "great powers."

The theory recognizes, too, that states are engaged in dialogue and discussion of a wide range of issues, in multiple forums, and many types of state organs participate in these discussions and generate "practice."[86] Moreover, the fact that

[86] On the appropriate weight to be given to the views of organs of executive, legislative, and judicial branches, see LEPARD, *supra* note 4, at 171–80.

states participate in an ongoing dialogue against the background of fundamental ethical principles that they have generally accepted – and the fact that the proposed approach explicitly takes these principles into account – mean that customary law can progress more easily in an ethical direction.

The proposed approach can, it is hoped, rescue customary international law from the current crisis in which it finds itself. In the world of medicine, every medical crisis must ultimately be resolved: either the patient lives, or the patient dies. It is critical to apply the appropriate remedy – adopting a view of customary international law as a dynamic process – to ensure its survival and relevance.

4

Custom, *Jus Cogens*, and Human Rights

John Tasioulas

Immanuel Kant notoriously declared that it was a "scandal of philosophy" that it had not yet furnished us with a convincing proof of the existence of an external world. International lawyers have their equivalent occupational scandal: the failure to achieve clarity or consensus on the nature of customary international law. Custom, after all, is arguably the most fundamental source of international law, at least insofar as treaty law is itself embedded within a customary framework. This framework includes various principles bearing on the interpretation of treaties and arguably also the grundnorm of treaty law, *pacta sunt servanda*. Indeed, the international lawyer's scandal goes deeper. All of us, philosophers or not, standardly proceed on the basis that a world external to our senses exists. By contrast, assertions about customary international law are largely confined to international lawyers, although their being taken seriously occasionally has real practical consequences for others.

It is not enough to respond to this state of affairs with a knee-jerk pragmatism: the shop-worn thesis that customary international law works well enough "in practice" and so requires no explication "in theory." After all, this simply presupposes that we already know what customary international law is, and merely shifts attention to whether it "works." In any case, it is doubtful that anything can satisfactorily "work" in a discursive and legitimacy-claiming practice if its very nature remains stubbornly opaque or conceptually problematic. Equally, we should not be put off by the skeptical dogma that all of our moral-political ideas are infected with contradictions at their very core, so that the search for an explanation that makes good sense of them is doomed from the outset. Even the alluring consolations of intellectual resignation need to be earned by argument rather than mere fiat.

In this chapter, by drawing on, clarifying, and extending previous work, I try to sketch the argument that the pragmatists and skeptics take to be either unnecessary or impossible. I offer a moral judgment-based account (MJA) of customary international law, one that challenges the orthodox idea that there is a deep