

The Conflict over Customary International Law and Human Rights Law: the Resolution of Process

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Globalization carries with it the power to accelerate states into the international system overnight, yet with that global system comes the responsibility of international rules and obligations. Unfortunately, states have a tendency to not adhere to certain principles if they are perceived as an obstruction to their sovereignty. International Law has the ability to stabilize these potential conflicts with its strength and requirements of adherence as established through a defined process of source analysis. The creation of custom which depends on consensus, time, and acceptance by the majority of states is what solidifies the requirements of adherence. International Law has all sorts of sources such as, conventions, custom, general principles, judicial decisions and writings of legal scholars as defined by the Statute of the International Court of Justice. The principles of reciprocity and cost-benefit analysis both add assurance that customary international law is used by states at large. For this reason this has established custom as a well defined and flexible institution in which to introduce and change laws as they become defined by the international system. The laws that are not properly created through a ‘right process’, however, undermines the validity of a system of laws and regresses the starting point from which is even harder to escape. This idea of a ‘right process’ is what differentiates Human Rights from the rest of the international legal system. It is understood that these rights are put upon states without the realization that states do not always adhere to these prearranged ideals and this is the reason states find themselves at odds over obligations.

The process of material (treaties and conventions) and subjective (real politick) sources of the customary process makes Human Rights a different¹ and often difficult subject of law to commit the notions of legitimacy, determinacy and acceptance in the international legal system. The established process that creates International Law creates Human Rights in the same fashion, the same sources and methods of analysis are used. Yet, somehow the creation of norms in the Human Rights Law system has overlooked the relations of states as a qualifier in determining if

¹ Restatement (Third) of the Foreign Relations Law of the United States, reporters notes to at 701(3).

human rights are of customary nature. So without the understanding of this real politick the norms do not become a reflection of state's *true* consensus. It is only through this combination of material and subjectivity that we can authentically claim any human right as possessing the characteristic of a norm in the international legal system. And it is this process that we find the solution to creating the customary norms that can be effectively be established later as *Jus Cogens* or norms that have universal consensus, states obligation and no derogation. Once established as *Jus Cogens*, these norms can cross the ever present divide between cultures and ideologies. The combined process of custom and international human rights with the material and subjective combination as dual functions of the process establishes a relationship designed as a qualifier for adherence.

Customary international law:

As said before, the process of custom creation forms the element of legitimacy for the international legal system of which we find becoming more and more global day by day. According to legal tradition, custom is created over time by the general practice of states' relations to each other and the *Opinio Juris* (the belief that a norm exists in international law). Usage of custom can be found in Article 38 of the Statute for the International Court of Justice (ICJ) which states that the court should apply "international custom as evidence of a general practice accepted as law."² Thomas Buergenthal describes 'general practice' as:

"Customary international law develops from the practice of states. To international lawyers, 'the practice of states' means official governmental conduct reflected in a variety of acts, including official statements at international conferences and in diplomatic exchanges, formal instructions to diplomatic agents, national court decisions, legislative measures or other actions taken by governments to deal with matters of international concern."³

² Statute of the International Court of Justice, Article 39 (1)b.

³ Thomas Buergenthal, *Public international Law in a nutshell*, (2002) p.22-23.

In accordance, Anthony D'Amato suggests that state actions require an expression of legality before the action can be accepted as actual custom inducing action.⁴

The characteristics of custom are continuity, uniformity and the constant reliance upon the rule which conforms to community beliefs that nations have obligations or *erga omnes* to enforce least the rule be broken on their own citizenry.⁵ These aspects can be demonstrated in both the *Asylum case*⁶ and *Anglo-Norwegian Fisheries case*⁷. In the *asylum case* the court declared that custom be 'in accordance with the constant and uniform usage practiced by the States in question,'⁸ that is states had to define a certain right upon another state who had an obligation to obey that right. In the *Anglo-Norwegian Fisheries Case*, the Court (ICJ) ruled that the usage of Norwegian's methods of measuring the territory of the sea was not in conformity with the rest of the states behavior and thus not a valid norm.⁹ Furthermore, in the *North Sea Continental Shelf cases*¹⁰ the ICJ further commented on the nature of custom in that "both extensive and virtually uniform [was required] in the sense of the provision provoked."¹¹ However, in the *Nicaragua v. United States case*¹², the court ruled that the action taken did not have to be 'in absolute rigorous conformity.'¹³ This ruling leaves custom slightly ambiguous,¹⁴ yet that ambiguity can be seen as an asset when dealing with an ever relative world.

As for *Opinio Juris*, the extent of its use can be a signal to how fast a rule becomes an international custom, in other words, the second aspect depends on the power of the community belief or reliance on the rule. As Michael Byers suggest, custom is a fluid formation that involves power giving way to obligation in two senses. The first is that there is one set of states that exert power on another set of states that are economically and politically weaker, and, secondly, there are powers or legal obligations that effect how states, no matter the strength,

⁴ Anthony D'Amato, *The Concept of Custom in International Law*, 1971, p. 49.

⁵ Oppenheim's *International Law*, Robert Jennings and Arthur Watts, eds. Vol. 1 (9th edition 1992), at 4.

⁶ *Asylum Case* ICJ Reports 1950.

⁷ *Anglo-Norwegian Case*, ICJ Reports 1951

⁸ *Asylum Cases*, ICJ Reports (1950), 266.

⁹ *Anglo-Norwegian Fisheries Case*, ICJ Reports (1951), 139.

¹⁰ *North Sea Continental Shelf Case*, ICJ Reports (1969)

¹¹ *North Sea Continental Shelf Case*, ICJ Reports (1969), 3.

¹² *Nicaragua v. United States*, ICJ Reports (1984)

¹³ *Nicaragua v. United States case*, ICJ Reports (1984), 392.

¹⁴ Oscar Schachter, "*International Law In Theory and Practice*," (1991) p. 35-37.

relate to each other.¹⁵ The problem with custom is that it can change; it is not, as some rule based lawyers have suggested, a set in stone list as are national or constitutional legal systems. However, as process based lawyers will defend, custom is the convergence of power and ‘common interest’ over a period of time.¹⁶ For example, custom can be compared to a river changing with the shifts in sediment and always flowing horizontally. The Non-compliance and loss of normative character of such rules as customary norms over a period of time suggest that what ultimately has been lost is the *Opinio Juris* that demanded conformity to reflect a legal obligation.¹⁷

If we look at custom in a relative sense, a wide range of possibilities arise. On one extreme side comes the *South West African Cases* in which South Africa argued that evidence suggested that there was not a norm of non-discrimination since many nations practiced the act freely, and thus discrimination was legal in their eyes.¹⁸ Therefore, South Africa’s view that acts such as torture which are venomously attacked by all states and established as a Human Rights norm, yet actually practiced widely¹⁹, demonstrate that the norm of torture is invalid.

In *Nicaragua v. United States* the court dealt with a problem of inconsistency when ruling on use of force and intervention.

“If a state acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, the significance of that attribute is to confirm rather than to weaken the rule.”²⁰

This case suggests a middle of the road approach that custom can be violated only in extreme circumstances in an effort to quell other serious offenses. At the other extreme end comes “higher normativity,” a term used by Oscar Schachter to describe laws against aggression and

¹⁵ Michael Byers, *Custom, Power and the Power of Rules*, 1999, p. 130.

¹⁶ Ibid. P. 135; Myres McDougal, ‘The Hydrogen Bomb Tests,’ 49 A.J.I.L. 357-58 (1955).

¹⁷ R. Higgins, *Problems and Process: International law and how we Us It*, (Clarendon Press, Oxford 1994), p.19.

¹⁸ *South West Africa Cases* (second Phase) ICJ Reports (1966).

¹⁹ Amnesty reports in 1990 that 104 United Nations members use torture.

²⁰ *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports (1986).

self defense which in his view are immutable and non-derogable, like jus cogens for any situation.²¹ This advocates that those laws which are of “higher normativity” are kept there by some natural law superseding the global sentiment and are enforceable without customs rule of consistent practice.²² Thus dismissing the community based *Opinio Juris* that confirms that the norm is indeed custom and relevant.

Character of Custom and Human Rights Law Sources:

Over the years since the Declaration, the question of customary normativity has just recently been explored as a developing field of legal theory. The growing concern with human rights warrants academics to discuss further its expansion into customary international law since there are some difficult characteristics surrounding emergence and displacement in the normative category. The future legality of human rights law and their normative properties are intimately connected to the relative State behavior and legal expectation of the State actors and the global community. Also, human rights law is a confusing and often difficult branch of international law to pass into the realm of customary law. The fact that states have not had the overwhelming state practice, as say the law of the Sea, makes the combination of state practice and *Opinio Juris* unbalanced. Reason for this inequality is that there exists a notion that State ‘Sovereignty’ has become an increasing barrier built to suppress the advancement of supranational systems made to regulate and monitor States behavior.²³ Some Human Rights norms, however, have made the hurdle into accepted laws of nations by virtue of being in the Universal Declaration on Human Rights adopted by the United Nations after the atrocities of the Second World War.

As Richard B. Lillich suggest in 1996, importance of Human Rights has come from the overwhelming support that the Universal Declaration on Human Rights (hereafter the Declaration) has gathered over the years. There has been so much support that the document has

²¹ O. Schachter, ‘Entangled Treaty and Custom’, in Y. Dinstein (ed.), *International law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (1989) 717-734.

²² R Higgins, *Problems and Process*, p.22.

²³ Anthea Elizabeth Roberts, ‘Traditional and Modern Approaches to Customary International Law: A Reconciliation,’ 95 *A.J.I.L.* 757.

incurred custom²⁴ as declared in the Montréal Statement which stated “[the Declaration]...has over the years become apart of customary international law.”²⁵ Custom is also affirmed by the Proclamation of Tehran quoting “[The Declaration]...constitutes an obligation for members of the international community.”²⁶ Furthermore, Professors Sohn and McDougal both attribute the Declaration’s authoritative and accepted influence to the level of *jus cogens* (meaning there can be no derogation from norms stated in the declaration and holding certain obligations *erga omnes*) with the ability of having interpreted the obligations of the United Nation’s charter.²⁷ Further evidence for the Declaration as custom came from national courts and that of the developing treaties of the Conventions on Civil and Political rights and the Convention on Economic, Social and Cultural rights that were adopted based upon the rights outlined in the Universal Declaration.²⁸ To paraphrase, the 1993 World Conference on Human Rights in Vienna called the Declaration as the ‘common ground when many states discuss human rights.’²⁹ Thus, the treaties that came prior to the Declaration owe their existence and acceptance to the legitimacy of Eleanor Roosevelt’s well timed document.³⁰ However, not all agree with such sentiment when regarding the customary aspect of the Declaration.

The wrangling over the sources of Customary Human Rights Law comes mainly from what Anthony D’Amato calls paradigms that have been taught in law schools and held by its students in a death hold grip. The first paradigm he describes as the sovereignty paradigm which was purported by Louis Henkin.³¹ The sovereignty paradigm holds that the human rights norms

²⁴ Egon Schwelb, ‘The Influence of the Universal Declaration of Human Rights on international and National Law,’ 53 *Proc. Am. Soc’y Int’l L.* 217 (1959); Humphrey Waldo, ‘Human Rights in Contemporary International Law and the significance of the European Convention, in the European Convention on Human Rights,’ 15 *Int’l and Comp. L.Q., Supp. No. 11*, (1965).

²⁵ Montréal Statement, 9 *J. Int’l Comm’n Jurists* 94, 95 (June 1968).

²⁶ Proclamation of Montréal, UN GAOR, 23rd Sess., U.N. Doc. A/conference 31/41 (1968).

²⁷ Louis B. Sohn, ‘The Human Rights Law of the Charter,’ 12 *Tex. Int’l L.J.* 129, 133 (1977); Louis B. Sohn, *The International Law: Protection of the Rights of the Individual Rather than the States*, 32 *Am. U. L. Rev.* 1, 17 (1982); Myers s. McDougal, Harold Lasswell and Lung-chu Chen, *Human Rights and World Public Order* (1980) p. 320-32.

²⁸ See Richard B. Lillich, ‘The Growing Importance of Customary International Human Rights Law,’ 25 *Ga. J. Int’l & Comp. L.* fall 1995/winter 1996.

²⁹ Vienna Declaration on the Right to Development, 1993.

³⁰ Hurst Hannum, ‘The Status and future of the Customary International Law of Human Rights: The Status of the Universal Declaration of Human Rights in National and International Law’ 25 *Ga. J.Int’l & Comp. L.* 287.

³¹ See Anthony D’Amato, ‘Human Rights as Part of International Law: a Plea for Change of Paradigms,’ 25 *Ga. J. of Int’l. & Comp. L.* Fall 1995/winter 1996. See also for a debate on dualism in U.S. courts: Rett Ludwikowski, , ‘Supreme Law or Basic Law? The Decline of the Concept of Constitutional Supremacy,’ 9 *Cardozo J. Int’l & Comp. L.* 253, Winter 2001.

can only be found in the ‘non-conventional’ law which leaves out custom and convention and ultimately the all important universality. Henkin believes sources come from Liberal National Constitutions and the laws of *Jus Cogens*.³² D’Amato explains that the liberalness of the constitutions of the United States and that of France do not have the ability to become sources of international law, in fact, with Human Rights in mind, most liberal Constitutions do not contain some of the most adhered to customary norms such as apartheid, genocide, extra-judicial killings, torture and disappearances.³³ The law of one nation is that law in which those citizens think necessary to protect themselves from the government of that one country; the law described can not be applied to other nations and thus not apart of the sources of international law. The other source of Human Rights norms as described by Henkin is that of *Jus Cogens* which is a legal term describing a norm’s ability to transcend all other rules of international law having universal jurisdiction and obligations.³⁴ Confusion to say the least, *Jus Cogens* rules are understood as objects not a means of process.³⁵ Henkin does however, confess to the ability of Human Rights norms to penetrate state sovereignty but only as ‘derogations’ and not rules of law. Professor Henkin has ultimately described himself as being uncontroversial in his understanding of sources since the growing pains of the international system is not comfortable with what D’Amato subscribes and suggest is the Human Rights Neutral Paradigm.

As sources of international law, the ‘Neutral’ Paradigm is the antithesis to that of the ‘Sovereignty’ Paradigm in almost every distinction. As nations become more and more interdependent rules of international law penetrate the nations’ jurisdiction because their state systems have transcended the borders. State interest is no longer concerned with itself but with that of other states as awareness in how inhabitants are treated in one state can be the concern of other states. Therefore, by the consent of states, international law is created and adhered to by the processes of mutual understandings of state values surpassing the hindering notion of sovereignty.

³² Louis Henkin, Human rights and State “sovereignty”, 25 *Ga. J. Int’l. & Comp. L.* (fall 1995/winter 1996) p. 31-37.

³³ D’Amato, *Supra* note 25.

³⁴ Henkin, *supra* note 26.

³⁵ See Anthony D’Amato, It’s a Bird, It’s Plane, It’s *Jus Cogens!*, 6 *Conn. J. Int’l L.* 1 (1990)

The Characteristics of Human Rights and Customary Law can be outline in Thomas M. Franck's 1988 article 'Legitimacy in the International System.' Here Franck suggests that a customary norm has its best chance of withstanding the harsh International system if it obtains legitimacy, determinacy and has gone through the 'right process.' The term legitimacy means that the law is one that is recognized by a majority of states as one that is in need of codification. The act of codification can solidify a right into custom by virtue of its recognition³⁶ as one that is indeterminate and in need of clarification. Franck goes on to say the right in question has to go through a series of determinations which define the right's provisions and obligations in an effort to accommodate the various nations wishing to apply this norm to their systems. If any one step is overlooked by the international community, the norm suffers and dies a very quick death. As the Philosopher Max Weber suggests that the 'right or law' has to comply with the public at large because 'in some way obligatory or exemplary' it is 'a model' that eventually will become 'binding' as the actions of others will conform.³⁷ Professor Schachter declared quite clearly that the laws drafted by the United Nation's International Law Society have the qualities of the right process in which "after [the commission] has devoted a long period in careful study and consideration of precedent and practice" the laws are then recommended. Furthermore, Schachter confirms determinacy by suggesting the nations prescribing to the law would gladly accept the codification of laws as cited by state practice that of 'newly developed' law.³⁸ The existence of these characteristics can only help the community in defining, accepting and cohering to rules that acquire a communities 'common interest.'³⁹

In Professor Hart's hypothesis, the "right process" suggests that the state would not accept a rule that has not gone through the rigors of the normative process and thus he stipulates is the reason that states codified the laws of treaties at Vienna.⁴⁰ Franck also affirms that the

³⁶ Arthur M. Weisburd, 'The Significance and Determination of Customary International Human Rights Law: The effects of Treaties and Other Formal International Acts on the Customary Law of Human Rights', 25 *Ga. J. Int'l & Comp. L.* p. 99. Fall, 1995/Winter, 1996.

³⁷ See Max Weber, *Economy and Society: An Outline of interpretive Sociology*, G. Roth & C. Wittich eds, 1979, p.31.

³⁸ Oscar Schachter, *Towards a Theory of International Obligation*, 8 *Va. J Int'l L.* 300 (1968).

³⁹ Thomas M. Franck, 'Legitimacy in the International System', 82 *AJIL* 705 (1988).

⁴⁰ H.L.A. Hart, *The Concept of Law*, Ch. 10 (1961)

‘ritual’ affect delivers validation and consistency which without stable processes the whole system would be in need of Machiavelli’s ‘arms for good laws.’⁴¹

National Courts

As the case of *The Paquete Habana*⁴² defined at the turn of the last century: “International law is apart of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.”⁴³ This case was the beginning of a great relationship between State and custom that the national decisions are a source of state evidence for the development of custom. For example, in 1980 two cases arose from the United States legal system, *Hostages Case* and the *Filartiga v. Pena-Irala case*, confirmed *Opinio Juris* in the opinions of the cases. Concerning the *Hostage case* heard by the International Court of Justice, the United States argued that the fact that Iran had violated “certain fundamental human rights...now reflected, *inter alia*, in the Charter of the United Nations, The Universal Declaration of Human Rights and corresponding portions of the International Covenant on Civil and Political Rights.”⁴⁴ Essentially the judge found in favor of the pleadings and signified that at least some of the rights contained in the Declaration and the Covenant Civil and Political rights were regarded as Customary Law. Also, in 1980, the case of *Filartiga v. Pena-Irala* in the Fifth Circuit of the United States Court of Appeals⁴⁵ which dealt with two Paraguayan plaintiffs against another Paraguayan for the offenses of torture, and death of their son and brother. The case was brought on the back of the Alien Tort Statute enacted in 1789 which provides: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”⁴⁶ Since the Convention on Civil and Political Rights had yet to be ratified by the United States Senate, the jurisdiction had to be found in the ‘law of nations’ or Customary Law. The brief by the United States after an exhausted display of evidence, suggested that torture had indeed become a norm of International law and was

⁴¹ N. Machiavelli, *The Prince*, 1981, p. 71.

⁴² *The Paquete Habana Case*, US Supreme Court, 1900, 175 U.S. 677, 20 S. Ct. 290, 44 L.ed

⁴³ *The Paquete Habana Case*, US Supreme Court, 1900, 175 U.S. 677, 20 S. Ct. 290, 44 L.ed. 320.

⁴⁴ Memorial to the International Court of justice concerning *United States v. Iran*, ICJ case 1980.

⁴⁵ For reference the 5th circuit consist of New Hampshire,

⁴⁶ Alien Tort Statute, 28 U.S.C. section 1350 (1994)

therefore admissible under the statute. The judgment agreed in that torture “had become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights.”⁴⁷ This case became a watershed for other cases of the like to be heard on the bases of the statute.⁴⁸ It was after this case that the third restatement of international law came into existence. This restatement declared that the norms listed prohibition against torture, arbitrary detention, summary executions or murder, disappearances, cruel, inhumane or degrading treatment, slave trade, systematic racial discrimination, genocide and a consistent pattern of gross violations of internationally recognized Human Rights. This blacklist is obviously not complete as professed the restatement is a rewritable document and upon need be expanded to include laws that are argued before any court of appeals to be customary. Thus we can see that the courts of nations, United States in particular can be used as a source of international law through both state practice and *Opinio Juris*.⁴⁹ Similar laws can be found in many of the world’s countries, the German courts according to Article 25 of the Basic Law (German Constitution) are advised to use “the general rules of public international law shall be an integral part of federal law.”⁵⁰ Also in Western European Courts take a similar approach when in their constitutions state that customary international law is “part of the law of the land.”

Resolutions and the United Nations System

The last few Security Council Resolutions to have emerged from the United Nations have attested to the power of consensus of certain norms in international law. The Security Council resolutions have the same effect in that they are wholly binding, and thus, the work does have what Professor Tunkin called an *ad hoc* effect.⁵¹ They have the same properties as the resolutions and can be taken as a procedural step to custom with the added provision of obligation. The Charter of the United Nations states that the General Assembly resolutions are indeed non-binding; however, they are an excellent example of the power of state consent since the United

⁴⁷ *Filartiga v. Pena-Irala*, 630 F.2nd 876 (2nd Cir. 1980)

⁴⁸ See *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2nd 421; *Fernandez v. Wilkinson*, 505 F. Supp. 787,798 (D. Kan 1980) dealt with arbitrary detention as prohibited by customary international law; *Rodriguez-Ferandez v. Wilkinson*, 654 F.2nd 1382 (10th Cir 1981).

⁴⁹ Richard B. Lillich, ‘The Growing Importance of Customary International Human Rights Law,’ *25 Ga. J. Int’l & Comp. L. 1*, Fall 1995/Winter 1996.

⁵⁰ Grundgesetz (German Constitution) art 25.

⁵¹ See G. Tunkin, *Osnovy sovemennogo mezhdunarodnogo prava* (1956). In Higgins, *Problems and Process*, p. 28.

Nations is made up of a majority of the world's countries. However, the adage that 'states do not mean what they say in resolutions' is purported by excessive usage and disregard member states have for resolutions of the United Nations.⁵² What is useful, however, about the General Assembly resolutions can be seen in their content and consistency where certain issues are concerned. The body of resolution text has the ability to establish patterns of determinate action and opinion that can be considered as the first step into the process of norm creation. Yet, as Judge Schwebel states, it is not just the resolutions that hold the pattern but that of the actual practice of states that comply with the resolution.⁵³ In fact, the act of looking at resolutions and finding contradictions within can be seen in the *Texaco Case* concerning the collective resolutions called the New International Economic Order resolutions. Professor Dupuy made the mistake of relying on resolution 1803 which he deduced as general practice, however, the consensus of the Charter for Economic and Duties and the Declaration on the New International Economic Order did not reflect the resolutions content. The inconsistency may reflect some defection but overall the pattern still reflects a certain amount of consensus being built amongst the majority of State members. The process of slow pattern build to consensus has a very legitimizing effect on the norms the UN chooses to issue resolutions. This process can ultimately lead to the codification of these norms in treaties based on the subsequent practice.

Treaties

The International Court of Justice has declared that the formation of customary law by treaty can be done in three distinctive means: 1) where the treaty rule is declaratory of pre-existing custom, 2) where the treaty has crystallized by process the meaning of the customary law, 3) where the subsequent practice has created new customary practice.⁵⁴ The difference, however, between other international customary norms and that of human rights norms is the fact

⁵² G. Arangio-Ruiz, 'The Normative Role of the General Assembly of the United Nations and the Development of Principles of Friendly Relations', *Recueil des cours* (1972 III); S. Schwebel, 'The Effects of Resolutions of the UN General Assembly on Customary International Law,' *Proc. ASIL* 301, (1979).

⁵³ Schwebel, 'The Effects of Resolutions' p. 305.

⁵⁴ These conditions were first defined in the 1969 ICJ case of the North Sea Continental Shelf Cases and the 1986 ICJ Judgment in the Nicaragua case. See Arthur M. Weisburd, 'The significance and Determination of Customary International Human Rights Law: The Effect of Treaties and Other Formal International Acts on the Customary Law of Human Rights' 25 *Ga. J. Int'l L.* 99, Fall 1995/ Winter 1996.

that Human Rights treaties are less often ratified than normal treaties.⁵⁵ The Human Rights treaties create norms that differ mainly because of the fact that non-parties will also be bound to the treaty or instrument that defines the norm and its obligations. Also, in some cases treaties will invoke norms outside the defined scope of text in that it will authorize the treaty body to draw on norms of customary law.⁵⁶ This significant and practical provision leaves the treaty body room to adjust with the changing patterns of community values on any norm over time. Essentially, the norms in question will persevere beyond widespread violation by some states. For example, torture exist as an international human rights norm, no state would deny this fact. However, torture is committed by a significant number of states who, in good faith, signed the convention against the use of torture. The norm will not fall out of exist due to this fact. Thus, the combination of both practice and *Opinio Juris* have to be absent for the norm to become irrelevant in practical international law practice.⁵⁷ What supposedly drives this process is the will of the common interest in the global community because normally states generally do not put positive and rights upon themselves without reason.

Of Power and State Practice

As we have seen above, the power of validity, determinacy and process can lead to law creation and adherence. The motivation for such laws is the ability of the globalizing world to process the rapid growth of distribution in information and diversity of populations that without adhered rules can lead to global chastisement and change in political fortunes. The consistency of state practice, *Opinio Juris* and the common interest of the people create and delete laws as they are respected. Thus, a look at the shifting powers of State's relations needs exploring if the process of Human Rights and Customary International Law is to be further understood.

In Michael Byers book, *Custom, Power and the Power of rules*, the evidence that international relations and legal developments are interconnected by the use by State's power are shown in the development of customary norms. It is written in Article 2(7) of the Charter of the United Nations that all stipulations with in a treaty shall remain the obligation for those states

⁵⁵ Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law*, 1989.

⁵⁶ *Ibid* p. 80.

that ratify the treaty. However, some states believe that the territorial jurisdiction of human rights should cover all human beings no matter who signed or did not sign the treaty. These States base their belief that states that have ratified the United Nations Charter are bound by Articles 55(c) and 56 of which list accepted Human Rights obligations. Secondly, they argue that there exist rules of customary international law regarding Human Rights which give them the mandate to monitor, encourage and protect rights of non-consenting states. However, the opposing side would argue, with force, that this mandate is one of ‘Cultural Imperialism’ and thus there has arisen a compromise. The compromise consists of consenting states having to agree to encourage and monitor the rights from a distance. There is much to be said for monitoring and encouraging when states use them to pressurize non-consenting states with the media and sanctions. Both inform the population of what is available and the discontent of the public to pressure the governments in a theoretical effort to comply. Legal scholars such as Koskenniemi suggest that human rights have obtained customary legal status by ‘an anterior – though at least in some respects largely shared—criterion of what is right and good for human life.’⁵⁸ Of course others take the view that the industrialized nations use the process of rules and that of human rights as regimes in an effort to economically control developing countries.⁵⁹ The Feminist critique of treaties holds that widespread marginalization has in turn created inequality that has created a gap between the now ratifying Convention on the Elimination of All Forms of Discrimination against Women and the unresolved economic, social or political disparities leaving women to grapple with an ever disproportionate place in law.⁶⁰

As said above, consensus of belief in what is humanly right can be the most powerful ally in creating custom. When majorities of States consent to a ‘basic minimum standard’ the rest of the world will soon comply with that law. Thus, pressure of community belief in what should be afforded to all of humanity is achieved through a great deal of consistency of state practice and consensus of the people within the global community at large. Through the relations of States we can see there are threats which can be alleviated by an effective and

⁵⁷ Rosalyn Higgins, *Problems and Process*, p. 18-19.

⁵⁸ Koskenniemi (1990a) as cited in Michael Byers, *Custom, Power and the Power of Rules*, 1999, p. 45.

⁵⁹ Andrew Moravcsik, *Explaining the Emergence of Human Rights Regimes: Liberal Democracy and Political Uncertainty in Postwar Europe*, Weather head center for international affairs, Harvard University, December 1998.

⁶⁰ Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A feminist Analysis*, (Manchester University Press) 2000. As reviewed by Jose E. Alvarez, *95 AJIL* 459. 2001.

impartial application to Human Rights Law, not many States can withstand a barrage of sanctions and constant global community pressure.

On the other side of the coin, The ability of states that are more powerful, for example the economics of the European Union and the militarily might of the United States, to sway and control international law is a creditable threat that they have the ability to make norms relevant to their political wills.

As Brownlie explains: “The hegemonial approach to international relations maybe defined as an approach to the sources which facilitates the translation of the difference of power between States into advantages for the more powerful actor. The hegemonial approach to the sources involves maximizing the occasions when the powerful actor will obtain ‘legal approval’ for its actions and minimizing the occasions when such approach may be conspicuously withheld.”⁶¹

Here the international lawyer is confronted with the disturbing fact that rules of law both present and future can be manipulated by fluxes of power within the international power *regimes*. These *regimes* of influence can or do cause serious disturbances, Human Rights norms would not only be indeterminate, but also used at the whim of a country for its own political and economic gains. These *regimes*, those of economic interest, may persist in the abuse of power which can lead to violations of Human Rights norms such as the widely talked about the emerging norm of the right to development. The right has been hampered by the developing countries use of farm subsidies and those of who export goods in developing countries have no means of trading in fair market. The recent trend towards lowering subsidies has angered many but it is only the will of the global community that denies the developed countries’ farmers from under pricing the agriculture produce of the developing countries. For another example, the might of military intervention has been on the rise ever since the fall of the Berlin Wall in 1990. The North Atlantic Treaty Organization’s intervention into Kosovo, Somalia, Afghanistan and Iraq has started debate on both the infringement of Sovereignty and the legality of intervention. The

⁶¹ Ian Brownlie, ‘International Law at the fiftieth Anniversary of the United Nations: General Course on Public International law’, (1995), at 49.

recent attacks on Kosovo and Afghanistan have come at the bequest of community values damning both the gross violations of the Genocide Convention and the outrage of September the 11th. Granted both have had difficulties resolving the conflicts but the desire for action was apparent to the governments participating in the interventions.

Furthermore, some abuses are slowly being defused by the enormous powers of what Robert F. Dornin calls ‘Mobilization of Shame’ in which he describes the enormous pressure exerted upon a country when perceived or reported violations have occurred and not been addressed. Dornin suggest that the United Nations Charter Article 1(3) engages States in an effort of international cooperation “to solve problems of economic, social, cultural and humanitarian nature.”⁶² The amassing of shame regarding widespread violations of rights can be used by the international community’s values in a process of creating norms which protect weaker states from *regimes*.

Power can both distort the whole system or it can influence through the four set principles of international law, using them for their own purposes or as implementation of rights by intervention. The first principle is that of Jurisdiction, “the authority to engage in the activities of control or regulation in a geographic area.”⁶³ The oft cited *Barcelona Traction case*⁶⁴ is used to define universal Jurisdiction of Human Rights when Judges affirmed that State’s obligation owed to the global community “By their very nature [they]...are the concerns of all States.”⁶⁵ Further along the court listed both contemporary international law and basic human rights: aggression, genocide, slavery and non-discrimination which have gained the level of *Jus Cogens* in international law. However, the court was not concentrating on human rights but that of criminal offenses that the principle of personality would allow a case of State v State in which one or more of the first State’s nationals has been violated.⁶⁶ The cases of States representing

⁶² United Nations Charter, Article 1(3).

⁶³ Byers, *Custom, Power*, p.53.

⁶⁴ *Barcelona Traction, Light and Power Company Case* (second phase), ICJ Reports (1970) 3

⁶⁵ Case concerning the *Barcelona Traction, Light and Power Company Limited (2nd phase)*, ICJ Reports (1970) 3 at Para. 33.

⁶⁶ *Reparations for injuries suffered in the Service of the United Nations*, Advisory Opinion (1949) 174 at 181-2.

non-nationals are limited to say the least, yet when preformed are based on a ‘breach of treaty in the form of violation of the Human Rights of national or non-nationals.’⁶⁷

The second principle is that of personality which in international law declares that states are entitled to possess the full complement of rights and to be subject to obligations under a specific legal system. States are principally equal, no matter the size or capacity for power, to play a role in forming customary international law. In the context of Human Rights law this principle probably has been the sole reason that weaker states, against a storm of strong states, have influenced the creation, adherence and change of norms of self-determination regarding decolonization.⁶⁸ This observation can also be seen in the general practice of International Human Rights Norms. New states and those territories that are not recognized by the body of states have difficulties when engaging in the participation and protection of Custom. The use of power within this principle can be defined as ‘exclusivist’ when the newly developed and unrecognized countries try to break the sanctum of established states and their agreed human rights norms.⁶⁹

The principle of reciprocity holds more influence when dealing with the vast majority of states. The principle concerns the recognition of Human Rights Norms which apply to States who have non-nationals within their borders. There are two ways to interpret reciprocity: First, it would seem that this principle applies to all states from past agreement that now holds every state by virtue of being.⁷⁰ The second interpretation is that this reciprocity is an agreement held bilaterally between states.⁷¹ Nowadays the ‘virtue of being’ is not good enough for most lawyers. ‘Bilateralism,’ as Byers explains, can eventually develop into a web of bilateral

⁶⁷ European Convention on Human Rights, Article 24; See Application 9940/82, *France, Norway, Denmark, Sweden and Netherlands v. Turkey*, 26 Yearbook of the European Convention on Human Rights (1983), Part II; Application 4448/70, *Denmark, Norway, Sweden and Netherlands v. Greece*, 12 Yearbook on the European Convention on Human Rights (1969), 12.

⁶⁸ Eyassu Gayim, *The Principle of Self-Determination*, Oslo: Norwegian Institute of Human Rights, 1990

⁶⁹ Simma, B. and P. Alston, ‘The Sources of Human Rights Law: Custom, Jus Cogens, General Principles,’ 12 Aust. Y. B. Int L. 82 (1992).

⁷⁰ John Austin, *The Providence of Jurisprudence Determined*, London: Weidenfield and Nicholson, 1954, Lecture I, 9-33; A.V Dicey, *Introduction to the Study of the Law of the Constitution*, (10th ed.) London: Macmillan, 1959, p.70-76.

⁷¹ Wesley Hohfeld, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning,’ (1916-17) 23 *Yale Law Journal* 710; Reproduced in Hohfeld *Fundamental Legal Conceptions* (New Haven: Yale University Press, (1923) p. 65.

relationships that ultimately become general practice in the international system; however, Bruno Simma sees 'Bilateralism' having the potential to be 'a barrier in the way of stronger solidarity in international law'.⁷² International law has many ways to establish general principles of law and if having bilateral agreements spur similar agreements amongst other nations then general practice through the customary process becomes a law of custom bringing obligation upon violation by any state. Reciprocity holds within its grasp the very notion of state power in the way states claim, respond and persistently object to the perceived rights. States that claim rights must have a position of power which quantifies its promotion of the right. Another ingredient is the ability of the right to be equally applied to all states, thus making the right usable by all states who wanted to apply the law to its own operations. And furthermore, the law must benefit all states without discrimination, making the law essential and useful in any State.

The principle of legitimate expectations requires that states who consent to treaties must under the rule of *pacta sunt servanda* uphold the treaty obligation in good faith. States generally see the actions they make as legally based and states justify these actions through bilateral or multilateral means. The trick is that States rely on the fact that all other states act according to their agreements⁷³ if not the system would suffer leaving states to persist in a wasteful effort to control unpredictable situations. Thus the expectation rule derives from continuity with in the content and practice in the effort to stabilize the relations of states that may conflict otherwise.

However, the reliance on perceived rules that had no prior existence can impede the process of custom, states immunity is an example of such preconception and delay. The idea of state immunity has for a while been thought of as an ancient idea, but it is not. The immunity of states from the prosecution for foreign states has only recently been established: Belgium in 1857, Germany in 1949 and the United Kingdom in 1977. This impediment of preconception has retarded the works of Human Rights prosecution in some of the most severe cases such as the Former Yugoslavia and Rwanda and recently with the International Criminal Court in regards to the United States rejection of jurisdiction. As for the judgments of the regional and

⁷² Byers *Custom, Power*, p. 89; Brunno Simma, 'Bilateralism and Community Interest in the law of State Responsibility,' in Yoram Dinstein (ed.), *International law at a time of Perplexity: Essays in Honour of Shabtai Rosenne* (Dordrecht: Martinus Nijhoff).

international courts, the quantifying power can be assessed in the principle *stare decisis* which states that prior decisions should be the decision for the future. Over time and according to article 38(1) (d) of the International Court of Justice Statute the repetition of these decisions may make applications to the customary process and thus stabilize reoccurring situations.⁷⁴ These decisions are not binding on the other States as specified by the court's Article 59, which reads: 'The decision of the Court has no binding force except between the parties and in respect of that particular case.'⁷⁵ Yet the repetition of States practice and the legitimate expectation of repetitious judgments can formulate custom and continuity. For example, Michael Byers quote from the *Gulf of Maine Case* in that the Court's judgment on the *North Sea Continental Shelf Cases* was 'the judicial decision which has made the greatest contribution to the formation of customary international law in this field.'⁷⁶

These decisions, therefore, are just guidance for future decisions on the customary international law when found in question by member states. The power of Regional Human Rights Courts and the International Criminal Court in making these decisions concerning Human rights violations or advisory opinions can help lead to a general practice of how the right can be applied or redressed within a culturally similar community. Thus, custom is created by the repetition of *general practice* and *Opinio Juris* a process that over time refines itself in an effort to appease the general consensus of state interest. This refinement thus leads ultimately to the codification of custom thus making them legitimately enforceable and adhered to.

The expectation of treaty adherence can be a powerful tool in the creation of Human Rights norms as treaty obligations which are negotiated and defined inside regionally based treaties. States, in good faith sign, ratify and promise to adhere to the defined provisions and these acts can be seen as general practice. However, treaty provisions such as torture are defined in more than one treaty and thus can lead to a codified rule of customary international law⁷⁷ with

⁷³ G. Arangio-Ruiz, 'The Normative Role of the General Assembly of the United Nations and the Development of Principles of Friendly Relations', *Recueil des cours* (1972 III) p. 431.

⁷⁴ Byers *Custom, Power*, p.121; Rosalyn Higgins, *Problems and Process*, 202-204.

⁷⁵ ICJ Statute Article 59.

⁷⁶ Byers, *Custom, Power*, p. 121; *North Sea Continental shelf Cases* (1969) ICJ Reports at 293.

⁷⁷ Jean-Francois Bonin, 'La Protectio contre le torture et les traitements cruels, inhumanains et degradants: l'affirmation d'une norme et l'evolution d'une definition en droit international', (1986) 3 *Revue quebecoise de droit international* 169; Nigel Rodley, *The Treatment of Prisoners Under International Law* (Oxford: Clarendon, 1987).

parallel obligations.⁷⁸ This development can also have a negative effect of the process of norm creation, as the treaty law is embedded within multiple treaties with different provisions and obligations invariably confusing States. The confusion over definition and obligation ultimately defuses the normative quality until there can be true determination regarding the norm, for example, the crime of torture.

Within the realm of Human Rights, the actions of monitoring and intervention on non-consenting States have been stagnant due to the United Nations Charter Article 2(7) which basically states that no intervention can be justified outside extreme measures.⁷⁹ The language suggest that only the most extreme violations of *Jus Cogens* can be intervened and then by force of chapter VII. However, the enforcement of violations of non-jus cogens Human Rights has progressed and hopefully, with global information services, will improve a great deal with multilateral practice and allowance. The obvious concern or show of power by the intervening or monitoring state can give credence to the rights that are shown or purported to be violated by the second state. Thus treaty adherence and monitoring have a major role in developing or forcing human rights into general practice. And if possible, the right does assent to *Jus Cogens*, it is added by the United Nations charter, securing the norm in a system that would have great difficulty changing.

Conclusion

As D'Amato suggests States actions require an expression of legality before the action can be accepted as actual custom inducing action. Power or the real politick of international law can explain why the legality of actions is so needed if countries are going to relate to each other with out conflict. States do not act on altruistic notions alone, it is a combination of community values and economic want that spurs most states on the path of Human Rights acceptance. Thus it is imperative that legal scholars widen their net of control factors when deciding whether or not all human rights have passed into the realm of customary law. Without a wide consideration

⁷⁸ Nicaragua Case (jurisdiction) (1984) ICJ Reports 392, 424 (Para. 73)

⁷⁹ Article 2(7) states: 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit

of the factors, the international legal community creates a false consciousness for states that are relying on custom to be legitimate for any given purpose. Without legitimacy, states have no bases for their actions; leaving States' actions as unrecognizable and erratic, slowing down our process of creating Human Rights norms. Like any society, States need the comfort of knowing what can and should not be done for any given occasion. This comfort comes from norms that have outlasted the 'right processes' and come out as stabilizing factors in society. In matters of States, the sources of custom all hold a combination of material and subjective variables that add to the effectiveness, acceptance and legitimacy of to obligatory norms revered in the community interest. Michael Byers' suggest that there are two ways countries can influence through the customary process, the first is the ability of states through individual influence of a state upon other states' behavior and the second is the legal obligation that is relative to all states. Thus, states relate to each other through charters, treaties, resolutions, Alien tort laws, and paradigms of power or forces of state's will, all swaying according to the power regimes and community consensus. Paradigms, such as D'Amato's neutral paradigm suggest that there are a multitude of sources of custom that can effectively signify as the content of custom and the relevant *Opinio Juris* of states just reinforces the State's notion of the true substance of applied custom. Sovereignty, thus, becomes a strategic concept that stagnate the process for those countries that believe their actions are their own yet in this emerging society, that is not true. States are not so much individual but components of a collective society that interacts every day and to ignore this cognitive relationship will deliver a set of lifeless rules that do not take the customs cognitive nature into account. In summation, Christopher Joyner stated in 1987,

“Political science can gain from international law by accepting the proposition that the law is a significant means for organizing political forces, for setting perceptions of national interest, and for promoting ways to attain those national interests.”⁸⁰

such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII'

⁸⁰ Christopher Joyner, "Crossing the Great Divide: Views of a Political Scientist Wondering in the World of International Law," 81 *Proceedings of the American Society of International Law* 385, (1987).

Treaties, resolutions, state practice of national courts all work to organize a system that is made to define norms as they exist.

The current process of Human Rights norms, however, does not take into account the various pressures of states relations to human beings simply because the subjective factor is diminished in comparison with that of the material existence of treaties and political will. These treaties demand that states immediately or as soon as possible reform their practices without taking into consideration that these states may not have the resources to accomplish the required right. For example, the Balkan States who are trying to get into the EU but before they can do this they have to show some signs of conforming to the European Convention on Human Rights, this is a difficult accomplishment for these struggling states to achieve. The main reason they want into the union is because they want these rights due to a prolonged oppression and sharp recovery, yet to achieve them they must have economic gain which will come slowly with the added support of the union. The real political exist despite the force of consciousness we may place within these rapidly devised norms and treaties. Thus, the potential capacity for the advancement of Human Rights norms becomes the limiting factor and must be addressed if the process of Human Rights into customary law is to be considered legitimate and enforceable. This over all may slow the process of custom down, but in the long run, stability and continued adherence will reinforce the notion of human rights as an established branch of International Law. Thus making Human Rights an acceptable or irresistible legal system for those countries who may wish to dismiss Human Rights as a violation of state sovereignty. The validity of the law not the quantity holds as the key to acceptable and adhered to norms of Human Rights which eventually will ascend to the ranks of non-derogable *Jus Cogens*.