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Cognitive Conflicts and the Making of International Law: From Empirical Concord to Conceptual Discord in Legal Scholarship

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Cognitive Conflicts and the Making of International Law: From Empirical Concord to Conceptual Discord in Legal Scholarship

*Jean d'Aspremont**

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I. INTRODUCTION

It has long been claimed that international lawmaking has grown pluralized in the sense that it has allegedly moved away from the traditional Westphalian and state-centric model of lawmaking.¹ New processes outside traditional diplomatic channels and involving non-state actors are said to qualify as lawmaking, and the products thereof have come to be ascertainable as genuine legal rules.² Such an assertion of a pluralization of international lawmaking is now common, and those studies that fail to give it sufficient emphasis are demoted to antediluvian scholarship.³

This uncontested prejudice in favor of pluralistic representations of lawmaking processes⁴ calls for a preliminary remark that will inform the argument subsequently made in this Part. Although uncontested in mainstream international legal scholarship,⁵ the mere finding that international lawmaking is now more heterogeneous, accommodates new forms of law-generating processes, and gives a say to new types of actors presupposes that international lawmaking was, in the past, monolithic and state-centric. In that sense, the claim of the pluralization of international law rests on a strong prejudice

1. See generally Peter M. R. Stirk, *The Westphalian Model and Sovereign Equality*, 38 REV. INT'L STUD. 641, 641–60 (2012) (discussing the Westphalian model and the seemingly recent trend away from this lawmaking process). For some critical remarks, see Stéphane Beaulac, *The Westphalian Legal Orthodoxy – Myth or Reality?*, 2 J. HIST. INT'L L. 148, 148–77 (2000).

2. For a few examples, see Jutta Brunnée & Stephen J. Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, 39 COLUM. J. TRANSNAT'L L. 19 (2000–2001).

3. See ALAN BOYLE & CHRISTINE CHINKIN, *THE MAKING OF INTERNATIONAL LAW*, 97 (Malcolm Evans & Phoebe Okowa eds., 2007) (“Focus on the continued exclusion of NGOs from formal aspects of international lawmaking misses the political and social reality of their increased participation on state and IGO behavior—whether this is deemed favourable or otherwise.”).

4. See *infra* Part II (providing a brief overview of the state of the literature in this respect). For critical remarks, see Jean d’Aspremont, *The Doctrinal Illusion of the Heterogeneity of International Lawmaking Processes*, in 2 SELECT PROCEEDINGS OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW 297, 297–312 (Hélène Ruiz Fabri, Rüdiger Wolfrum & Jana Gogolin eds., Hart Publishing 2010), available at http://paper.ssrn.com/sol3/papers.cfm?abstract_id=1230964 (demonstrating that “the contemporary assertion that international lawmaking has become more heterogeneous is less the result of an actual practice than the outcome of an inclination of scholars to expand their material of study”).

5. See d’Aspremont, *The Doctrinal Illusion of the Heterogeneity of International Lawmaking Processes*, *supra* note 4, at 297–312 (recognizing the contemporary assertion that international lawmaking has become more heterogeneous).

about the state of the prepluralized era of lawmaking.⁶ In that sense, the empirical finding of a pluralization of international lawmaking, albeit being almost unanimously shared among observers and scholars, manifests consensus on some preconceived data that is the preexistence of something like the Westphalian order. Needless to say that such preconceived data is itself the expression of a construction.⁷

This being said, it is not the aim of these introductory considerations to shed a radical, skeptical veil on all attempts to make sense of international lawmaking. While acknowledging the prejudices informing the conceptualizations of lawmaking in the literature, the foregoing only means to recall the uncontroversial relativity of any basic empirical or conceptual finding about law. Indeed, one cannot seriously engage with the theories of lawmaking—as this Article is supposed to do—without bringing to mind such an elementary observation. Currently, it seems beyond dispute that the way in which lawyers construct not only law but also fact—practices of creation or application of rules—is contingent on the cognitive lens with which one has—consciously or unconsciously—chosen to look at international law.⁸

If one applies the abovementioned elementary epistemological remarks to the question of international lawmaking under discussion here, the story would go as follows. When one wants—as most international legal scholars do—to make sense of and systematize the international lawmaking process, one needs to choose a paradigm through which to cognize norm-generating processes in international law and the contours of the international legal order that these norm-generating processes create. A few dominant paradigms seem to have emerged in the literature about lawmaking processes. They ought to be briefly sketched out at this introductory stage before they are further examined in the paragraphs that follow.

When it comes to cognizing international lawmaking, one of the most dominant paradigms found in the literature has been the “subjecthood” paradigm. Indeed, subjecthood has been used to cognize all the practices of international norm-generating processes in international law. Processes that could not be captured by virtue of

6. See Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183, 185 (1997) (outlining briefly the state of the prepluralized era of lawmaking).

7. See generally ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 333 (Gerald Duckworth & Co. Ltd. 1988) (“There are no preconceptual or even pretheoretical data . . .”).

8. The relativity of the cognitive tool is one of the paradigms of the inquiry carried out in Jean d'Aspremont, *Non-state Actors from the Perspective of Legal Positivism*, in PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM: MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW 22 (Jean d'Aspremont ed., 2011).

the concept of subjecthood would not qualify as international lawmaking.⁹ Subjecthood is a static model for the apprehension of international lawmaking processes. International legal scholarship on lawmaking has also given rise to another static conceptualization of lawmaking, one grounded in the “pedigree” of the norm produced. According to this paradigm, lawmaking would be any process that leads to the creation of a norm that can be ascertained as a legal rule by virtue of its pedigree.¹⁰ Such a form of staticism has proven more formal than the traditional approach, which is based on statehood, as the former has entailed a resort to a theory of formal sources.¹¹

The paradigm of subjecthood and that of formal pedigree came under the fire of the “New Haven School,” whose disciples contended that either subjecthood or pedigree must be abandoned because their inherent staticism was said not to allow one to comprehend international lawmaking processes.¹² International norm-generating processes should not be cognized on the basis of a static and arbitrary concept like subjecthood. Rather, a more dynamic cognitive tool, like that of participation, offers better cognitive tools to comprehend (the dynamics of) international lawmaking processes and their actors.¹³ This old schism between staticism—associated with subjecthood—and dynamism—associated with participation—has continued uninterrupted for the last several decades, fueling immense controversy and generating reams of repetitive scholarship.¹⁴

Against the backdrop of a seemingly irreconcilable tension between staticism and dynamism in scholarly models of international lawmaking as well as the cognitive limitations of approaches exclusively based on participation, scholars have endeavored to develop other perspectives on international lawmaking. In particular, and as will be discussed below, new conceptualizations have attempted to understand lawmaking from the standpoint of the impact of its input.¹⁵ This is the cognitive twist found in approaches informed by “global administrative law” (GAL) or the Heidelberg project’s research on international institutions exercising public authority. Others, coming to terms with the abiding divide between the abovementioned static and dynamic approaches, have attempted to overcome the debate between subjecthood, pedigree, and

9. For an overview of such an approach, see *infra* Part III.A.

10. For an overview of such an approach, see *infra* Part III.B.

11. For an outline of the emergence and evolution of that paradigm in international legal scholarship, see JEAN D’ASPREMONT, *FORMALISM AND THE SOURCES OF INTERNATIONAL LAW: A THEORY OF THE ASCERTAINMENT OF LEGAL RULES* 38–82 (2011).

12. For criticisms of static approaches, see *infra* Part III.C.

13. For an overview of such an approach, see *infra* Part III.C.

14. See *infra* Part III.C.

15. For an overview of such approaches, see *infra* Part III.D.

participation by advocating a neostatic and neoformalistic pedigree-based approach to lawmaking. The main difference with the classic static approach originates in the pedigree being itself in constant evolution and flux and constantly allowing new norm-generating processes to be elevated to lawmaking status.

As demonstrated by this introductory overview, the international legal scholarship, in its quest for a paradigm able to apprehend international norm-generating processes qualifying as lawmaking, has been oscillating between static approaches and dynamic approaches. The former are based on the author of the norm (subjecthood) or its formal origin (pedigree) whilst the latter (e.g., participation) try to capture and explain the intricate and multidimensional fluxes between the authors of the norms and the norms themselves (impact or dynamic pedigree). International legal scholars have thus been resorting to various and diverging paradigms to make sense of international lawmaking. All of these approaches will be described in further detail below.

This Article endeavors to shed some light on the reasons guiding scholars to choose one of these paradigms. After a brief outline of the mainstream empirical construction of current norm-generating processes in international law and a further detailed description of the main cognitive choices found in international legal scholarship, this Article elaborates on the driving forces behind each of the main paradigms permeating contemporary literature on international lawmaking. In doing so, this Article draws attention to the politics of empiricism and cognition with the aim of engaging in critical self-reflection on how international legal scholars and practitioners have been making sense of international lawmaking.

II. EMPIRICAL CONCORD: THE PLURALIZATION OF INTERNATIONAL LAWMAKING

This Part recalls the main traits of the contemporary pluralization of international lawmaking as it is empirically depicted in mainstream scholarship. While there seems to be a consensus on the principal characteristics of the move away from the Westphalian, state-centric lawmaking blueprint (Part II.A), some disagreement persists regarding the extent of the resilience of states as the principal legal actors (Part II.B). All in all, however, the phenomenon of pluralization has not been disputed. As the subsequent Part will demonstrate, the major source of disagreement among experts has not been their empirical model to understand the practice but rather the analytical tool that they have used to reconstruct that practice and its significance for international law as a whole.

A. Manifestations of Pluralization in the Practice of International Lawmaking

The mainstream view is that, in practice, the making of modern international law has witnessed a growing pluralization *ratione personae* for actors other than states have gradually increased their role in lawmaking processes.¹⁶ As the story goes, states have ceased to be perceived as having a monopoly on international lawmaking. It is true that this has not been a completely unprecedented phenomenon.¹⁷ Yet, this pluralization *ratione personae* of international lawmaking has become of a unique intensity.¹⁸ As a result, the idea is now commonly accepted that a myriad of actors are involved nowadays in lawmaking processes, although this does not prejudge the question of who formally holds the rights and obligations created thereby.¹⁹ Consequently, normative authority is no longer understood as being exercised by a closed circle of high-ranking officials acting on behalf of states. It is agreed that normative authority, instead, boils down to a tangle of complex procedures involving various state and non-state actors.²⁰ According to that common view, public authority is construed as having grown informal and estranged from the traditional international lawmaking processes.²¹

16. See Charnovitz, *supra* note 6, at 184 (noting the expansion of pluralization); see also BOYLE & CHINKIN, *supra* note 3, at 42–43 (outlining how pluralization has grown throughout various points in history).

17. See Charnovitz, *supra* note 6, at 184–85 (explaining that while many believe the increasing involvement of NGOs within the international community to be a “twentieth-century phenomenon,” the growth has actually been “occur[ing] for over 200 years”); see also BOYLE & CHINKIN, *supra* note 3, at 42–43 (outlining how pluralization has grown throughout various points in history); Jean d’Aspremont, *Non-State Actors in International Law: Oscillating Between Concepts and Dynamics*, in PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM: MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW 1, 4 (Jean d’Aspremont ed., 2011).

18. See BOYLE & CHINKIN, *supra* note 3, at 43 (highlighting the “exponential growth” of non-state actors participating within the international community); d’Aspremont, *Non-State Actors in International Law: Oscillating Between Concepts and Dynamics*, *supra* note 17, at 4.

19. See BOYLE & CHINKIN, *supra* note 3, at 97 (“It would be myopic to insist on the classical view of states as the sole makers of international law; rather we must recognize the multi-layered, multi-partite nature of the international law-making enterprise.”) (internal citations omitted); d’Aspremont, *Non-State Actors in International Law: Oscillating Between Concepts and Dynamics*, *supra* note 17, at 5.

20. This has sometimes been called ‘verticalization’. See JAN KLABBERS, ANNE PETERS & GEIR ULFSTEIN, *THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW* 14 (2009); d’Aspremont, *Non-State Actors in International Law: Oscillating Between Concepts and Dynamics*, *supra* note 17, at 5.

21. See Matthias Goldmann, *Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority*, 9 GERMAN L.J. 1865, 1871–79 (2008) (identifying alternative ways in which public authority is exercised at the international level); see also Armin von Bogdandy, Philipp Dann &

Compelling empirical evidence is usually produced to underpin these conclusions.²² On the basis thereof, non-state actors can be said to have been expanding their clout in international lawmaking processes while also exerting some influence in the review²³ and amendment²⁴ procedures of international treaties. It is nonetheless acknowledged in the literature that, although the degree of their influence is probably unprecedented, the involvement of non-state actors is not entirely unheard of. Indeed, in a famous article, Steve Charnovitz demonstrated that nongovernmental organizations (NGOs) have been contributing to international lawmaking processes for more than two hundred years.²⁵ Despite concurring with this finding, most scholars agree that the degree and intensity of their contribution to lawmaking has increased dramatically.²⁶

Besides the abovementioned pluralization *ratione personae* of lawmaking at the international level, other types of pluralization are mentioned in the literature. For instance, processes by virtue of which international law is made are said to have turned heterogeneous as regards to the nature and format of the instruments through which norms are produced at the international level. This diversification has been construed as the manifestation of a healthy

Matthias Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, 9 GERMAN L.J. 1375, 1387–88 (2008) (discussing external approaches to international law and differences from classic international law).

22. See generally BOYLE & CHINKIN, *supra* note 3 (providing a significant amount of empirical materials throughout their study).

23. See Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personal Mines and on Their Destruction art. 12, Sept. 18, 1997, 36 I.L.M. 1507 (entered into force Mar. 1, 1999) [hereinafter Convention on the Prohibition], available at http://www.un.org/Depts/mine/UNDocs/ban_trty.htm (noting that NGOs may participate in review procedures); Convention on Cluster Munitions art. 12, opened for signature Dec. 3, 2008, 48 I.L.M. 357 (entered into force Aug. 1, 2010), available at <http://www.clusterconvention.org/files/2011/01/Convention-ENG.pdf> (“[R]elevant non-governmental organizations may be invited to attend each Review Conference . . .”); d’Aspremont, *The Doctrinal Illusion of the Heterogeneity of International Lawmaking Processes*, *supra* note 4, at 297–312.

24. See Convention on the Prohibition, *supra* note 23, at art. 13 (“[R]elevant non-governmental organizations may be invited to attend each Amendment Conference . . .”); d’Aspremont, *The Doctrinal Illusion of the Heterogeneity of International Lawmaking Processes*, *supra* note 4, at 297–312.

25. Charnovitz, *supra* note 6, at 185; d’Aspremont, *The Doctrinal Illusion of the Heterogeneity of International Lawmaking Processes*, *supra* note 4, at 297–312.

26. See generally Gaëlle Breton-Le Goff, *NGO’s Perspectives on Non-State Actors*, in PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM 248 (Jean d’Aspremont ed., Routledge 2011) (recognizing that while “NGOs are not a new phenomenon,” recently they have been “gain[ing] in visibility and attract[ing] the attention of legal scholars”); NGOS, THE UN, & GLOBAL GOVERNANCE (T. G. Weiss & L. Gordenker eds., 1996).

pluralism or, sometimes, that of a daunting fragmentation.²⁷ The present Article does not fully develop these contentions. It only argues that there seems to have been an overall consensus on their empirical existence.

B. *Persisting State Dominance?*

While there seems to have been a consensus among authors and experts about the empirical manifestations of the pluralization of international lawmaking, some of them have argued that the types of pluralization in norm-making processes which have been mentioned above—and especially the increased participation of non-state actors—should certainly not disguise the fact that states have retained significant control over international lawmaking processes.²⁸ These scholars have argued that, in at least some contexts, states have conversely preserved their clout.²⁹ Such a preservation of state dominance, according to that view, has manifested itself in various manners. First, it may be the consequence of continuous intensive lawmaking activity through the classical treaty-making system, which remains very state-centric.³⁰ This is also visible in the steady use of existing international institutional lawmaking mechanisms where states still wield important privileges as well as influence. The best example thereof is the creation of wide-ranging and binding rules by states through the United Nations Security Council,³¹

27. See generally Martti Koskeniemi, *The Fate of Public International Law: Between Technique and Politics* 70 MOD. L. REV. 1, 2007, on the discourses about the pluralization of the substance of law.

28. d'Aspremont, *Non-State Actors in International Law: Oscillating Between Concepts and Dynamics*, *supra* note 17, at 4; see also Andrew Clapham, *Human Rights Obligations of Non-State Actors* 5–6 (2006) (“Whether globalization is really leading to the demise of the nation state is still an open question. It may be argued that, in at least some contexts, the globalization of certain decision-making processes is actually leading to a greater role for the state . . .”). This is also acknowledged by A. Peters, T. Förster & L. Koechlin, *Towards Non-state Actors as Effective, Legitimate, and Accountable Standard Setters*, in NON-STATE ACTORS AS STANDARD SETTERS 496–97 (A. Peters et al. eds., 2009); d'Aspremont, *Non-state Actors from the Perspective of Legal Positivism*, *supra* note 8, at 22–28 (outlining generally legal scholars' opinions about the pluralization of international lawmaking).

29. This is also an argument made by BOYLE & CHINKIN, *supra* note 3, at 97.

30. As an example, consider the area of international economic law (e.g., the overhaul of the international economic order through the Final Act of the 1986–1994 Uruguay Round of trade negotiations or the United Nations Framework Convention on Climate Change). Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154; United Nations Framework Convention on Climate Change, *opened for signature* May 9, 1992, 1771 U.N.T.S. 107, S. Treaty Doc. No. 102-38. See also d'Aspremont, *Non-state Actors from the Perspective of Legal Positivism*, *supra* note 8, at 22–28.

31. See generally S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (adopting a wide-ranging antiterrorism resolution); Stefan Talmon, *The Security*

including rules regulating the activities of non-state actors themselves.³²

The idea of resilience of the state amidst pluralization of international lawmaking is said not to be limited to an increased use of the classical methods of lawmaking.³³ The emergence of new types of lawmaking has arguably also reinforced the dominant position of states.³⁴ A good example can be inferred from the practice whereby individual government agencies and actors negotiate directly with their foreign partners, giving rise to new transnational regulatory frameworks (TRNs).³⁵ Indeed, the TRNs can also be read as an illustration of the extent of the power of states exercised outside traditional lawmaking frameworks.³⁶ This can be explained as the result of a deliberate endeavor by states to cast norms or standards outside the classical lawmaking processes.³⁷ This is done with a view

Council as World Legislature, 99 AM. J. INT'L L. 175 (2005) (speaking of the UN Security Council as an "international legislator"); see also d'Aspremont, *Non-State Actors in International Law: Oscillating Between Concepts and Dynamics*, *supra* note 17, at 4.

32. See, e.g., S.C. Res. 942, ¶ 7, U.N. Doc. S/RES/942 (Sept. 23, 1994) (reinforcing measures against Bosnian Serb forces); S.C. Res. 864, ¶¶ 19–21, U.N. Doc. S/RES/864 (Sept. 15, 1993) (establishing sanctions against UNITA). On this practice of the Security Council and its ability to create obligations for non-state actors, see Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, 450–51 (July 22).

33. See generally Jean d'Aspremont, *Inclusive Law-Making and Law-Enforcement Processes for an Exclusive International Legal System*, in PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM: MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW 425 (Jean d'Aspremont ed., 2011) (discussing the resiliency of the state and its ability to react and adapt).

34. *Id.* at 431.

35. See, e.g., ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER, 18–19 (2004) (explaining that a "new world order of government networks" will "compliment and strengthen" current infrastructure); Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT'L L. 1041, 1061–62 (2002–2003) (noting that national agencies can facilitate "horizontal cross-fertilization" with their foreign counterparts); see also Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 3–4 (2002–2003) (noting that contemporary international cooperation is occurring between discrete, specialized agencies of governments that are "increasingly networking with their counterparts abroad"); d'Aspremont, *Non-State Actors in International Law: Oscillating Between Concepts and Dynamics*, *supra* note 17, at 5. For some recent critical reappraisal, see Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 YALE J. INT'L L. 113, 122–24 (2009); Gregory Shaffer, *Transnational Legal Process and State Change: Opportunities and Constraints* 6–15 (New York Univ. Law Sch. Inst. for Int'l Law and Justice, Working Paper No. 2010/4, 2012), available at www.iilj.org/publications/documents/2010-4.Shaffer.pdf.

36. See SLAUGHTER, *supra* note 35, at 3–4 (discussing the thriving TRNs); d'Aspremont, *Non-State Actors in International Law: Oscillating Between Concepts and Dynamics*, *supra* note 17, at 5.

37. In the same sense, see E. Benvenisti, *Coalitions of the Willing and the Evolution of Informal International Law*, in COALITIONS OF THE WILLING –

to bypassing the rigidity and accountability constraints—although they are limited—inherent in the making of formal rules of international law.³⁸ According to that view, states remain present and influential, even in fields where they are not naturally dominant, without yielding to any accountability mechanisms.³⁹ Those recognizing the resilience of state dominance have simultaneously submitted that these developments do not necessarily contradict the unique contemporary contribution of non-state actors to lawmaking processes.⁴⁰ These two simultaneous phenomena may simply manifest a complexity never observed before.⁴¹

The idea of resilient state dominance remains controversial. At the empirical level, it is probably where most controversies are located. Yet, such limited controversies on the remaining clout of states do not suffice to obfuscate the overall consensus according to which, from an empirical perspective, international lawmaking processes have undergone dramatic pluralization. This consensus at the empirical level is, however, where the scholarly concord ends. Indeed, at the conceptual level, when it comes to making sense of international lawmaking as a whole, the international legal scholarship is riven by deep conceptual disagreements. It is the object of the following paragraphs to spell out some of these paradigmatic divides.

AVANTGARDE OR THREAT? 2 (Calliess, C. Nolte & G. Stoll eds., Göttinger Studien zum Völker- und Europarecht, Bd. 8, 2008); see also Verdier, *supra* note 35, at 171–72; d'Aspremont, *Non-State Actors in International Law: Oscillating Between Concepts and Dynamics*, *supra* note 17, at 5.

38. See Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 29 (2005) (illustrating how GAL aims to compensate for the lack of accountability of these new forms of lawmaking); see also Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EUR. J. INT'L L. 187, 195–97 (2006); Joost Pauwelyn, *Mapping the Action and Testing Concepts of Accountability and Effectiveness*, 3–9 (Project Framing Paper, May 31, 2010), available at http://www.hiil.org/assets/902/Publication_TransnationalConstitutionality_IIPPM_Framing_Paper_Pauwelyn_draft_3_1_May_2010.pdf (noting that informal international lawmaking “dispenses with certain formalities traditionally linked to international law,” making it less accountable).

39. For further discussion of this, see d'Aspremont, *Non-State Actors in International Law: Oscillating Between Concepts and Dynamics*, *supra* note 17.

40. See d'Aspremont, *Inclusive Law-Making and Law-Enforcement Processes for an Exclusive International Legal System*, *supra* note 33, at 430–31 (noting the importance of non-state actors in the international lawmaking processes and that “states remain the ultimate law-makers”).

41. d'Aspremont, *Non-State Actors in International Law: Oscillating Between Concepts and Dynamics*, *supra* note 17, at 1.

III. CONCEPTUAL DISCORD: THE PARADIGMATIC DIVIDES IN THE COGNITION OF INTERNATIONAL LAWMAKING

The previous Part argued that, notwithstanding the limited debates as to the actual extent of the resilience of state dominance, the finding that international lawmaking is undergoing a sweeping pluralization has mustered a wide consensus among observers, experts, scholars, and practitioners. How they make sense of it, however, shows great divergences among them. Indeed, despite concurring on their empirical finding, observers, experts, scholars, and practitioners disagree in the treatment thereof and, in particular, in the way they cognize the multiplicity of actors whose participation has been empirically apprehended. This Part seeks to outline some of the main cognitive discrepancies found in the literature.

As was mentioned in the introductory observations of this Article, five main approaches to lawmaking seem to permeate the literature: a static approach grounded in the concept of subjecthood, another static understanding informed by the concept of pedigree, a dynamic conception of lawmaking based on participation, a dynamic conception based on the exercise of public authority, and, eventually, a perspective that—while primarily static—aims at bridging the pedigree-based conception of lawmaking with social processes. These approaches will be introduced here in the chronological order of their emergence in international legal scholarship. Being the traditional cognitive take on norm-generating processes, subjecthood and pedigree are the first forms of cognition of international lawmaking that ought to be mentioned (Part III.A and Part III.B). Because the conceptions based on participation arose in reaction to static approaches, they are subsequently examined (Part III.C). Because they tried to offset the cognitive limitations of participation-based conceptions of lawmaking while trying to accommodate greater dynamism, output-based perspectives (Part III.D) and neoformalist pedigree-based approaches (Part III.E) ought to be mentioned last.

A. Subject-Based Approaches to Lawmaking

The subject-based approach to lawmaking seems to have been ingrained in the very early systematization of international law.⁴² Indeed, the appellation *international law* directly refers to its main “fabricants,” for it is this reference to nation-states as the makers of international law that prodded Jeremy Bentham’s *An Introduction to*

42. For a historical account of the concept of subject, see the fascinating work of JANNE E. NIJMAN, *THE CONCEPT OF INTERNATIONAL LEGAL PERSONALITY: AN INQUIRY INTO THE HISTORY AND THEORY OF INTERNATIONAL LAW* (2004).

the *Principles of Morals and Legislation* to coin the expression *international law*.⁴³

According to this approach, the makers of international law were deemed—originally the sole—subjects of international law in that they enjoyed legal personality. A correlation was thus established between states as the makers of international law and subjecthood.⁴⁴ In this sense, “[i]nternational law is conceived of as horizontal law, in which the subjects of the law are also the makers of the law.”⁴⁵ The kinship so established between prominence in lawmaking and subjecthood constituted a prejudice that permeated the legal scholarship for more than a century. As a result, lawmaking processes had always been perceived—despite being a common object of study in political science and international relations⁴⁶—as falling outside the scope of legal scholarly inquiries.⁴⁷ Lawmaking was seen as a matter for subjects of international law. An entity not qualifying as a subject could not claim to be participating in lawmaking. Interestingly, it is this very prejudice between the prominent lawmaking role of states and subjecthood that long barred the recognition of an international legal personality for international

43. See JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 325–27 (MacMillan & Co. 2005) (using the phrase *international law* and discussing the origin of international law).

44. See *Russia v. Turkey*, 2 R.I.A.A. 829, 870 (Perm. Ct. Arb. 1912) (illustrating the correlation between states as makers of international law and subjecthood); see also J. L. BRIERLY, *THE LAW OF NATIONS OXFORD* 1, 41 (Humphrey Waldo ed., 6th ed. 1963) (noting that states hold the power to make international law and are inherently subject to it); T. J. LAWRENCE, *THE PRINCIPLES OF INTERNATIONAL LAW* 1–14 (McMillan & Co., 7th ed. 1927) (discussing the notion that all states, particularly those “civilized states” that make international law, are subject to international law); L. OPPENHEIM, 1 *INTERNATIONAL LAW* 15–19 (R.F. Roxburgh ed., 8th ed. 1955) (“Since the Law of Nations is based on the common consent of individual States, States are the principal subjects of International Law.”). Compare CHARLES E. ROUSSEAU, 1 *PRINCIPES GÉNÉRAUX DU DROIT INTERNATIONAL PUBLIC* 1, 3 (Éditions A. Pedone 1944) (qualifying the affirmation that international law only regulates relations between states), with Hans Kelsen, *Théorie générale du droit international public*, 42 *Recueil des Cours* pt. IV 182, 183 (1932) (noting that international law has no inherent “domaine de validité matériel”).

45. Philip Allott, *The True Function of Law in the International Community*, 5 *IND. J. GLOBAL LEGAL STUD.* 391, 404 (1998).

46. See, e.g., *GOVERNANCE IN A GLOBALIZING WORLD* (Joseph S. Nye & John D. Donahue eds., 2000) (illustrating how the lawmaking process has been a common object of study in political science); *GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS* (James Rosenau & Ernst-Otto Czempiel eds., 1992) (same); JAMES ROSENAU, *THE STUDY OF WORLD POLITICS*, 2 *GLOBALIZATION AND GOVERNANCE* (Routledge 2006) (same); Joseph S. Nye & Robert O. Keohane, *Transnational Relations and World Politics: An Introduction*, 25 *INT’L ORG.* 329 (1971) (same).

47. See d’Aspremont, *Non-State Actors From the Perspective of Legal Positivism*, *supra* note 8, at 24 (illustrating that lawmaking processes in the past were not discussed in legal scholarly work).

organizations.⁴⁸ Indeed, for several decades, scholars and judges resisted the claim that international organizations could enjoy subjecthood for reasons pertaining to the abovementioned lawmaking prejudice.⁴⁹ It is in this sense that, in the opinion of this author, the 1949 International Court of Justice (ICJ) advisory opinion on the *Reparation for Injuries Suffered in the Service of the United Nations (Reparations)* produced a liberating effect.⁵⁰ This opinion formed a “constitutionalizing”⁵¹ breaking point because lawmaking and subjecthood came to be severed from one another. Indeed, in the case of international organizations, subjecthood was accordingly no longer derived from their lawmaking role but rather from their functions (the objective school) or the will of their creators (the subjective school).⁵² The severance between lawmaking and subjecthood performed in the mid-twentieth century bore two main consequences that ought to be mentioned here.

First, as a result of the disconnection of legal personality from lawmaking, the question of subjecthood came to arise with respect to all kinds of other actors who did not directly participate in lawmaking. In addition to international organizations having legal personality, a number of other non-state actors came to be recognized as international legal persons, although this has been perceived as an indirect consequence stemming from them having rights and duties, rather than the consequence of direct conferral of international legal personality upon non-state actors.⁵³ This has thus not put into question the state-centricism of the pre-*Reparations* era. Indeed, it was not contested that the rights and obligations that non-state actors may bear have arguably remained the outcome of lawmaking

48. See David J. Bederman, *The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel*, 36 VA. J. INT'L L. 275, 277 (1995–1996) (discussing the international legal personality of international organizations).

49. See R. Collins, *Classical Positivism in International Law Revisited*, in INTERNATIONAL LEGAL POSITIVISM IN A POST-MODERN WORLD (Jean d'Aspremont & Jörg Kammerhofer eds., forthcoming 2013) (providing historical narratives on the development of international law).

50. *Reparations of Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 174–89 (Apr. 11).

51. See Bederman, *supra* note 48, at 277–80 (providing an in-depth discussion of *Reparations*).

52. For some critical remarks, see Richard Collins, *Non-State Actors in International Institutional Law*, in PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM: MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW 311, 315–17 (Jean d'Aspremont ed., 2011).

53. This has led some scholars to describe the question of international legal personality as “circular,” “sterile,” and boiling down to an “intellectual prison.” See August Reinisch, *The Changing International Legal Framework for Dealing with Non-State Actors*, in NON-STATE ACTORS AND HUMAN RIGHTS 37, 69–72 (Philip Alston ed., 2005); Clapham, *supra* note 28, at 59–63; d'Aspremont, *Non-state Actors from the Perspective of Legal Positivism*, *supra* note 8, at 25.

processes where the dominance of the state is central.⁵⁴ Above all, it was continuously said that a formal international legal personality derived from their rights and duties could well be recognized to these actors but that this falls short of formally elevating them to actual lawmakers.⁵⁵ Thus, the severance between legal personality and lawmaking allowed the recognition of a legal personality to actors deprived of any major lawmaking powers.

The second consequence of the mid-twentieth century dissociation between lawmaking and subjecthood is the exact opposite. It is not that legal personality was recognized to actors without lawmaking powers. It is rather that lawmaking roles were recognized for a new range of actors not necessarily endowed with legal personality. In the post-*Reparations* era, participation in lawmaking does not turn the actor concerned into a new legal subject.⁵⁶

It must be acknowledged here that, while the severance between lawmaking and subjecthood quickly gained widespread acceptance, some reactionaries continued to deduct legal status from participation in lawmaking, not in the form of subjecthood but rather in the form of a formal lawmaker status. This "light subjecthood thesis" is at the heart of these legal scholars who inferred from developments of a new international lawmaking framework, described in Part II, a formal status of lawmaker.⁵⁷ In the same vein, a significant group of scholars, even though they recognize that that contemporary lawmaking processes are still fundamentally state-centric, argue that granting a lawmaking status to non-state actors should at least be promoted and vindicated.⁵⁸ A significant number of international

54. d'Aspremont, *The Doctrinal Illusion of the Heterogeneity of International Lawmaking Processes* *supra* note 4, at 303–07.

55. See, e.g., Georges Abi-Saab, *Cours Général de Droit International Public*, in 207, pt. VIII RECUEIL DES COURS 39 (1987); d'Aspremont, *Non-state Actors from the Perspective of Legal Positivism*, *supra* note 8, at 25.

56. On this point, see d'Aspremont, *The Doctrinal Illusion of the Heterogeneity of International Lawmaking Processes* *supra* note 4, at 305–09.

57. See, e.g., Menno T. Kamminga, *The Evolving Status of NGOs Under International Law: A Threat to the Inter-State System?*, in NON-STATE ACTORS AND HUMAN RIGHTS 93, 109–11 (Philip Alston ed., 2005) (noting that, while their role still is weak, NGOs are taking a more formal role in the realm of international lawmaking); Gunther Teubner, *Global Bukovina: Legal Pluralism in the World Society*, in GLOBAL LAW WITHOUT A STATE 3, 13–14 (Gunther Teubner ed., 1997) (referring to contracting in the global context, "as [a] source of law . . . on equal footing with judge-made law and legislation"); W. Michael Reisman, *Unilateral Action and the Transformation of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 EUR. J. INT'L L. 3, 16–18 (2000) (highlighting the self-legitimizing attitude of interveners purporting to remedy human rights violations but not acting with any formal legal authority).

58. See generally ANTHONY CLARK AREND, LEGAL RULES AND INTERNATIONAL SOCIETY 189–97 (1999) (encouraging interdisciplinary cooperation to identify non-state actors participating in "authoritative practice" whose activities are "intended to give

legal scholars thus advocate the idea of a lawmaking role for non-state actors.⁵⁹ This continuous scholarly appeal of the junction between lawmaking and personality has, however, remained too isolated and marginal. This is why it is not further explored here.

For the sake of the argument made here, it must be pointed out that the main outcome of such a perspective is that the pluralization mentioned in Part II could be cognized short of legal personality. Said differently, the subject-based model, once severed from lawmaking, has allowed its proponents to more easily recognize the pluralization of international lawmaking processes.

Yet, even severed from legal personality, such a subject-based approach remained burdened with cognitive deficiencism, which explains its limited success in the literature. Indeed, it is argued here that it is not only that such an approach fails to capture norm-generative activities between subjects that are not legal persons. It is also that, even with respect to these norm-generating processes between legal persons, the cognitive value of subjecthood is limited. Indeed, it has always been close to impossible to formally certify the existence of subjects of international law for their identification has inextricably remained immune from any apprehension through formal categories, which can be understood as much the cause as the consequence of the fundamentally political nature of the processes of identification of subjects on the international plane. The identification of states should suffice to illustrate this point. Indeed, in this respect, international law continues to be almost exclusively dependent on recognition. International legal scholars—who classically resent such political contingencies—have nonetheless long tried to make the point that the determination of the subjects of international law is a matter for international law.⁶⁰ Such a legalist position has informed the scholarly construction of the three- or four-element theories of statehood.⁶¹ Even though some international legal

rise to the creation of legal rules”); Richard Falk & Andrew Strauss, *On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty*, 36 STAN. J. INT’L L. 191 (2000) (advocating for a popularly elected global legislative body); d’Aspremont, *Non-state Actors from the Perspective of Legal Positivism*, *supra* note 8, at 26.

59. It is also particularly well illustrated by the fact that scholars have witnessed the creation of a special law journal devoted to the question (*Non-State Actors and International Law*—published by Brill until 2005) or that of a book series initiated by Math Noortmann (*Non-State Actors in International Law, Politics and Governance*—published by Ashgate).

60. See, e.g., JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 40–42 (Clarendon Press 2d ed. 2006) (stating that “statehood is . . . a central concept of international law . . .” and setting out five “exclusive and general legal characteristics of States”); d’Aspremont, *Non-State Actors in International Law: Oscillating Between Concepts and Dynamics*, *supra* note 17, at 2.

61. For a critical presentation, see Thomas Grant, *Defining Statehood: The Montevideo Convention and Its Discontents*, 37 COLUM. J. TRANSNAT’L L. 403 (1999).

rules, like those pertaining to self-determination, human rights, and democracy, may occasionally impinge on the formation of new subjects and the gender of the newborn,⁶² this mirage—which I call the Montevideo mirage⁶³—has not sufficed to make identification of the subjects of international law a formal process and rein in the politics of subject certification.⁶⁴ As far as non-state actors are concerned, their identification may prove even more elusive. It is not difficult to understand that this impossibility to formally certify the existence of subjects of international law, aggravated by the overarching determinative roles of recognition and the illusion of formalism behind the theories of statehood, has reinforced the move away from the subject-based approach to lawmaking and paved the way for other approaches to lawmaking. Such alternative approaches are now examined.

B. Static Pedigree-Based Approaches to Lawmaking

Either from the very beginning or as a result of the abovementioned severance of lawmaking power and subjecthood, many international legal scholars have long shied away from approaching international lawmaking from the vantage point of the legal personality. Rather, they argue that it is only as soon as the normative product of a process is identified as law that this process can properly be considered a lawmaking process. In that sense, qualification as a lawmaking process hinges on the normative product thereof. Only when the latter is identified by virtue of its pedigree as law can the norm-generating process concerned be considered lawmaking. This approach to lawmaking, albeit not the initial one, is possibly the most dominant one.⁶⁵

62. See generally Jean d'Aspremont, *Legitimacy of Governments in the Age of Democracy*, 38 N.Y.U. J. INT'L L. & POL. 877 (2006) (drawing a distinction between "legitimacy of origin" and "legitimacy of exercise" and discussing changes in legitimacy through the "qualification" of new governments and "disqualification" of failed governments); Jean d'Aspremont, *Post-Conflict Administrations as Democracy-Building Instruments*, 9 CHI. J. INT'L L. 1 (2008) (analyzing "the use of international administrations of territories to create or to reconstruct democratic states"); Jean d'Aspremont, *Regulating Statehood: The Kosovo Status Settlement*, 20 LEIDEN J. INT'L L. 649 (2007) (discussing the status settlement "of unprecedented extent" in the 2007 UN-proposed regulation of statehood for Kosovo); d'Aspremont, *Non-State Actors in International Law: Oscillating Between Concepts and Dynamics*, *supra* note 17, at 2.

63. By reference to the famous 1933 *Montevideo Convention on the Rights and Duties of States* (the Convention), which, for the sake of the Convention, elaborates on the criteria an entity should satisfy to be considered a state. d'Aspremont, *Non-State Actors in International Law: Oscillating Between Concepts and Dynamics*, *supra* note 17, at 1–2.

64. *Id.*

65. For an overview of that approach in the contemporary legal scholarship, see D'ASPREMONT, *FORMALISM*, *supra* note 11, at ch. 3.

This view came to prevail in twentieth-century international legal scholarship. Scholars of the twentieth century, having resolutely retreated from the dualism of natural law, endorsed a rule-based approach or source-based approach of law identification.⁶⁶ In their great majority, these twentieth-century scholars did not shed the idea of their predecessors that international law rests on the consent of the primary lawmakers. Subject to a few exceptions,⁶⁷ they agreed that natural law does not constitute a source of law per se, although the content of rules may reflect some principles of morality.⁶⁸ The consensus on the idea that the will of the state is the most obvious *material source* of law⁶⁹ remained unchallenged.⁷⁰ The main difference between nineteenth-century and twentieth-century international legal scholars lies in the fact that the latter tried to

66. See, e.g., T. J. LAWRENCE, *THE PRINCIPLES OF INTERNATIONAL LAW* 1–14 (Percy H. Winfield ed., 7th ed. 1923) (stating that international law is a “historical investigation of what [the rules between states] are” rather than an “*a priori* inquiry into what the rules of international intercourse ought to be” and that states adopt “rules which can be shown to have been adopted in similar circumstances by all or most states” rather than rules “deduced from the consideration of absolute rights”); L. OPPENHEIM, *2 INTERNATIONAL LAW: A TREATISE* 92 (1st ed. 1905) (“We know nowadays that a Law of Nature does not exist . . . Only a positive Law of Nations can be a branch of the science of law.”); Paul Guggenheim, *What is Positive International Law?*, in *LAW AND POLITICS IN THE WORLD COMMUNITY* 15 (George A. Lipsky ed., 1953) (arguing for the autonomy of positive law over the natural law doctrine and the sociological theory of international law). See generally G. SCHWARZENBERGER, *INTERNATIONAL LAW* (3d ed. 1957) (discussing the types of institutions in international law); L. Oppenheim, *The Science of International Law: Its Task and Method*, 2 *AM. J. INT’L L.* 315 (1908) (“The rules of the present international law are to a great extent not written rules, but based on custom.”).

67. See G. Fitzmaurice, *Some Problems Regarding the Formal Sources of International Law*, in *SYMBOLAE VERZIJL* 161–68 (Martinus Nijhoff ed., 1958) (Fr.) (exploring natural law as a formal source of law); L. LE FUR, *La théorie du droit naturel depuis le XVII^{ème} siècle et la doctrine moderne* [*The Theory of Natural Law Since the Seventeenth Century and the Modern Doctrine*], 18 *COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW*, 259–442 (1927) (Fr.).

68. See J. Basdevant, *Règles générales du droit de la paix* [*General Rules of Law of Peace*], 58 *COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW* 477–78 (1936) (Fr.). This came to be reflected in the case law as well. See the statement of the ICJ in the South West Africa case: “It is a court of law, and can take account of moral principles only in so far as these are given sufficient expression in legal form.” *South West Africa* (Eth. v. S. Afr.; Liber. v. S. Afr.), Second Phase, Judgment, 1966 I.C.J. 6, ¶ 49 (July 18).

69. On the distinction between material and formal sources, see L. OPPENHEIM, *1 INTERNATIONAL LAW* 24 (8th ed. 1955). See also C. ROUSSEAU, *1 PRINCIPES GÉNÉRAUX DU DROIT INTERNATIONAL PUBLIC* [GENERAL PRINCIPLES OF PUBLIC INTERNATIONAL LAW] 106–08 (Pedone 1944) (Fr.); P. E. Corbett, *The Consent of States and the Sources of the Law of Nations*, 5 *BRIT. Y.B. INT’L L.* 20–30 (1925) (discussing the sources of international law); Fitzmaurice, *supra* note 67, at 153.

70. For a more recent manifestation of the voluntary nature of international law, see generally P. Weil, *Towards Normative Relativity in International Law?*, 77 *AM. J. INT’L L.* 413 (1983). For a judicial expression of that idea, see S.S. Lotus, *Collection of Judgments*, 1927 P.C.I.J. (ser. A) No.10, at 18 (Sept. 7).

devise formal law-ascertaining criteria with which to capture state consent.⁷¹ This is precisely how twentieth-century scholars ended up grounding the identification of international legal rules in a theory of allegedly formal sources⁷²—a construction that continues to enjoy strong support among twenty-first-century scholars.⁷³ In their view, international legal rules stem from the will of states expressed through one of the formal sources of international law. The systemic character of the theory of the sources, which they elaborated, proved instrumental in their vision of international law as constituting a system.⁷⁴ It simultaneously allowed international lawmaking to be captured through prisms alien to legal personality because only the formal source of law—and the relevant pedigree associated with each source—is relevant for the apprehension of international lawmaking.

It is true that, among those scholars who abide by such a source-based approach to lawmaking, there has not been a consensus on the exact sources—the pedigree inherent in each of them—that ought to be recognized as the main cognitive tool to capture international lawmaking. Although being a mere list of the applicable law of a given judicial body,⁷⁵ the endless debate about the ambit, meaning, and authority of the list of admitted sources of Article 38 of the Statute of the Permanent Court of International Justice and later of the ICJ⁷⁶ has been very symptomatic of these remaining disagreements. Certainly, here is not the place to revisit these controversies.

More important is to emphasize the consequences of such a dominant pedigree-based approach to the cognition of international lawmaking. It is argued here that, like the subjecthood perspective,

71. See generally O.A. ELIAS & C.L. LIM, *THE PARADOX OF CONSENSUALISM IN INTERNATIONAL LAW* (1998) (refining the theory of consent).

72. See Alain Pellet, *Cours Général: le Droit International entre souveraineté et communauté internationale* [General Course: International Law between Sovereignty and International Community] (2007) (Fr.); 2 ANUÁRIO BRASILEIRO DE DIREITO INTERNACIONAL [BRAZILIAN YEARBOOK OF INTERNATIONAL LAW] 12, 15, 19, 31 (2007) (Braz.).

73. See, e.g., ALEXANDER ORAKHELASHVILI, *THE INTERPRETATION OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW* 51–60 (2008) (discussing the “threshold of legal regulation in international law”).

74. Likewise, it cannot be excluded that the practice of law-applying authorities will itself yield contradictions. That does not bar the practice from providing a meaning to law-ascertainment criteria. See, e.g., Anne-Charlotte Martineau, *The Rhetoric of Fragmentation: Fear and Faith in International Law*, 22 LEIDEN J. INT’L L. 1, 7–8 (2009) (discussing unity and diversity in the systematic formulation of international law).

75. See Alain Pellet, *Article 38*, in *THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY* 731–870 (Andreas Zimmermann et al. eds., 2d ed. 2012).

76. On the controversies that occurred during the drafting process of Article 38, see THOMAS SKOUTERIS, *THE NOTION OF PROGRESS IN INTERNATIONAL LAW DISCOURSE* 121–26 (2010).

the pedigree-based approach is very exclusionary. As long as the norm produced is not formally ascertainable as law, the process of its creation will not be recognized as a formal lawmaking process—and its epistemic interest will be deemed very limited.

Likewise, it is worth realizing that such an approach to lawmaking rests on an *ex post facto* reconstruction. Indeed, it is only once a given rule is recognized as a rule of law that the process leading thereto will be endowed with the status of a lawmaking process. For instance, if an agreement is recognized as a treaty, the negotiations and the—formal or informal—process preceding that agreement will be elevated into a treaty-making process.

It is not difficult to understand that, as a result of these cognitive effects of the pedigree-based approach to international lawmaking, the explanatory virtue of such a static approach to lawmaking, irrespective of its other merits—for instance, in terms of rule-ascertainment⁷⁷—remains limited. As is well-known, these explanatory and descriptive deficiencies led to the emergence of more dynamic approaches grounded in the concept of participation.

C. Dynamic Participation-Based Approaches to Lawmaking

The explanatory and descriptive handicaps of the static approach to lawmaking, whether based on subjecthood or pedigree, have led, in the second half of the twentieth century, to a move away from any formal category to describe lawmaking. This turn—sometimes described as the instrumentalist turn⁷⁸—came to be embodied by the famous scholars at Yale Law School in New Haven, Connecticut. The New Haven School is premised on the inability of formal concepts—whether subjecthood or pedigree—to describe the multiple facets of lawmaking or capture the great variety of legal actors involved therein. Scholars affiliated with the New Haven School invite international legal scholars to move away from any attempt to formally identify the international legal subjects (and from the correlative concept of legal personality) and, rather, to espouse the far more intricate and multilayered notion of “participants.” They contend that the static notion of subject as well as that of pedigree of rules are too narrow to capture the various aspects of lawmaking processes and that a more dynamic concept like that of participation should be embraced with a view to apprehending these various fluxes in which law originates. Such a contention was of course not accidental. It was the result of their conceptual assumption that law

77. On the question of law ascertainment, see generally D'ASPROMONT, *FORMALISM*, *supra* note 11. See also *id.* at chs. 1, 2.

78. See Martti Koskenniemi, *What is International Law For?*, in *INTERNATIONAL LAW* 57–81 (Malcolm D. Evans ed., 2d ed. 2006).

is primarily a process of decision making rather than a defined set of rules and obligations.⁷⁹ According to Myles S. McDougal, international law is

a comprehensive process of authoritative decision in which rules are continuously made and remade; that the function of the rules of international law is to communicate the perspectives (demands, identifications and expectations) of the peoples of the world about this comprehensive process of decision; and that the rational application of these rules in particular instances requires their interpretation, like that of any other communication, in terms of who is using them, with respect to whom, for what purposes (major and minor), and in what context.⁸⁰

Worded differently, international law is "a flow of decision in which community prescriptions are formulated, invalidated, and in fact applied."⁸¹ In the same vein, Rosalyn Higgins sees international law as "the whole process of competent persons making authoritative decisions in response to claims which various parties are pressing upon them, in respect of various views and interests."⁸² In sum, international law is accordingly regarded as a comprehensive process of decision making rather than as a defined set of rules and obligations.⁸³ In the context of this Article, it will not come as a surprise that, if law is envisaged as a process, scholars are brought to

79. See generally HAROLD D. LASSWELL & MYRES S. MCDUGAL, JURISPRUDENCE FOR A FREE SOCIETY (1992) (articulating and exploring the deliberative, problem-solving, and decision-making purposes of law); MYRES S. MCDUGAL & WILLIAM MICHAEL REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 5 (1980); Myres S. McDougal, *International Law and the Future*, 50 MISS. L.J. 259 (1979) ("In its most useful conception . . . law is regarded as a process of authoritative decision through which the members of a community seek to clarify and secure their common interests."); Myres S. McDougal, *International Law, Power, and Policy*, 82 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 133 (1953); Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *Theories about International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188 (1968) (discussing the role of decisionmakers and scholars in choosing a plan of international jurisprudence); d'Aspremont, *Non-State Actors in International Law: Oscillating Between Concepts and Dynamics*, *supra* note 17, at 2.

80. Myres S. McDougal, *A Footnote*, 57 AM. J. INT'L L. 383 (1963).

81. McDougal, *Law, Power, and Policy*, *supra* note 79, at 181.

82. Rosalyn Higgins, *Policy Considerations and the International Judicial Process*, 17 INT'L & COMP. L.Q. 58, 59 (1968).

83. See generally LASSWELL & MCDUGAL, JURISPRUDENCE FOR A FREE SOCIETY, *supra* note 79 (articulating and exploring the deliberative, problem-solving, and decision-making purposes of law); MCDUGAL & REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE, *supra* note 79; McDougal, *International Law and the Future*, *supra* note 79 ("In its most useful conception . . . law is regarded as a process of authoritative decision through which the members of a community seek to clarify and secure their common interests . . ."); McDougal, *International Law, Power, and Policy*, *supra* note 80 (discussing the role of decision makers and scholars); McDougal et al., *Theories about International Law: Prologue to a Configurative Jurisprudence*, *supra* note 79.

observe a more complex field of inquiry that requires a different type of sophistication and more dynamic concepts, like that of participation.⁸⁴

While it brought about a renewed interest in process-based understandings and the cross-disciplinary perspectives that accompanied them, the New Haven School approach was never immune from criticism. Some of these broadsides may explain why the policy-oriented approach can be seen as having failed to thwart the adherence to formal law ascertainment that has dominated mainstream international legal scholarship, at least until recently.⁸⁵ It is noteworthy that a great deal of the criticism leveled against the process-based approach of the New Haven School originated in the suspicion that its proponents were in collusion with American foreign policy decision makers. According to that criticism, the New Haven School was geared toward the legitimization of American foreign policy.⁸⁶ If this is true, the New Haven School shows itself vulnerable to the same criticisms as naturalism.⁸⁷ Others have objected that the New Haven approach does not provide enough guidance as to whether a given behavior is wrongful or not.⁸⁸ For if the policy-oriented schools understand the “authoritative” character of the process so broadly, then international law comes to be indiscriminately encapsulating of any decision made by any international decision maker and generates a lot of uncertainty.⁸⁹

84. On the idea of participation, see d’Aspremont, *Non-State Actors in International Law: Oscillating Between Concepts and Dynamics*, *supra* note 17, at 1–2.

85. See the remarks of R. A. Falk, according to whom the New Haven School cannot survive the vision of its founders. See R.A. Falk, *Casting the Spell: The New Haven School of International Law*, 104 *YALE L.J.* 1991, 1997 (1995).

86. This has famously been explained by James Hathaway, *America, Defender of Democratic Legitimacy*, 11 *EUR. J. INT’L L.* 121, 130 (2000). In the same sense, see JAMES HATHAWAY, *RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 20 (2005); Falk, *supra* note 85; Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century, General Course on Public International Law*, in 281 *RECUEIL DES COURS* 10, 26–29 (1999).

87. See Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 *HARV. INT’L L.J.* 81, 86 (1991) (pointing out that “the [p]olicy-approach could be collapsed into naturalism” and noting the criticisms that emerge because of this); Hathaway, *America, Defender of Democratic Legitimacy*, *supra* note 86, at 128 (stating that the New Haven School depletes international law of the certainty required for meaningful accountability); HATHAWAY, *RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW*, *supra* note 86, at 21 (“The policy-oriented school of international law has thus spawned a new version of natural law thinking under which the will of powerful states is simply substituted for that of God or nature.”).

88. HATHAWAY, *RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW*, *supra* note 86, at 22. For a tentative rebuttal of that type of criticism, see ROSLYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 8 (1995).

89. See Anthony D’Amato, *Is International Law Really Law?*, 79 *NW. U. L. REV.* 1293, 1302 (1984–1985) (asserting that the New Haven School approach comes perilously close to stating that any international contention, whether or not couched in legal language, becomes law).

Such uncertainty can preclude international law from offering “meaningful accountability.”⁹⁰ The ensuing arbitrariness cannot be avoided without returning to a rule-based approach.⁹¹

Whatever the actual success of the New Haven School, its legacy, when it comes to cognizing lawmaking, is dramatic. Indeed, the sweeping move toward the study of lawmaking as a set of processes rather than through the lens of formal subjects or lawmakers is a move that can partly be attributed to the influence wielded by schools like the New Haven School.⁹² Indeed, with the exception of the specific difficulties of international convention-making processes, lawmaking by international organizations, and other limited exceptions, lawmaking processes, according to the static approaches described above, had always been understood—despite being a common object of study in political science and international relations⁹³—as situating themselves outside the ambit of legal scholarly inquiries.⁹⁴ In that sense, the spectrum of cognition brought

90. HATHAWAY, RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW, *supra* note 86, at 18.

91. See Martti Koskenniemi, *International Law in a Post-Realist Era*, 16 AUSTL. Y.B. INT'L L. 1, 8 (1995) (“We have recourse to legal rules precisely because organizing social life directly on values turned out to be impossible; values are too general as policy guidelines when formulated so that all would agree.”).

92. See generally ABRAM CHAYES, THOMAS EHRLICH & ANDREAS F. LOWENFELD, INTERNATIONAL LEGAL PROCESS: MATERIALS FOR AN INTRODUCTORY COURSE (1968) (collecting problems and examples for an introductory international law course that detail international legal processes). See Mary Ellen O’Connell, *New International Legal Process*, 93 AM. J. INT’L L. 334, 349 (1999) (noting that the “International Legal Process” shares much with the New Haven approach but can be distinguished in “ways similar to the distinctions American legal process scholars drew between themselves and the legal realists”); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2642–43 (1997) (discussing the various iterations of the legal process in international law theory); see also Harold Hongju Koh, *Bringing International Law Home*, 35 HOUS. L. REV. 623, 653 (1998) (arguing that international law acquires “stickiness” and “obedience” through the transnational legal process, which consists of a repeated cycle of interaction, internalization, and interpretation).

93. See Robert O. Keohane & Joseph S. Nye, *Transnational Relations and World Politics: An Introduction*, 25 INT’L ORG. 329, 332–33 (1971) (differentiating “interstate” actions from “transnational” actions and actors); GOVERNANCE IN A GLOBALIZING WORLD (Joseph S. Nye & John D. Donahue eds., 2000) (collecting various studies of international treaty-making and ordering processes); GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS (James Rosenau & Ernst-Otto Czempiel eds., 1992) (providing sources that demonstrate how governance occurs in world politics); JAMES ROSENAU, 2 THE STUDY OF WORLD POLITICS: GLOBALIZATION AND GOVERNANCE 1–3 (2006) (collecting sources detailing the dynamics and governance of globalization in the post–Cold War world); d’Aspremont, *Non-State Actors in International Law: Oscillating Between Concepts and Dynamics*, *supra* note 17, at 6.

94. See d’Aspremont, *Non-State Actors From the Perspective of Legal Positivism*, *supra* note 8, at 31 (explaining the important role of international legal scholars as the “grammarians” of the language of international law).

about by the New Haven School dramatically outpaced that of the static subject- and pedigree-based approaches mentioned above.

The consequences of such a new cognitive approach have been wide-ranging. Indeed, once scholars espousing a participants-based approach eventually elevated lawmaking processes—or standard setting⁹⁵—into a lofty topic worthy of scholarly research,⁹⁶ attention turned to the participation of actors who cannot be formally considered legal subjects. As a result, in only a few decades, international legal scholars massively moved to the study of non-state actors. Such a move was accompanied by a deformalization of international law-ascertainment indicators,⁹⁷ which came to harmfully bear upon the authority and normative character of international law as well as the ability of legal scholarship to produce meaningful knowledge.⁹⁸ This being said, irrespective of its consequences in terms of the authority and normativity of international law and of the international legal scholarship, a move away from a scholarship intensively resorting to static concepts has allowed international lawyers to zero in on this whole series of new participants in international lawmaking processes.⁹⁹

95. See generally NON-STATE ACTORS AS STANDARD SETTERS (A. Peters et al. eds., 2009) (discussing the increasing role of non-state actors in standard setting).

96. For some classical studies on international lawmaking processes, see DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING (R. Wolfrum & V. Röben eds., 2005); BOYLE & CHINKIN, *supra* note 3.

97. See, e.g., A. Peters, T. Förster & L. Koechlin, *Towards Non-State Actors as Effective, Legitimate, and Accountable Standard Setters*, in NON-STATE ACTORS AS STANDARD SETTERS 550–51 (A. Peters et al. eds., 2009) (“[T]he globalisation of law has created a multitude of decentred lawmaking processes in various sectors of civil society, independently of nation-states.”) (internal quotations omitted); d’Aspremont, *Non-State Actors in International Law: Oscillating Between Concepts and Dynamics*, *supra* note 17, at 7.

98. For an evaluation of this deformalization of law-ascertainment processes, see generally Jean d’Aspremont, *The Politics of Deformalization in International Law*, 3 GOETTINGEN J. INT’L L. 503 (2011). See also d’Aspremont, *Non-State Actors in International Law: Oscillating Between Concepts and Dynamics*, *supra* note 17, at 7.

99. See, e.g., NON-STATE ACTOR DYNAMICS IN INTERNATIONAL LAW: FROM LAW-TAKERS TO LAW-MAKERS 1–5 (Math Noorthmann & Cedric Ryngaert eds., 2010) (collecting sources dealing with transnational corporations, corporate social responsibility, the imposition of international duties, international legal status, contemporary world society, and international lawmaking); NON-STATE ACTORS AS STANDARD SETTERS, *supra* note 95 (discussing the increasing role of non-state actors in standard setting); NON-STATE ACTORS AND INTERNATIONAL LAW (Andrea Bianchi ed., 2009) (collecting sources that detail the roles played by non-state actors in regards to the making and studying of international law); d’Aspremont, *Non-State Actors in International Law: Oscillating Between Concepts and Dynamics*, *supra* note 17, at 7.

D. Dynamic Output-Based Approaches to Lawmaking

Against the backdrop of the cognitive limitations of the approaches to international lawmaking based on subject, pedigree, or participation, new models of cognition of international lawmaking have emerged in the literature focusing on the output of norm-generating processes.¹⁰⁰ Although not directly centered on international law but on the new forms of contemporary norm making, this is also the understanding found in the Heidelberg research project entitled the *Exercise of Public Authority by International Institutions*¹⁰¹ and GAL,¹⁰² which cognize norm-generating processes by virtue of the impact of the norm.

From such an output-based perspective, what matters is “whether and how the subjects of norms, rules, and standards come to accept those norms, rules, and standards, . . . [and] if they treat them as authoritative, then those norms can be treated as . . . law.”¹⁰³ In their view, any normative effort to influence international actors’ behavior if it materializes in the adoption of an international instrument should be viewed as part of international law. It is argued

100. For a few examples, see JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 601 (2005); Jutta Brunnée & Stephen J. Toope, *International Law and Constructivism: Elements of an International Theory of International Law*, 39 COLUM. J. TRANSNAT’L L. 19, 65 (2000–2001). These effect-based approaches must be distinguished from the subtle conception Kratochwil defended based upon the principled application of a norm that refers to the explicitness and contextual variation in the reasoning process and the application of rules like situations in the future. FRIEDRICH V. KRATOCHWIL, RULES, NORMS, AND DECISIONS: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS 206–08 (1989); Friedrich Kratochwil, *Legal Theory and International Law*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL LAW 55, 58 (David Armstrong ed., 2009).

101. See Matthias Goldmann, *Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority*, 9 GERMAN L.J. 1865, 1869 (2008) (stating that “a large part of the instruments by which international institutions exercise authority remains beyond the reach of meaningful legal concepts”); Armin von Bogdandy, Philipp Dann & Matthias Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, 9 GERMAN L.J. 1375, 1387 (2008) (finding, in part, that transnational legal processes are similar to managerial approaches because they both focus on “questions of compliance and efficiency” wherein law is “one of several means for the effective and efficient regulation of society”).

102. See generally Kingsbury et al., *supra* note 38; Harlow, *supra* note 38; Benedict Kingsbury, *The Concept of ‘Law’ in Global Administrative Law*, 20 EURO. J. INT’L L. 23, 29–31 (2009) (positing that GAL rests on an “extended Hartian conception of law,” which elevates “publicness” to a constitutive element of law where *publicness* means the claim made for law that has been wrought by the whole society, by the public, and the connected claim that law addresses matters of concern to the society as such).

103. On that approach, see Jan Klabbers, *Law-making and Constitutionalism*, in THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 98 (Jan Klabbers, Anne Peters & Geir Ulfstein eds., 2009).

here that such an effect-based (or impact-based) conception of international law entails a shift from the perspective of the norm maker to that of the norm user. According to that understanding, international lawmaking is accordingly identified by its end, which is the use of the norm by its addressee.

It is submitted here that output-based approaches resemble pedigree-based cognition in the sense that lawmaking processes are retroactively reconstructed. It is once the product of a norm-generating process has impacted its addressees' behaviors that such a process is turned into a lawmaking process. Output-based perspectives nonetheless differ from pedigree-based ones in that it is not the normative product that comes to elevate the process in lawmaking but its impact. Looking at lawmaking from the vantage point of its output thus comes with a behaviorist dimension, which makes it more dynamic than pedigree-based approaches to lawmaking. Indeed, conceptualizations of lawmaking evolve together with the impact of norms.

These approaches to international lawmaking have proved rather popular among international legal scholars as a result of their cognitive advantages.¹⁰⁴ Indeed, like participation-based approaches, they allow the capture of dimensions of international lawmaking, which subject-based and pedigree-based perspectives would leave aside. Likewise, their dynamism permits a constant rejuvenation and allows them to accommodate new forms of the exercise of public authority at the international level. It must nonetheless be stressed that they are not without problems, especially in terms of the—albeit sometimes temporary—deformalization of law which they bring about.¹⁰⁵ This is a conceptual drawback, which a fifth and last take on international lawmaking has tried to contain while also trying to preserve dynamism.

E. Dynamic Pedigree-Based Approaches to Lawmaking

Looking at international law from the vantage point of participation is not inherently linked to the New Haven School. Arguing that law is exclusively a process is not necessarily incompatible with a pedigree-based approach. Indeed, a last category of scholars needs to be mentioned as they have ventured to embrace a more formal pedigree-based conception of lawmaking without rejecting any exploration of lawmaking from the vantage point of participation.

104. See *supra* note 100 and accompanying text.

105. See d'Aspremont, *The Politics of Deformalization in International Law*, *supra* note 98 (studying this subject in greater detail).

Certainly, endeavors to bring the process-based approach of the New Haven School and the more static conceptions of international law closer to one another are not unprecedented.¹⁰⁶ It is not certain that this reconciliation has always been successful.¹⁰⁷ This author has himself tried to reconcile static pedigree-based approaches to law (and lawmaking) with more dynamic social processes in the law.¹⁰⁸ Indeed, while acknowledging that approaching international law from the standpoint of its sources corresponds to a formal conception of law zeroed in on law as a product, the author of this Article has argued elsewhere that such a pedigree-based approach does not need to be completely static.¹⁰⁹ Indeed, pedigree-based approaches to international law ought not necessarily be condemned to be static. According to that argument, theories of sources—if grounded in the social practice of law-applying authorities—can change and can be changed. This is the so-called social thesis—borrowed from English analytical jurisprudence¹¹⁰—which provides dynamism for an otherwise entirely static product-centered conception of law. In the specific context of international law, such a conceptualization makes it possible to argue that the social practices of law-applying authorities have long ceased to reflect the practices that the ancestral Article 38 of the Statute of the Permanent Court of International Justice was meant to reflect. This is why, according to this thesis, approaching the sources of international lawmaking from the

106. See, e.g., Georges Abi-Saab, *Cours General De Droit International Public*, 207 RECUEIL DES COURS 39 (1987); Martti Koskeniemi, *FROM APOLOGY TO UTOPIA* 165 (2005) (discussing attempts to create a law that is simultaneously “normative and concrete”); Oscar Schachter, *Towards a Theory of International Obligation*, 8 VA. J. INT’L L. 300, 307–08 (1967–1968) (attempting to identify the “obligatory norm” concept based, in part, on McDougal); C. WILFRED JENKS, *THE COMMON LAW OF MANKIND* 410 (1958) (“The international lawyer should know something of the basic features of the historical and current foreign policies of the leading Powers and of the main groups of states in all parts of the world and of the long-term trends which have characterised their development; without such knowledge, his legal thinking will be apt to become an abstraction remote from political reality and powerless to influence practical affairs.”); G.J.H. VAN HOOF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* 44 (1985) (“Where Positivism does not go far enough in taking account of what is happening in society and therefore is too rigid, the Policy Oriented approach goes too far and ends up almost equating international law with the entire world social and political process.”); d’Aspremont, *Non-State Actors in International Law: Oscillating Between Concepts and Dynamics*, *supra* note 17, at 3.

107. See HIGGINS, *supra* note 88, at 8 (questioning whether these authors have attempted to float a conciliatory understanding of international law).

108. D’ASPROMONT, *FORMALISM*, *supra* note 11, at ch. 8 (highlighting the ambition of *FORMALISM AND THE SOURCES OF INTERNATIONAL LAW*).

109. *Id.*

110. Jean d’Aspremont, *Herbert Hart in Post-Modern International Legal Scholarship*, in *INTERNATIONAL LEGAL POSITIVISM IN A POST-MODERN WORLD* (J. d’Aspremont & Jörg Kammerhofer eds., forthcoming 2013) (noting that “Hart’s social fact-based positivism did not seek to offer a general theory of the law”).

standpoint of Article 38 no longer makes much sense because it does not reflect the current fledgling consensus among its main important law-applying authorities. Instead, such a theory of sources ought to radically depart from the static pedigree-determining blueprints found in the mainstream literature and be shaped as a dynamic model of rule ascertainment grounded in an ever-evolving social practice. On top of advocating a move away from Article 38—and especially the abandonment of the law-ascertaining role of state intent for the identification of treaties or associated doctrines, like those conveying illusions of formalism in the delimitation of customary international law—this Article calls for a more pluralistic conception of law-applying authorities that ought not to be restricted to domestic and international courts and tribunals. New actors have come to produce social practice determinative of the ascertainment indicators contained in the theory of sources of international law.¹¹¹ The virtues of such a dynamic pedigree-based approach also rest in the abstract possibility to apprehend the international normative activity, which nowadays takes place outside the ambit of traditional international law and a strictly static approach would fall short of capturing. Indeed, if the social practices that give rise to the criterion of apprehension allow their capture as lawmaking, nothing precludes their elevation into lawmaking.¹¹²

IV. EPISTEMIC PLURALISM AND EPISTEMOLOGICAL SELF-INTEREST

Making sense of international lawmaking has long been an ambition of international legal scholars.¹¹³ In that endeavor, they have been resorting to a wide variety of cognitive tools: subject, pedigree, participant and actor, public authority, or a blend of several of them. Each of these approaches has generated a different picture of international lawmaking. According to the approach chosen, international lawmaking appears as a more or less formal, systematized, inclusive, and state-centric process.

111. See, e.g., d'Aspremont, *Non-State Actors From the Perspective of Legal Positivism*, *supra* note 8, at 25–30 (discussing the roles of legal scholars and international courts and tribunals in producing these social practices).

112. I have simultaneously challenged the urge of international lawyers to apprehend these normative phenomena through their own cognitive instruments with a view to necessarily including them in their scope of expertise and elevating them in legal materials. I have called for some critical self-reflection of the gluttony of international lawyers who systematically—and almost obsessively—seek to label every phenomenon as law. *Id.*

113. See generally Jörg Kammerhofer, *Law-making by Scholars*, in RESEARCH HANDBOOK ON THE THEORY AND PRACTICES OF INTERNATIONAL LAW-MAKING 1–2 (Catherine Brölmann & Yannick Radi eds., forthcoming 2013) (demonstrating a critical stock taking of scholarly attempts to make sense of international lawmaking).

It is undoubtedly not the aim of these concluding remarks to vindicate one of these cognitive choices. There is probably not one cognitive choice trumping the others. They all constitute a paradigm that has its own merits. Coming to terms with the variety of paradigms found in the literature pertaining to international lawmaking should certainly not be construed as a call for radical pluralism. In this author's view, merely accepting the plurality of cognitive choices—and the conceptualizations of lawmaking inherent in each of them—would boil down to nothing more than skeptical relativism. Yet, it seems of import that when one grapples with issues of lawmaking, then that one consciously assumes one's cognitive choices. Assuming such choices, however, presupposes awareness, not only of the underlying cognitive choice behind any study of international lawmaking but also of the parameters informing it. Indeed, cognitive choices, like those pertaining to the understanding of international lawmaking, are not neutral.¹¹⁴ They are informed by an array of different parameters. When it comes to foundational topics like international lawmaking, one of these parameters is certainly the observer's concept of law. The concept of law of the observer will to a large degree—at least assuming cognitive and methodological consistency—determine the cognitive tool to which one resorts to make sense of international lawmaking. Another parameter—probably very pregnant in choices determining approaches to international lawmaking—rests in one's research interest. In the author's view, it can hardly be denied that one necessarily embraces an approach or a method that fits with the type of research that one is interested in carrying out. The choice of one of the cognitive tools mentioned above can also be read as an expression for the preference of one given dimension of international lawmaking for a given dimension of international law. For instance, those solely interested in the formal sources of international law might favor a pedigree-based approach to international lawmaking, which will lead them to focus on a very narrow dimension of that process. Because of their extremely narrow cognitive scope, pedigree-based approaches to international lawmaking could even be seen as the manifestation of a general lack of interest for the processes in international lawmaking. On the contrary, participant- and actor-based understandings of international lawmaking reflect the observer's interest in norm-generating processes rather than formal sources and the identification of subjects.

114. See Mark Greenberg, *How Facts Make Law*, 10 *LEGAL THEORY* 157, 186 (2004), available at <http://ssrn.com/abstract=797125> (explaining that law practices, including facts about participants' beliefs, cannot determine their own relevance).

It is argued that awareness of such epistemological self-interest allows greater mutual coexistence between the various approaches to international lawmaking that have been outlined in this Article. But awareness of the influence of epistemological self-interest in cognitive choices in the studies of international lawmaking also calls for some relativism. Epistemological interest in one dimension of international lawmaking and, thus, the cognitive choices that they inform, necessarily reflects a given epoch—the epoch in which the observers situate themselves. The various cognitive choices behind studies of international lawmaking inevitably have an epochal dimension. Such an epochal anchorage of scholarly approaches to international lawmaking is what ineluctably condemns the scholarship on international lawmaking to a Sisyphean cognitive repetition.

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