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An Interpretive Theory of International Law: The Distinction Between Treaty and Customary Law

Hiram E. Chodosh

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An Interpretive Theory of International Law: The Distinction Between Treaty and Customary Law

*Hiram E. Chodosh**

ABSTRACT

The author begins with an explanation of the importance of the distinction between treaty and customary law. The author then presents six alternative principles currently used to inform that distinction (dichotomy, overlap, relativity, interdependence, equivalence, and indeterminacy) and evaluates the application of these principles according to their theoretical coherence, practicability, reconcilability, and resolving power. The author concludes that each of the alternative principles is unsatisfactory in at least one respect and proposes a superior interpretive approach that does not define customary law in terms of treaty, but rather according to its own independently defining attributes. Finally, the author suggests that this approach, called sub-referential threshold relativity (STR), may be applied to other key distinctions in legal doctrine and scholarship.

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MR. BASIE: *If we mean distinction we should say distinction, if you mean professional sports as distinguished from amateur sports, that's one thing. If you mean as opposed to that's something else*

....

In this context, the way [amateur is] used here it implies failure, just reeks of it. You've got your professional there being paid for these services where the amateur's efforts aren't making him a dime.

....

This word amateur starts out to mean doing something for the love of it, that's the root, doing it for its own sake without a price on it. Now these days where there's a price on everything, what's not worth getting paid for's not worth doing. You say something's amateurish means it's a real halfassed job. You want the best you hire a professional. A real pro, as they say.

....

You take van Gogh, the painter Vincent van Gogh? A painting of his brought over fifty million dollars a few years ago but in his whole lifetime he only sold one picture, that make him an amateur? Some hobby he had, turning out these halfassed pictures on Sunday afternoons? You get into this you're getting into apples and oranges.

WILLIAM GADDIS**

I. INTRODUCTION

Developing a theory of interpretation for the recognition of international law is of profound contemporary importance.¹ In

** WILLIAM GADDIS, *A FROLIC OF HIS OWN* 190, 195-96 (1994).

1. See, e.g., Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L L. 1, 2 (1988) (noting the "great practical importance" of source identification).

response to increasing global interdependence, prominent scholars are calling for the recognition of universal² or world³ law. These proposals may intensify challenges to the time-honored distinction between treaty and customary⁴ law,⁵ which are still

2. See, e.g., Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529 (1993) (stressing that, given the increasing interdependence of nations resulting from cross-border integration, "it may be necessary to establish new rules that are binding on all subjects of international law regardless of the attitude of any particular state").

3. See, e.g., Harold J. Berman, *World Law*, 18 FORDHAM INT'L L.J. 1617, 1621-22 (1995) (arguing for use of the phrase, "world law," based on a "new era of global interdependence").

4. The term "customary law" is distinct from custom. As Harold Berman has written, "Custom, for example, in the sense of habitual patterns of behavior, is distinguished from customary law, in the sense of customary norms of behavior that are considered to be legally binding." HAROLD J. BERMAN, *LAW AND REVOLUTION* 8 (1983).

5. The relationship between treaty and customary law has drawn much scholarly attention. See generally MARK E. VILLIGER, *CUSTOMARY INTERNATIONAL LAW AND TREATIES* (1985); R.R. Baxter, *Treaties and Custom*, 129 R.C.A.D.I. 35 (1970) ("The determination whether a treaty is declared customary international law at the time of its adoption or coming into force or whether, on the other hand, it subsequently passed into customary international law is not always easy to make. However difficult that task may be, the distinction is of first importance and must be maintained."); Jonathan I. Charney, *International Agreements and the Development of Customary International Law*, 61 WASH. L. REV. 971, 996 (1986) (discussing alternative ways in which "international agreements may be relevant to finding customary international law," but cautioning that agreements "should be carefully viewed in the context of state practice and *opinio juris*"); Anthony D'Amato, *Manifest Intent and the Generation by Treaty of Customary Rules of International Law*, 64 AM. J. INT'L L. 892, 892, 902 (1970) (arguing for a "new method" to accord "well with the growing need to objectify and place upon a scientific basis the methodology by which one may determine what in fact are the rules of customary law." "By looking at the form in which a treaty provision is couched, and the structure of the treaty itself, the generalizability or nongeneralizability of the provision, and hence its impact upon customary law, may be scientifically determined."); Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT'L L. 281 (1988) (noting that "the borderline between norms *de lege lata*—binding now—and those *de lege ferenda*—meant to be binding in the future—must be carefully drawn"); John K. Gamble, Jr., *The Treaty/Custom Dichotomy: An Overview*, 16 TEX. INT'L L.J. 305 (1981); Lawrence A. Howard, *The Third United Nations Conference on the Law of the Sea and the Treaty/Custom Dichotomy*, 16 TEX. INT'L L.J. 321 (1981); Leslie M. MacRae, *Customary International Law and the United Nations' Law of the Sea Treaty*, 13 COL. W. INT'L L.J. 181 (1983); Gary L. Scott & Craig L. Carr, *The International Court of Justice and the Treaty/Custom Dichotomy*, 16 TEX. INT'L L.J. 347 (1981); E.W. Vierdag, *The Law Governing Treaty Relations Between Parties to the Vienna Convention on the Law of Treaties and States Not Party to the Convention*, 76 AM. J. INT'L L. 779 (1982) ("Although codifying conventions can settle the law not only for the parties to them, but also for states that—for whatever reason—have not become parties to them, it is nevertheless clear that, in a conflict between a state that is party to such an instrument and a nonparty, the latter will firmly deny that it is bound by the codified rules if the denial will

considered the two⁶ primary sources of international law.⁷

In the construction of a proverbial tower designed to eliminate international legal babble, treaty and customary law remain the major conceptual tools. Treaty is the more frequently utilized international law-making instrument; however, unlike customary law, it is not presumed to be universally binding.⁸ Its more restricted rule of application renders treaty less well-suited to the creation of an international law binding on all nations.⁹

make a difference in the conflict (as it did in the *North Sea Continental Shelf* cases.)" (citation omitted).

6. This trend has also spurred theoretical attention to the development of additional sources of international law that are neither treaty nor customary. See, e.g., Hiram E. Chodosh, *Neither Treaty nor Custom: The Emergence of Declarative International Law*, 26 TEX. INT'L L.J. 87 (1991).

7. The descriptions of treaty and customary law as sources of international law are codified in Article 38 of the Statute of the International Court of Justice (the I.C.J.). Article 38 provides that the I.C.J. shall apply treaty, customary law, general principles, and (subject to significant qualification) judicial decisions and scholarship as a subsidiary source.

Article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 105, 1060, T.S. No. 993 [hereinafter STATUTE OF THE I.C.J.].

8. See *Gulf of Maine (Can. v. U.S.)*, 1984 I.C.J. 246, 292-93 (Oct. 12) (describing customary law as "undoubtedly of general application, valid for all States and in relation to all kinds of maritime delimitation"); *North Sea Continental Shelf (F.R.G. v. Den. and Neth.)*, 1969 I.C.J. 3, 38 (Feb. 20) (discussing customary international law as having "equal force for all members of the international community" and not subject to "any right of unilateral exclusion"). See also Charney, *supra* note 2, at 531 ("While treaties may require the consent of individual states to be binding on them, such consent is not required for customary norms."); Sir Humphrey Waldock, *General Course on Public International Law*, 106 R.C.A.D.I. 49 (1962) ("[C]ustomary law is not a form of tacit treaty but an independent form of law[,] . . . constitut[ing] a general rule of international law which, subject to one reservation, applies to every State."), *cited in* Gamble, *supra* note 5, at 306.

9. See Charney, *supra* note 2, at 551 ("[G]eneral [customary] international law may be established on the basis of less formal indications of consent or acquiescence. This makes worldwide law possible; it cannot be done through treaties alone.").

This comparative disadvantage of treaty, combined with the universal reach of customary law, currently motivates a conclusory equivalence of treaty provisions (binding only on treaty-parties) with customary, hence universally applicable, rules. Although some scholars have expressed strong reactions to this proclivity,¹⁰ the voluminous literature dedicated to understanding the distinction between treaty and customary law still lacks a theoretically coherent and practicable interpretive approach that can resolve disputes over the recognition *vel non* of distinct sources of international law,¹¹ in particular those sources, such as customary law, that have universal applicability.

The absence of a coherent theory and practical approach allows for a wide range of contradictory and divergent views. Inconsistent views of the distinction between treaty and customary law may be identified and evaluated according to a number of alternative categorical principles. These principles may be viewed as architectonic¹² because they structure the

10. See, e.g., Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 439 (1983) (critiquing the "veritable de-conventionalization of conventional rules").

11. See, e.g., Sir Gerald G. Fitzmaurice, *The Foundations of the Authority of International Law and the Problem of Enforcement*, 19 MOD. L. REV. 1, 10 (1956) ("The absence of any patent and obvious source of obligation . . . deprives . . . international [jurists] of any manifest point at which [they] can rest, and which [they] can regard as a satisfactory terminal point beyond which there is no practical necessity to go.") (quoting THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 3 (1990)).

12. "Architectonic" is a term used along similar lines in many diverse disciplines, including, without limitation: (1) philosophy (the principles that structure knowledge and meaning), see, e.g., WALTER WATSON, *THE ARCHITECTONICS OF MEANING* (1985); W.H. WERKMEISTER, *KANT: THE ARCHITECTONIC AND DEVELOPMENT OF HIS PHILOSOPHY* (1980); (2) psychology (the study of theories that have a unifying structural design), see, e.g., PHILIP POMPER, *THE STRUCTURE OF MIND IN HISTORY* (1985) (identifying genetic, epigenetic, catastrophic, dialectic, and systemic structures in psychoanalytical theory); (3) architecture (the study of the principles of architectural design), see, e.g., HUGO LEIPZIGER, *THE ARCHITECTONIC CITY IN THE AMERICAS* (1944); M.A. ANANTHALWAR AND ALEXANDER REA, *INDIAN ARCHITECTURE V.1, ARCHITECTONICS* (1980); (4) science, see, e.g., WOLFGANG BALZER ET AL., *AN ARCHITECTONIC FOR SCIENCE: THE STRUCTURALIST PROGRAM* (1987); WENDELL J.S. KRIEG, *ARCHITECTONICS OF HUMAN CEREBRAL FIBER SYSTEMS* (1973); and (5) law, see, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* 250, 302 (1971) (discussing the first principle of the architectonic system: "Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all."). Yet, the use of architectonics in this study differs from that in the foregoing literature in one critical respect. Whereas architectonics is understood to denote "the unifying structural design of something," (MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 61 (10th ed. 1993) [hereinafter *DICTIONARY*]), this study focuses on the competing designs underlying one's comprehension of distinct linguistic expressions and the arguably distinct phenomena they seek to grasp. Whereas this study is set in the context of public international legal theory, the identification of competing architectonic principles,

understanding of any two presumably distinct terms or concepts. This Article denominates these architectonic principles as follows: dichotomy, overlap, relativity, interdependence,¹³ equivalence, and indeterminacy. These six principles represent a typology of different ways in which the distinction between any two terms or combinations of terms may be understood.¹⁴ Given the escalation of a wide array of international law-making projects,¹⁵ a reexamination of the alternative principles that underlie the treaty/customary law distinction is particularly central to the further development of coherent and practicable rules of recognition¹⁶ for international law.

The choice among alternative views is not merely of academic significance. The distinction between treaty and customary law is critical because the identification of an international rule as treaty or customary law directly affects the scope of the rule's applicability.¹⁷ If a treaty is considered binding only on parties to the treaty, and customary law is presumed universally binding, the nature of the distinction (if any) between the two sources may have a profound consequence for the nontreaty party. For example, if treaty and customary law are deemed mutually exclusive,¹⁸ then the treaty and customary rules must be different

the normative comparison of them, and the proposed theory of sub-referential threshold relativity carry the potential for broad application to several pairs of critical distinctions in the law (e.g., substance/procedure, territoriality/personality, and *lex ius*). See LEOPOLD POSPŠIL, *ANTHROPOLOGY OF LAW* 1-2 (1971) (discussing these as three fundamental dichotomies). See generally OWEN FISS & ROBERT COVER, *THE STRUCTURE OF PROCEDURE* (1979).

13. Interdependence is often related to oppositional thinking (e.g., Sir Thomas Browne "declaring that contraries are the life of one another," and Swedenborg "explaining that a thing cannot exist without its contrary"). RODNEY NEEDHAM, *COUNTERPOINTS* 100 (1987).

14. This is not intended to be a necessarily exhaustive list of possibilities. This study attempts to identify those conceptual possibilities that best correspond, however roughly, to both explicit and implicit conceptions evident in the preexisting literature, and to discuss them in a manner designed to make conceptual comparisons both intelligible and constructive.

15. See discussion *infra* in Section II.A on the different approaches to conflicts of law caused by increases in cross-border activity in a wide range of legal subject matter.

16. See H.L.A. HART, *THE CONCEPT OF LAW* 92 (1961) (on rules of recognition); *id.* at 208-31 (on the absence of rules of recognition in international law). See also Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705 (1988); FRANCK, *supra* note 11.

17. Given the increasing interdependence of nations resulting from cross-border integration, Jonathan Charney stresses that "it may be necessary to establish new rules that are binding on all subjects of international law regardless of the attitude of any particular state." Charney, *supra* note 2, at 529.

18. This is referred to as the dichotomous view. See discussion *infra* Section III.A.

and, accordingly, the nontreaty party would not be bound by the treaty rule. On the other hand, if treaty and customary law are considered to be the same,¹⁹ nontreaty parties would be bound by the treaty rule.²⁰

In an attempt to reconcile and resolve disagreements over the recognition of customary law based on evidence of treaty, this Article critiques ways in which the distinction between treaty and customary law has been understood and proposes a new interpretive approach to address the theoretical and practical weaknesses of prior methods. At its most rudimentary level, this article argues that customary law should not necessarily be understood²¹ according to the terms of treaty, whether in dichotomous, equivalent, or some other relationship, but rather according to its own independently²² defining attributes.²³

19. This is referred to as the equivalent view. See discussion *infra* Section III.E. Even where treaty and customary rules both apply but resolve the same issue differently, treaty rules do not necessarily override customary law. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27) (rejecting U.S. claim that multilateral treaty reservations barring adjudication also barred claims based on even identical rules under customary international law).

20. *Military and Paramilitary Activities*, 1986 I.C.J. at 14.

21. This view is referred to throughout this article as "cross-referential" (i.e., the understanding of two expressions in terms of one another). This term is used instead of many alternatives, such as "opposite," "opposed," "polar," or "antithetical." See NEEDHAM, *supra* note 13, at 27. Each of these alternatives assumes a significant contrast, indeed a mutual exclusivity, whereas cross-reference may include an equivalent relationship between two terms and is intended to be neutral as to whether the existence of two terms denotes contrast or similarity. Cross-referential is also used in lieu of several Aristotelian typologies of distinctions, developed in ARISTOTLE, *CATEGORIES AND DE INTERPRETATIONE* (J.L. Ackrill trans., 1963) and ARISTOTLE, *METAPHYSICS* (John WARRINGTON trans., 1956). Cross-reference is broader than and inclusive of (i) correlative terms such as senior/junior, i.e., terms defined in relation to one another (e.g., "the double and the half"), (ii) contraries, of which there are two types, i.e., the first includes a pair of terms with no intermediate between them (e.g., a number must be odd or even but may not be both, and the second encompasses pairs of terms that denote maximum difference and have intermediates between them, such as black and white, between which there are hues of grey; (iii) privation and possession, i.e., opposites that are connected with the same thing (e.g., blindness and sight of the eye); and (iv) affirmation and negation, in which it is necessary as a matter of logic for one to be true and the other false (e.g., a contradiction). See G.E.R. LLOYD, *POLARITY AND ANALOGY* (1966), summarized in NEEDHAM, *supra* note 13, at 44-49, and critiqued in *id.* at 50-60 (describing the use of opposition as a spatial metaphor for contrasted terms). Needham correctly questions Aristotle's treatment of each of these pairs of distinctions as merely oppositional. *Id.* at 50-52.

22. This view is referred to herein as "sub-referential" (i.e., the understanding of two expressions not in terms of one another, but by reference to those attributes that define each term independently). Thus, unlike cross-referential definitions, sub-referential definitions define expressions in terms of what they are, rather than what they are not. For a discussion of classical,

This Article evaluates each of the identified architectonic principles according to its theoretical coherence, practicability, reconcilability, and resolving power. These evaluative standards are designed to assess each architectonic principle in the area of law. This Article concludes that none of the architectonic principles currently utilized in the international law literature sufficiently satisfies all of the postulated standards. In response to this common failure, this Article proposes a set of interpretive steps designed to overcome the various shortcomings of the other views. This four-step interpretive approach is called "sub-referential threshold relativity" (STR).

This Article is organized accordingly. Given the abstract nature of this study, Section II provides a more extensive presentation of the problems posed and the solutions proposed by this study. Part A discusses the contemporary and future importance of the distinction between treaty and customary law. Part B describes in greater detail the interpretive problems posed by the distinction between any two terms. To introduce the interpretive theory, Part C addresses the question of whether minivans are cars or trucks. Sections III and IV apply the interpretive theory to the treaty/customary law distinction. Section III provides a critique of the competing views and concludes that each view exhibits at least one significant disadvantage. Based on this critique, Section IV proposes a new interpretive approach, sub-referential threshold relativity, which is designed to achieve greater theoretical coherence, practicability, reconcilability with alternative generalizations, and resolving power.

II. PRESENTATION OF THE PROBLEM AND ALTERNATIVE SOLUTIONS

A. *Significance of the Treaty/Customary Law Distinction*

The need to develop a theory of interpretation designed for rules of recognition that distinguish different sources of

traditional, and modern definitions of customary international law, see Chodosh, *supra* note 6, at 97-105.

23. Thus, instead of defining truth in terms of what is false, it must be defined according to some other term or set of terms considered affirmative definitional attributes of truth, such as in accordance with fact. See, e.g., SPINOZA'S ETHICS 69 (A. Boyle trans., 1941) ("[H]e who would distinguish the true from the false must have an adequate idea of what is true and false. . .").

international law²⁴ is of profound contemporary and future importance in both international and national²⁵ settings. Not only is the distinction between treaty and customary law still important in areas of traditional international conflicts,²⁶ but it may also become increasingly critical in the resolution of legal problems caused by intensifications of transnational activity. Such activity includes the cross-border movement and exchange of people,²⁷ goods,²⁸ currency,²⁹ services,³⁰ communication

24. Unpacking the ambiguity of the phrase "international law" may be accomplished by posing a fundamental, dynamic, and multidimensional tripartite question: whose law applied by whom to whom? By the term international, one may intend to grasp (i) law (even domestic law) that applies to legal personalities of more than one nation (i.e., conflict of laws, or private international law); (ii) law that is made or created by more than one nation (i.e., the sources of international law); or (iii) law that is applied by formal institutions created or established by more than one nation (e.g., the European Union, North American Free Trade Agreement Arbitration Panels) or by decision-makers from more than one nation (e.g., international arbitration). By the term "law," one may mean (i) actual behavior, (ii) the abstract rules intended to prescribe and proscribe certain behavior, or (iii) authoritative decision. See generally KARL N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941); POSPIŠIL, *supra* note 12, at 193; W. Michael Reisman, *The Cult of Custom in the Late 20th Century*, 17 CAL. W. INT'L L.J. 133 (1987) [hereinafter Reisman, *Cult of Custom*]. See also W. Michael Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, 10 YALE J. INT'L L. 1, 9 (1984) [hereinafter Reisman, *International Incidents*] ("Operational code . . . must be sought in elite behavior.").

25. The question "what is international law?" is often difficult, but necessary to answer, and is of great practical importance in U.S. law. There are many examples of statutory and common law rules that presuppose a knowledge of what international law is. For example, the U.S. Constitution vests Congress with the power "[t]o define and punish . . . Offenses against the Law of Nations." U.S. CONST. art. 1, § 8, cl. 10. Second, the Alien Tort Statute confers jurisdiction over a suit "by an alien, for tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. In order to determine whether a court has jurisdiction under this statute, it must determine whether the law of nations has been violated. Third, in *The Nereide*, 13 U.S. 388, 423 (1815), Chief Justice Marshall proclaimed that in the absence of a congressional enactment, U.S. courts are "bound by the law of nations which is a part of the law of the land." *Id.* Finally, in *Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804), he declared that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Id.* For an excellent analysis of the *Charming Betsy* doctrine, see Ralph G. Steinhardt, *The Role of International Law As a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1106 n.7 (1990). Each of these rules or doctrines presupposes a knowledge of what international law is or requires.

26. See, e.g., *infra* text and notes discussing I.C.J. case law in Sections III and IV.

27. See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *TRENDS IN INTERNATIONAL MIGRATION: CONTINUOUS REPORTING SYSTEM* (1992).

28. See INTERNATIONAL MONETARY FUND, *DIRECTION OF TRADE STATISTICS: YEARBOOK* (1994); see also ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *MONTHLY STATISTICS OF FOREIGN TRADE* (1994) (reporting that the

technologies,³¹ and environmental harms.³² Given pronounced differences between the nations affected by cross-border transactions, these activities give rise to profound social,³³ economic,³⁴ and political³⁵ controversies, and result in increasingly frequent conflicts of law. These conflicts involve the

\$224,915,000,000 of world trade among member nations in 1992 is an increase over trade values in 1991).

29. Currency exchange markets have experienced remarkable growth, at times requiring governmental interventions in currency markets to bolster a national currency. The U.S. Federal Reserve Bank recently purchased undisclosed, large quantities of U.S. dollars in order to keep the dollar from falling beneath its all-time, post-WWII low. Richard Chang, *Stocks Rise to New Record, Dollar Hits Post-War Low*, REUTER EUR. BUS. REP., Mar. 23, 1995.

30. Transnational service industries have also grown enormously.

31. U.S. entertainment industries, in particular movies and television, are perhaps the most desired by foreign consumers and thus feared by commercial interests in foreign nations. This combination of demand and fear has made the cultural industries a heated topic of international trade regimes. For example, the U.S.-Canada Free Trade Agreement contains exemptions for Canadian barriers to U.S. cultural industries. See *The United States-Canada Free Trade Agreement*, Jan. 2, 1988, art. 2005-07, 2 B.D.I.E.L. 359.

32. See Michael Anders, *Climate Conference to Take on Global Warming*, AGENCE FRANCE PRESSE, Mar. 26, 1995 (relating that the Berlin conference will focus on environmental harms that have a global impact, e.g., the greenhouse effect).

33. "The wave of immigration from poor territories to rich countries and the influx of people from rural areas to cities have reached an unprecedented scale, forming what the U.N. Population Fund has called the 'current crisis of mankind.'" Liu Binyan, *Civilization Grafting; No Culture Is an Island*, FOREIGN AFFAIRS, Fall 1993, at 19. For descriptions of overall population trends and their interrelationship with environmental changes, see AL GORE, *EARTH IN THE BALANCE* (1992).

34. See, e.g., The Bureau of National Affairs, Inc., *U.S., Japan Still Negotiating to Resolve Flat Glass Dispute*, 11 INT'L TRADE REP. 1888 (discussing the flat glass agreement between the United States and Japan and reporting the disagreement between the two countries on how to measure improved access to this market).

35. See Lori Rodriguez, *View of Reaction to Proposition 187*, HOUS. CHRON., Dec. 3, 1994, at 33A (describing Mexican demolition of a McDonalds restaurant in Mexico City in response to California's passage of Proposition 187, which denies legal immigrants education, welfare, and non-emergency medical care); see also Mary Lee, *West's Values Take a Beating in Asia*, S. CHINA MORNING POST, Aug. 21, 1994, at 8 (discussing issues raised by Singapore's arrest and subsequent caning of Michael Fay, a U.S. citizen accused of vandalism in Singapore); *The Birth of a New Europe*, S.F. CHRON., Nov. 7, 1993, at 1 (stating that French farmers, with government backing, oppose economic integration and prefer safety of protectionist measures); David Israelson, *It's a Big If How Danes Will Vote on Treaty*, TORONTO STAR, May 16, 1993, at F1 (referring to opposition faced by John Major to the new European Currency Unit); Matt Miller, *Pragmatic Policy Shift Reflects Beijing's Value*, SAN DIEGO UNION TRIB., May 27, 1994, at 8 (concluding that the United States caved into Chinese opposition to considering human rights as a condition to renewed most-favored nation status).

diverse subject matter of child custody,³⁶ crime,³⁷ human rights,³⁸ discrimination,³⁹ antitrust,⁴⁰ securities,⁴¹ sales,⁴² trade,⁴³ currencies,⁴⁴ bankruptcy,⁴⁵ banking,⁴⁶ labor,⁴⁷ broadcasting and media,⁴⁸ and the environment.⁴⁹

36. Robert P. Hey, *Parents Battle for Children Across International Borders*, CHRISTIAN SCI. MONITOR, Jan. 2, 1987, at 1 (in many cases, U.S. parents face insurmountable legal difficulties in regaining custody of a child abducted to a foreign country); Dona Munker, *Driven to Extremes*, N.Y. TIMES, Sept. 27, 1992, § 7, at 17 (reviewing Betty Mahmoudy's book, *For the Love of a Child*, about her battle with her Iranian husband to retrieve her daughter from Iran).

37. See, e.g., *United States v. Noriega*, 746 F. Supp. 1506, 1514 (S.D. Fla. 1990) (holding extra-territorial jurisdiction appropriate over a case involving the leader of Panamanian armed forces because his drug related activities had direct effect within United States).

38. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984); *Cruz Muniz v. State*, 851 S.W.2d 238, 256-57 (Tex. Crim. App. 1993) (holding a Mexican-U.S. defendant properly received capital punishment).

39. See, e.g., *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248-59 (1991) (discussing applicability of Title VII to a discrimination claim brought by a U.S. citizen against a U.S. employer for acts which occurred outside the United States).

40. See, e.g., *Laker Airways Ltd. v. Pan American World Airways, Inc.*, 604 F. Supp. 280, 285 (D.D.C. 1984) (holding that a British Corporation doing business in the U.S. was subject to U.S. antitrust law).

41. See *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987); *Edgar v. Mite Corp.*, 457 U.S. 624 (1982).

42. See *Corporation Venezolana de Fometo v. Vintero Sales Corp.*, 629 F.2d 786, 792-794 (2d Cir. 1980) (finding it appropriate to apply a federal common law choice of law rule in order to decide which of the concerned jurisdiction's substantive law of fraud (i.e., that of New York or that of Venezuela) should govern and holding the latter to apply).

43. Thomas L. Friedman, *A Dispute on Wheat Heats Up*, N.Y. TIMES, Apr. 23, 1994, at 39 (trade dispute between Canada and the United States about Canadian subsidies of its wheat).

44. See Ronald David Greenberg, *The Eurodollar Market: The Case for Disclosure*, 71 CAL. L. REV. 1492, 1493 (1983) (arguing that "the international character of the Eurodollar market makes comprehensive regulatory strategies unfeasible," recommending "the creation of a system of disclosure to assist Euro-banks in the proper evaluation of risk, without unnecessarily hampering their Eurodollar operations").

45. See *In re Koreag, Controle et Revision S.A.*, 961 F.2d 341 (1992); *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709 (1987).

46. *Edelmann v. Chase Manhattan Bank*, 861 F.2d 1291 (1st Cir. 1988) (involving a multi-national bank's liability for deposits in a foreign branch expropriated by the country in which the branch was located).

47. Fair Labor Standards Act, 29 U.S.C. §§ 201-19 (1988 & Supp. IV 1992); *Cruz v. Chesapeake Shipping, Inc.*, 932 F.2d 218 (1991).

48. *Bachchan v. India Abroad Pubs. Inc.*, 585 N.Y.S.2d 661 (1992). See Donald S. Macdonald, *The Canadian Cultural Industries Exemption under Canada-U.S. Trade Law*, 20 CAN.-U.S.L.J. 253 (1994).

49. *Amlon Metals, Inc. v. FMC Corp.*, 775 F.Supp. 668 (S.D.N.Y. 1991). See generally Sean D. Murphy, *Prospective Liability Regimes for the Transboundary Movement of Hazardous Wastes*, 88 AM. J. INT'L L. 28-40 (1994) (discussing the conflict-of-law obstacles to transnational litigation of environmental disputes).

The treaty/customary law distinction is critical to three interrelated and at times overlapping strategies to accommodate, reconcile, or eliminate such conflicts. First, nations may attempt through legislation to apply their domestic law extraterritorially based on internationally acceptable conflict-of-law principles.⁵⁰ Second, nations may create or recognize uniform rules, whether through international agreement or through domestic acceptance of an emerging norm. Third, nations may unify, federalize, or internationalize their municipal jurisdictions.⁵¹

Each of these three approaches presupposes a coherent, practicable, and explicable way to identify distinct international legal sources, including treaty and customary international law. First, source recognition is necessary to the identification of internationally acceptable conflict-of-law principles and the permissible scope of extraterritorial jurisdiction. Second, and most directly, source theory is important for the identification and application of international rules themselves. Finally, international institutions, such as the International Court of Justice (I.C.J.), are obligated to identify and apply distinctions between different types of international legal sources, such as treaty and customary law, which remain the two most important manifestations of international legal obligation.⁵²

50. For a seminal introduction to conflict of laws, see LEA BRILMAYER, *CONFLICT OF LAWS* (2d ed. 1995). International conflict of laws is also traditionally referred to as private international law, a term confusing to U.S. lawyers, who often misunderstand private international law to be a body of international law that regulates private, nonstate conduct. States also use jurisdiction-avoidance devices, not formally considered under the discipline of conflict of laws, but utilized in fact patterns not dissimilar from those addressed by conflict of laws, e.g., personal jurisdiction, *forum non conveniens*, political question, etc. See Harold H. Koh, *Transnational Public Law Litigation*, 100 *YALE L.J.* 2347, 2382 (1991) (discussing doctrinal targeting to solve problems of jurisdiction avoidance devices).

51. The appropriate condominium of the foregoing strategies should be guided by a normative comparison of these three basic approaches to accommodating, reconciling, or eliminating the conflicts of law that result from intensifications of cross-border activity.

52. The noncontroversial statement that treaty and customary law comprise two sources of international legal obligation remains silent on three critical, related issues: first, the categorical *de facto* totality of these two sources; second, the nature of the distinction between them either in relation to each other or in relation to other definitional standards of recognition; and, third, the practical consequences flowing from answers to the foregoing questions. For a discussion of the first question see Chodosh, *supra* note 6. This Article addresses the latter two questions concerning competing conceptions of the distinction between treaty and customary law. First, this Article suggests that the choice of competing conceptions of treaty and customary law as mutually exclusive, categorically overlapping, different only in degree, interdependent, equivalent, or indeterminate is not determined by the mere existence of two terms, but by the

1. Extraterritorial Principles

Renewed attention to international legal sources is important in the conflict-of-law area. Conflicts of law call for two types of normative uniformity: (1) uniformity of the permissible bases for the assertion of prescriptive jurisdiction, and (2) uniformity of the substantive domestic rules that themselves are in conflict. Conflict-of-law principles are concerned with the former type of uniformity; however, they vary considerably concerning the priority given to different types of cross-border factors. Such principles may focus alternatively on the situs of (1) the forum;⁵³ (2) the legal personalities of the parties in dispute,⁵⁴ including the nationality of the claimant (passive personality)⁵⁵ or the defendant (nationality);⁵⁶ (3) specific conduct (territoriality),⁵⁷ including intent and resulting consequences (effects/intent);⁵⁸ (4) the content of the conflicting laws themselves (universality);⁵⁹ or (5)

conceptual assumptions brought to the reading. Additionally, this Article explores the practical consequences of any particular choice among the foregoing alternatives.

53. For domestic application of the *lex fori* rule, see for example, *Foster v. Leggett*, 484 S.W.2d 827 (Ky. App. 1972) ("The basic law is the law of the forum, which should not be displaced without valid reasons.").

54. For domestic law theories that prioritize legal personality factors, see BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963). For U.S. views on international legal personality principles, see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1986) [hereinafter RESTATEMENT OF FOREIGN RELATIONS] (discussing principles of nationality (of the defendant) and passive personality (of the plaintiff)).

55. RESTATEMENT OF FOREIGN RELATIONS, *supra* note 54. See also *United States v. Yunis*, 681 F. Supp. 896 (D.C. 1988) (holding that passive personality and universality principles together provide ample grounds to support an assertion of U.S. jurisdiction in prosecution against hijacking by foreigners on foreign soil of aircraft occupied in part by several U.S. nationals).

56. RESTATEMENT OF FOREIGN RELATIONS, *supra* note 54.

57. See, e.g., RESTATEMENT OF THE LAW OF CONFLICT OF LAWS 11 (1934) (Wrongs); *id.* at 22 (Contracts); RESTATEMENT OF FOREIGN RELATIONS, *supra* note 54, § 402(1) (territoriality principle).

58. RESTATEMENT OF FOREIGN RELATIONS, *supra* note 54, § 402 (territoriality principle). See, e.g., *Laker Airways Ltd. v. Sabena*, 731 F.2d 909, 920-25 (1983).

59. Several domestic law doctrines focus on the content of the law in conflict. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (public policy exception); *Marchlik v. Coronet Insurance Co.*, 239 N.E. 2d 799 (Ill. 1968) (public policy exception); *Jepson v. General Cas. Co.*, 513 N.W.2d 467 (Minn. 1994) (better law doctrine). For the procedural law and penal law exceptions, see *Sampson v. Channell*, 110 F.2d 754 (1st Cir. 1940), *cert. denied*, 310 U.S. 650 (1940) (holding burden of proof in contributory negligence defense substantive for *Erie* purposes but procedural according to Massachusetts law, thus justifying application of forum rule); and *Paper Products v. Doggrell*, 261 S.W.2d 127 (Tenn. 1953) (refusing to apply Arkansas statute, determined to be penal for choice of law purposes, that permitted personal liability of shareholders for breach of contract by corporation that failed to file corporate

some combination or balancing of the foregoing factors (reasonableness or comity).⁶⁰ However, in the absence of agreement on or acceptance of the priority to be accorded to certain factors over others, these principles will remain an area of disagreement within conflict-of-law doctrine itself.

Not only are several bases of transnational subject matter jurisdiction less settled (e.g., effects/intent, passive personality, and universality),⁶¹ but even well-settled principles of nationality and territoriality lead to the possibility that more than one law might apply to the same transaction or dispute.⁶² For example, a U.S. national working abroad may be obligated (by virtue of nationality) under U.S. law to do what is considered illegal under the foreign nation's law (by virtue of territoriality).⁶³ Even if one assumes that both the nationality and territoriality principles have attained customary status, there are neither general treaty⁶⁴ nor customary law rules for resolving such conflicts among conflict-of-law principles themselves.⁶⁵ The uncertain status of at

documents with local county). The continental European analogue to the public policy exception is the principle of *ordre publique*. See David J. Gerber, *Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States*, 34 AM. J. COMP. L. 745 (1986). In international jurisprudence, U.S. courts focus on congressional intent of extraterritorial application; see *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248-59 (1991) (holding Title VII—which was later amended as a result of this opinion—to fall short of demonstrating affirmative congressional intent to overcome presumption against extraterritorial effect of legislation). U.S. courts have also based decisions on the international principle of universality. See *Filartiga v. Pena Irala*, 577 F. Supp. 860, 863 (E.D.N.Y. 1984) ("Torture is viewed with universal abhorrence; the prohibition of torture by international consensus and express international accords is clear and unambiguous."). See also *United States v. Yunis*, 681 F. Supp. at 900-01 (discussing universality principle). See generally, RESTATEMENT OF FOREIGN RELATIONS, *supra* note 54, §§ 402, 404.

60. See *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976) (preferring a jurisdictional rule of reason to the territoriality test and the effects/intent test); Scott A. Burr, *The Application of U.S. Antitrust Law to Foreign Conduct: Has Hartford Fire Extinguished Considerations of Comity?*, 15 U. PA. J. INT'L BUS. L. 221 (1994).

61. RESTATEMENT OF FOREIGN RELATIONS, *supra* note 54, §§ 402, 404.

62. See Perry Dane, *Vested Rights, "Vestedness" and Choice of Law*, 96 YALE L.J. 1191 (1987) (arguing for the general principle that the choice of forum should not determine the choice of law that governs a particular dispute).

63. See *Mahoney v. Radio Free Europe, Inc.*, 67 Fair Empl. Prac. Cas. 170 (BNA) (D.C. Cir. 1995).

64. That is, there is no international treaty dedicated solely to conflict-of-law problems.

65. In specific instances, however, courts often draw on jurisdictional principles embodied in treaties and arguably extend those principles to nationals of nontreaty states, implicitly interposing notions of what is customary law. See, e.g., *United States v. Yunis*, 681 F. Supp. 896 (D.C. 1988) (applying passive personality and universality principles embodied in specific treaties signed by a

least some extraterritorial principles under international law and the lack of priority among potentially conflicting, authoritative principles⁶⁶ present significant obstacles to solving legal problems caused by increasing cross-border activities.⁶⁷

2. Uniform Rules

Most significantly, the treaty/customary law distinction poses a difficult problem when attempting to achieve uniformity of applicable law. As cross-border activity increases, and in instances when conflict-of-law doctrines are deemed inadequate, nations seek to create uniform, international rules.⁶⁸ On their face, these rules eliminate the underlying differences of law that create conflicts. Progress in the internationalization of rules touches many diverse fields of the law: child abduction,⁶⁹ immigration,⁷⁰ sale of goods,⁷¹ currency standards,⁷² protections

majority of states applicable to assert U.S. jurisdiction over hijacking by foreign national on foreign soil of aircraft occupied by several U.S. nationals).

66. Assuming both the nationality and territoriality principles are equally sufficient bases for the assertion of extraterritorial jurisdiction, the choice of national law will then depend on the availability and choice of the forum.

67. The strategy of utilizing conflict-of-law principles carries the advantage of maintaining local preferences in law. Indeed, whether to continue to employ choice of law over other strategies may depend on how frequent and important such conflicts are. If conflicts are rare and unimportant compared with the interest in local normative preferences, it makes little sense to alter local law. On the other hand, as cross-border transactions become increasingly numerous and central to the well-being of the local community, choice of law may be comparatively inadequate. This disadvantage of unpredictability in choice of law as a strategy is simultaneously an advantage of the second type of uniformity, that is, making uniform the substantive norms that govern cross-border activity.

68. This body of law has been traditionally referred to as public international law, law made by and between nations. See Ralph G. Steinhardt, *The Privatization of Public International Law*, 25 GEO. WASH. J. INT'L L. & ECON. 523 (1991).

69. See Hague Convention on the Civil Aspects of International Child Abduction, 42 U.S.C. § 11603(e)(2); *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993) (holding that a child's "habitual residence" for purposes of the Hague Convention must not be confused with domicile, and concluding that to determine the habitual residence a court must focus on the child rather than on the parents and examine past experience instead of future intentions).

70. See Schengen Agreement on the Gradual Abolition of Checks at their Common Borders, June 14, 1985, 30 I.L.M. 68 (giving nation where first entry is made exclusive jurisdiction over immigration status).

71. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 19 I.L.M. 671.

72. TREATY ON EUROPEAN UNION [Maastricht Treaty or TEU], ch. 2, arts. 105-09. See also *Learning to Fly*, THE ECONOMIST, Jan. 15, 1994, at 75; *European Monetary Union; the Twisting Road from Here to There*, THE ECONOMIST, Nov. 19, 1994, at 91 (discussing the European Union's actions toward establishment of a monetary union with a single currency).

of cultural sovereignty,⁷³ environmental regulation,⁷⁴ extradition,⁷⁵ human rights,⁷⁶ foreign investment,⁷⁷ and especially trade.⁷⁸

Strategies to create uniform rules take one of two overlapping and interrelated forms: (1) domestic, noncontractual acceptance of the uniform rule, often prompted by international criticism and sanctions⁷⁹ or as a condition to either international assistance⁸⁰

73. North American Free Trade Agreement, art. 2107, Dec. 17, 1992, 32 I.L.M. 605 (1993) [hereinafter NAFTA] (definition of cultural industries); European Convention on Cultural Property, June 23, 1985, 25 I.L.M. 44; UNESCO Convention, 823 U.N.T.S. 231, 10 I.L.M. 289 (1971).

74. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Mar. 22, 1989, 20 I.L.M. 656. The 1992 United Nations Conference on Environment and Development (or Earth Summit), held in Rio de Janeiro in June 1992, produced several international agreements for the signature of delegates, including the Rio Declaration on Environment and Development, June 13, 1992, U.N. Doc. A/CONF.151/5, 31 I.L.M. 874 (1992) [hereinafter RIO DECLARATION] (A declaration of principles of environmental protection and its link to sustainable development.).

75. See European Convention on Extradition, Dec. 13, 1977, 17 I.L.M. 813 (1978); Inter-American Convention on Extradition, Feb. 25, 1981, 20 I.L.M. 723.

76. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; Banjul Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58; European Convention for Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Nov. 26, 1987, 27 I.L.M. 1154 (1988).

77. See, e.g., Patrick Del Duca, Book Review, 85 AM. J. INT'L L. 240 (1991) (reviewing LUIGI MIGLIORINO, GLI ACCORDI INTERNAZIONALI/SUGLI INVESTIMENTI (1989)) (discussing approximately 250 bilateral treaties governing international investment, and investigating whether the treaties, together with elements of state practice, permit the inference of general principles of customary international law).

78. General Agreement on Tariffs and Trade, Apr. 15, 1994, 33 I.L.M. 1125 [hereinafter GATT]. See *A Dream of Free Trade*, THE ECONOMIST, Nov. 19, 1994, at 35 (reporting on the summit of the Asia-Pacific Economic Cooperation forum, held in November 1994 in Bogor, Indonesia, where the 18 members declared their commitment to the establishment of a free trade area stretching from the United States to China); Julian Ozanne & Mark Nicholson, *Summit Paves Way for Mideast Trade Zone*, FINANCIAL TIMES, Nov. 2, 1994, at 22 (summit grouping public and private sector leaders from the Middle East and North Africa declared the goal of establishing a common market based on free movement of goods and services).

79. South Africa's rejection of *apartheid* represents a prominent example. See Steven Mufson, *South Africa 1990*, FOREIGN AFF., 1990, at 120 (explaining the dismantling of *apartheid*).

80. For example, monetary assistance from the World Bank or the International Monetary Fund (IMF) are often conditioned on national reforms of the political, economic, and legal systems, and on policy choices in favor of democratic suffrage, human rights, or (more recently) environmental protection. See Jonathan Cahn, *Challenging the New Imperial Authority: The World Bank and the Democratization of Development*, 6 HARV. HUM. RTS. J. 159 (1993) (arguing that the World Bank performs law-making functions in recipient countries); Cynthia C. Lichtenstein, *Aiding the Transformation of Economies: Is the Fund's Conditionality*

or membership in common unions⁸¹; or (2) bi- or multilateral adoption of the uniform rule through consensual agreement (treaty),⁸² recognition of general practice accepted as law (customary law), or declarations of what the law is or should be (declarative law).⁸³ Although the uniformity of rules carries the significant advantage of reconciling formal conflicts between legal rules, residual disagreements over the rules of recognition and the interpretive application of these potential sources of law require additional scholarly attention.⁸⁴ In this respect, the nature of the treaty/customary law distinction may determine

Appropriate to the Task?, 62 FORDHAM L. REV. 1943, 1947-48 (1994) (assistance from the IMF is conditioned on economic and monetary policy reforms).

81. Mexico, for example, agreed to strengthen its internal environmental laws in order to strengthen U.S. support for the North American Free Trade Agreement. See Damian Fraser, *Mexico Ponders Price it Must Pay for NAFTA—Side Accords Demanded by the U.S. Raise Some Thorny Issues*, FINANCIAL TIMES, Mar. 23, 1993, at 9 (reporting that despite sovereignty concerns, Mexico expected to agree to new environmental regulations to accede to NAFTA). The European Union also has placed conditions on countries applying for membership. See Robert Mauthner, *No Quick Entry, but the Log Jam is Broken*, FINANCIAL TIMES, May 19, 1986, Survey rec., at 3 (discussing political obstacles to Turkey's membership in EEC); Victor Walker, *The Key to Successful EEC Integration*, FINANCIAL TIMES, Dec. 22, 1982, § 3, at 6 (discussing Greece's economic adjustments as requisites to EEC membership).

82. See Kenneth C. Randall, *The Treaty Power*, 51 OHIO ST. L.J. 1089 (1990); KAYE HOLLOWAY, MODERN TRENDS IN TREATY LAW (1967).

83. Whereas the relationship between treaty and customary law is the focus of this article, declarative law, referred to herein, is discussed thoroughly in Chodosh, *supra* note 6, and mentioned in Koh, *supra* note 50, at 276.

84. Even uniform treaty language is vulnerable to conflicting national interpretations, and subject to appeals to customary methods of interpretation. The U.S.-Japan trade negotiations provide a prominent example. The Japanese are accustomed to describing the immediate disagreements over the correct interpretation of uniform language in international agreements with the United States by referring to an insect ("*takshimuro*") that changes appearance depending on the angle from which it is viewed. See also *Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522 (1987) (holding permissive language in Hague Evidence Convention (e.g., use of the word "may") as indication that Hague procedures were merely one of many U.S. litigant options, whereas European parties had interpreted the same provision to indicate the exclusive procedure for obtaining evidence within their countries). See also FRANCK, *supra* note 11, at 53-54 (discussing the advantages and disadvantages of intentional indeterminacy). Franck identifies certain advantages to constructive ambiguity in a 1958 treaty provision on the underwater continental shelf: "The parties to the treaty simply disguised their differences, using a word-formula that left the matter in abeyance pending further work by courts, administrators, and by the evolution of customary state practice. The resultant vagueness permitted a rule to evolve flexibly, in response to advances in technology [that] the drafters could not foresee." Yet, he argues that "indeterminacy also makes it easier to justify non-compliance." *Id.*

who makes the law, who applies the law, and who is subject to it.⁸⁵

First, regarding who makes the law, in the United States, for example, a treaty must be ratified by the Senate to become U.S. federal law.⁸⁶ Arguably, however, no congressional consent is a prerequisite for customary international law to become binding in the U.S. courts.⁸⁷ Therefore, the identification of customary international law by either the executive or judicial branches may at times remove Congress from the active formal process of international normative development.

Second, regarding who applies the law, the application of customary law by U.S. courts invokes separation-of-powers concerns (e.g., if the courts allow the President to displace customary international law in which Congress played a law-making role pursuant to its constitutional authority to define and punish offenses against the law of nations).⁸⁸ As a constitutional matter, treaty is on a par with federal legislation, but the status of customary international law in U.S. court adjudication is controversial.⁸⁹

Finally, concerning who is subject to the law, treaty is presumed binding only on parties to international conventions or treaties. In contrast, customary international law, defined as

85. See Chodosh, *supra* note 6 (discussing three views of customary international law addressing respectively these three questions).

86. U.S. CONST. art. II, § 2, cl. 2.

87. See Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 727-31 (1986).

88. See U.S. CONST. art. I, § 8, cl. 10, which allocates law-making power to Congress to define and punish offenses against the law of nations, which has been equated by our courts with customary international law. See *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); see also Richard Prgent, *Presidential Authority to Displace Customary International Law*, 129 ML. L. REV. 77 (1990).

89. *Mexico v. Hoffman*, 324 U.S. 30 (1945); *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562 (1926); *United States v. Cadena*, 585 F.2d 1252 (5th Cir. 1978); *Dreyfus v. Von Finck*, 534 F.2d 24 (2d Cir. 1976); *Fiocanni v. Attorney General of the United States*, 462 F.2d 475 (2d Cir. 1972); *State v. Marley*, 509 P.2d 1095 (Haw. 1973); *Republic of Argentina v. City of New York*, 250 N.E.2d 698 (N.Y. 1969); *American League for a Free Palestine v. Tyre Shipping Co.*, 119 N.Y.S.2d 860 (Sup. Ct. 1952). For discussions of the relationship between customary law and domestic court adjudication, see James Crawford et al., *Application of Customary International Law by National Tribunals: General International Law and Common Law: A Decade of Developments*, 76 AM. SOC'Y INT'L L. PROC. 231 (1982); C. Donald Johnson, Jr., *Filartiga v. Pena-Irala: A Contribution to the Development of Customary International Law by a Domestic Court*, 11 GA. J. INT'L & COMP. L. 335, 336-37 (1981); David F. Klein, Comment, *A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts*, 13 YALE J. INT'L L. 332 (1988); Eric George Reeves, Note, *United States v. Javino: Reconsidering the Relationship of Customary International Law to Domestic Law*, 50 WASH. & LEE L. REV. 877 (1993).

general practice accepted as law, is presumed universally binding.⁹⁰ Increasing numbers of disputes involving at least one legal personality of a nontreaty party therefore may be resolved by applying customary international law or some other previously unrecognized source of law or by finding that no international law applies. Given a general increase in the quantity and scope of treaty, the architectonic principle chosen to inform the relationship between treaty and customary law may determine the outcome of such disputes. For example, under the dichotomous view,⁹¹ if the rule is one of treaty, then no customary law applies; thus, the nontreaty party has no obligation under customary international law.⁹² Alternatively, under an equivalent view,⁹³ treaty (with little more)⁹⁴ is customary law. Therefore, even the nontreaty party is bound by the treaty *qua* customary rule.⁹⁵

3. Unification of National Jurisdictions

Finally, comprehension of the treaty/customary law distinction is equally important to the legal functions of international institutions. Because they are aware of the limitations of both conflict-of-law doctrines and because they rely upon national institutions to apply uniform rules, nations may create international institutions in order to develop consistent and authoritative organization,⁹⁶ interpretation,⁹⁷ and

90. Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457 (1985); Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 1985 BRIT. Y.B. INT'L L. 1.

91. See *infra* Section III.A.

92. See *e.g.*, North Sea Continental Shelf Cases (W. Ger. v. Den.) (W. Ger. v. Neth.), 1969 I.C.J. 3, 26-27 (Feb. 20); Asylum Case (Colombia v. Peru), 1950 I.C.J. at 277. See generally Richard E. Levy, *International Law and the Chernobyl Accident: Reflecting on an Important but Imperfect System*, 36 U. KAN. L. REV. 81 (1987); VILLIGER, *supra* note 5 (raising question whether "the refusal of states to become parties to a treaty [should] be evidence that no such rule exists").

93. See *infra* Section III.E.

94. Under this view, it is unclear what "little more" would be needed.

95. See, *e.g.*, *The Paquete Habana*, 175 U.S. 677, 704, 706-07 (1900). See also VILLIGER, *supra* note 5, at 18-22 (1985) (raising the question of whether treaties are "examples of state practice which may form the basis of customary law binding on nonparties").

96. Uniformity of norms is intended to be a broader concept than legislation of uniform norms. Uniformity may be achieved without an international legislative institution, although the result of normative uniformity may be the same. Furthermore, uniformity may extend to regulate all intranational activity rather than merely trans- or international activity.

97. Treaty Establishing the European Community as Amended by Subsequent Treaties, and Protocol on the Statute of the Court of Justice of the

enforcement⁹⁸ of rules.

Such institutions may perform a variety of arguably quasi-legislative,⁹⁹ quasi-judicial,¹⁰⁰ and quasi-executive¹⁰¹ functions.¹⁰² Each of these functions presupposes the ability to

European Economic Community, Mar. 25, 1957, arts. 164-188, 31 I.L.M. 247 (Arts. 173 and 177 confer authority on the European Court of Justice to review actions of members as well as the legality of acts adopted by the Parliament, Council, and Commission.); NAFTA, *supra* note 73, arts. 2008-2019 (establishing arbitration panels to resolve disputes between parties regarding the interpretation of treaty provisions); STATUTE OF THE I.C.J., *supra* note 7, art. 36 (confers jurisdiction on the I.C.J. to hear any case brought to it by state parties, and any case on a matter specifically provided for in the U.N. Charter or other treaty or convention).

98. Allocations of executive powers to international bodies are evidenced in the growing role of the U.N. peace-keeping and enforcement activities. See H.E. Boutros Boutros-Ghali, *Beyond Peacekeeping*, 25 N.Y.U. J. INT'L L. & POL. 113 (1992).

99. U.N. CHARTER arts. 9-22 (functions of the General Assembly); *id.* arts. 23-32 (functions of the Security Council). Art. 10 grants the General Assembly the power to make recommendations to the United Nations or the Security Council on any question within the scope of the Charter. *Id.* art. 10. The Security Council is authorized to pass resolutions mandating certain actions by member states which are binding on those member states. *Id.* art. 25.

100. STATUTE OF THE I.C.J., *supra* note 7; NAFTA, *supra* note 73, arts. 2016-2017.

101. S.C. Res. 761, U.N. SCOR, 47th Sess., 3087th mtg., U.N. Doc. S/Res/761 (1992); G.A. Res. 45/2, Electoral Assistance to Haiti, U.N. GAOR, 45th Sess., Agenda Item 154, U.N. Doc. A/Res/45/2 (1990); G.A. Res 45/3, Situation in Cambodia, U.N. GAOR, 45th Sess., Agenda Item 32, U.N. Doc. a/46/61-s/22059 (1991); S.C. Res. 751, U.N. SCOR, 47th Sess., 3069th mtg., U.N. Doc. S/RES/751 (1992).

102. This strategy of creating international institutions carries the advantage of nearly eliminating conflicts of both law and legal interpretation between nations. See United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. 56/LOS/CRP.1/Rev.1 (June 3, 1994)); Louis B. Sohn, *International Law Implications of the 1994 Agreement*, 88 AM. J. INT'L L. 696, 701 (1994) (The agreement of the implementation of the Law of the Sea Convention is evidence that "there is a new dynamic mechanism, allowing the international community to create a new law directly by all nations gathering around a conference table, . . . and long public debate to agree on what the law should be. It is a more democratic process than that of national parliaments . . ."). However, it also has the disadvantages of diluting local influence and oversight. In this respect, one may also compare unification and extraterritorial approaches, or choice of law, as approaches to international legal problems in terms of choice between local control and international coordination. As Franck notes, Kant admonished against amalgamating national states under a single power because, "the laws progressively lose their impact as the government increases its range, and a soulless despotism, after crushing the germs of goodness, will finally lapse into anarchy." Immanuel Kant, *Perpetual Peace*, in *POLITICAL WRITINGS* 114 (H. Reiss ed., H. Nisbet trans., 1970), cited in FRANCK, *supra* note 11, at 22. The creation of internationalized jurisdiction also causes conflicts between international and municipal institutions. See, e.g., Michael H. Shuman, *With GATT, We Must Guard Our Cities*, N.Y. TIMES, Nov. 20, 1994, § 3 at 13. Local

recognize which rules are binding on whom (i.e., whether the rules have legal effect and whom they obligate).

In these three approaches or strategies to conflicts caused by cross-border activity, such as the utilization of extraterritoriality principles and conflict-of-law doctrines, the creation of uniform rules, and unification of national jurisdictions, the distinction between treaty and customary law is of practical contemporary significance, not merely of linguistic or academic concern. Thus, the importance of the distinction compels an interpretive exploration of conflicting ways in which the distinction may be understood.

B. *The Problem with Cross-Reference*

It is neither original nor controversial to state that the meaning of words is relational. To define is to fix or mark the limits of one meaning in relation to other meanings.¹⁰³ But the facial difference of the words themselves does not determine the specific nature of the terms' interrelationship¹⁰⁴ or their relationship to other terms.¹⁰⁵ In other words, language provides the medium through which knowledge about sources of international law is structured. But the recognition and differentiation of international legal sources depend on structural principles that underlie the face of the linguistic medium.¹⁰⁶

control is diminished by allocations of authority to supra-national institutions, which result in poor access for local interests to various legislative, adjudicatory, and executive processes. For example, the Norwegian public's perception of the inefficiency of the "bureaucrats in Brussels" was a major factor in Norway's referendum vote to not join the European Union. John Darnton, *Vote in Norway Blocks Joining Europe's Union*, N.Y. TIMES, Nov. 29, 1994, at A1. Furthermore, the institutional functions are performed by professionals from diverse legal cultures and political ideologies; thus, conflicts of interpretation and process are not altogether avoided. See, e.g., *In the Matter of Certain Softwood Lumber Products from Canada*, Panel No. ECC-94-1904-01-USA, 1994 FTAPD LEXIS 11, at 15-16.

103. DICTIONARY, *supra* note 12, at 303.

104. Compare NEEDHAM, *supra* note 13, at 83 ("Pairs of terms can be related by adjunction, conjunction, subsumption, alternation, mutual exclusion, and in other ways.")

105. For example, words expressed differently may have the same meaning (i.e., synonyms). The same word used in different contexts (often colloquial) may have opposite meanings (e.g., a "bad" car may mean either a bad car or a very good one indeed, or an "awful-awful" may denote a particularly rich milkshake). A same-sounding word may have altogether different but not necessarily oppositional meaning (i.e., homonyms). Furthermore, the very same word when applied to real phenomena may have an inherently oppositional meaning (e.g., enemies).

106. Cf. NEEDHAM, *supra* note 13, at 96.

The dyad potted bloom/wild flower is composed of terms that can be seen as contraries: a taxonomic connection between them is that they are . . .

Martti Koskenniemi underscores the relational quality of language¹⁰⁷ by noting that "expressions are like holes in a net. Each is empty in itself and has identity only through the strings which separate it from the neighbouring holes."¹⁰⁸ However appealing the net metaphor,¹⁰⁹ the image raises three sets of issues concerning the relationship between two concepts, such as treaty and customary law: (1) the precise structure of the distinction between the two distinguished terms; (2) the purposes poorly or well-served by the chosen characterization of the distinction; and (3) the superficiality of understanding different concepts cross-referentially (i.e., in terms of one another).

1. Alternative Relationships

The first set of issues raised by the net metaphor concerns the nature of the potential cross-referential relationships between the two distinguished terms. Six different possibilities of cross-referential interrelationships between two distinct terms may be applied to the net metaphor: (1) dichotomy—the string may divide the two semantic holes into hermetically sealed meanings; (2) overlap—the net may fold onto itself; (3) relativity—if the string moves from time to time, the meaning is not fixed; (4) interdependence—one hole may be shaped by the other, or the two holes may rely upon the same string; (5) equivalence—when the string deteriorates, the two holes may become one; or (6)

species of the genus flower. But all this means is that they can be classed together under the superior taxon of flower; the name of that taxon is not the name of the two of them considered together as a unity.

Id.

107. MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA (1989).

108. *Id.* at xx. Koskenniemi utilizes a form of linguistic structuralism to support his jurisprudential analysis. However, his dichotomous treatment of objectivity and subjectivity is vulnerable to attack. For example, in his discussion of liberalism, he writes that "any constraint [to prevent harm to others] seems a violation of individual freedom as what counts as 'harm' can only be subjectively determined." *Id.* at 66. Yet, as Terry Eagleton has pointed out, meaning may be intersubjective in being comprised of a common understanding. Such intersubjective meaning may be short of objectivity, but it nonetheless constrains "what counts as 'harm.'" See TERRY EAGLETON, LITERARY THEORY (1983) (critiquing structuralism in literary criticism and linguistic theory).

109. The net metaphor is hardly new. It is familiar to Buddhist philosophy. See, e.g., FRANCIS H. COOK, HUA-YEN BUDDHISM: THE JEWEL NET OF INDIA (1977). There is a notable distinction. Koskenniemi's net tends to have only two holes because he focuses much of his interpretive attention on putative oppositions; whereas the jewel net in Buddhist philosophy is infinite in its relationships of "mutual identity and mutual intercausality." *Id.* at 2.

indeterminacy—the string may be too weak to delimit a boundary of meaning.

The foregoing possibilities each focus on different points of relationship in the spectrum of meaning and suggest a distinct architectonic principle.¹¹⁰ A dichotomous understanding perceives only the extremes; the distinction will require the choice of one term or the other. An overlapping understanding presumes a starting point of binary oppositions and focuses on the middle where the extremes meet. A relative perspective posits opposing polarities, and aims at the subtlety of shades and the differentiation of gradient degrees across the spectrum of meaning between the poles. A dialectic or interdependent conception of the distinction between opposites (like its dichotomous counterpart) focuses on the extremes but presupposes a counter-magnetic relationship between the poles. Under this conception, not only are meanings interdependent, but they may also be in causal relation to each other. An equivalence of the two terms focuses on both the overlapping middle where the two opposites are both in evidence and on the interdependence between the two—one being unthinkable or impossible without the other. Finally, an indeterminate view draws selectively on the insights and failings of each of the foregoing views, and concludes that the distinctions are too indeterminate for purposes of ordering experience.¹¹¹

110. Before exploring applications of the architectonic principles thus identified, some preliminary points about the architectonics of the principles themselves should be made: they are not arbitrarily ordered; they may be understood reflexively; and they are often dynamically interrelated. First, the sequence in which these relational principles are listed here is not arbitrary. The progression from one to the next is frequently a reaction to the perceived disadvantages of the former. Thus, on the scale from dichotomy to indeterminacy, one sees not only a progression of comprehension and criticism, but also a digression of logic and legal administrability. Related to the foregoing point, the first three principles tend to support more static, categorical analyses; the latter three are found in more dynamically process-oriented texts. Second, the distinctions between these architectonic principles, as identified here, may be understood according to the principles themselves. Finally, the principles are also dynamically interrelated. Several principles may be employed in a single text or treatise. Thus, the identification of any one principle with any one text may be itself one of relative emphasis.

111. Each of the principles may be summarized in more or less algebraic terms: (i) dichotomy— T equals negative C , where C equals negative T ; (ii) overlap—some T are C ; (iii) relativity— X equals T attributes minus C attributes; if X is positive, then X is (relatively) T ; if X is negative, X is (relatively) C ; (iv) interdependence—because T equals negative C , and C equals negative T , the two values of T and C are interdependent; the meaning of one inheres in the other; (v) equivalence—even where T equals negative C , T may equal C , however, where C equals zero; and (vi) indeterminacy—the value assigned to T or C is arbitrarily variable (subjective and political); thus, there is no determinate (objective and legal) distinction between T and C . With regard to equivalence, compare John M. Rogers & Robert E. Molzon, *Some Lessons About the Law from Self-Referential*

2. Purposes Served

The second general set of questions raised by the idea of words as relational concerns the purposes served by the choice of a particular relationship and the consequence of any particular choice. From this perspective, the net metaphor is too static. Adding motion to the image, expressions of language, law, and nets serve a variety of social purposes. For example, language grasps phenomena, law resolves disputes, and nets catch fish. The more precisely tailored the differences between the holes and the purpose of differentiation,¹¹² the more likely it is that coherent and practicable use of language will facilitate the resolution of disputes.

The alternative ways of appreciating or rejecting distinctions as dichotomous, overlapping, relative, interdependent, equivalent, or indeterminate, serve a variety of different goals. In evaluating the architectonic principles that inform distinctions between international legal sources, this Article suggests tendencies within the particular purposes served by each architectonic principle. Dichotomy tends to serve hierarchical¹¹³ order.¹¹⁴ Overlap attempts to capture commonality, when mutual exclusivity was previously presumed. Relativity tries to grasp subtlety. Interdependence aspires to uncover dynamic relationships. Equivalence works to demystify dichotomies. Indeterminacy tends to facilitate criticism.

These principles are employed by a wide array of political and legal international commentators who debate many issues,

Problems in Mathematics, 90 MICH. L. REV. 992, 999 (1992) ("A system of statements could be invented in which both X and not-X are true, but it could soon be proved that *all* statements in the system are true, and the system would not be of much use.") (citing ERNEST NAGEL & JAMES R. NEWMAN, GÖDEL'S PROOF 50-51 (1958) and RAYMOND SMULLYAN, FOREVER UNDECIDED: A PUZZLE GUIDE TO GÖDEL 57-58 (1987)).

112. For a contrary view, see Anthony A. D'Amato, *Why Do We Need Customary Law*, in INTERNATIONAL LAW ANTHOLOGY 51 (Anthony A. D'Amato ed., 1994) [hereinafter D'Amato, ANTHOLOGY] ("Disputes tend to arise when a treaty provision does *not* cover the dispute, or when its coverage is ambiguous or otherwise contestable," arguing that Jeremy Bentham's wish "that the more fine-meshed the treaty system, the fewer disputes—or at least the fewer important disputes—will tend to arise" is not realizable.). See also Anthony D'Amato, *Legal Uncertainty*, 71 CAL. L. REV. 1, 4-8 (1983) [hereinafter D'Amato, *Legal Uncertainty*].

113. For an anthropological view of a hierarchical opposition, see Louis Dumont, *La Communauté anthropologique et l'idéologie*, 18 L'HOMME 83-110; Louis Dumont, *On Value*, 66 PROC. BRITISH ACADEMY 207-41 (1980). For a critical analysis of Dumont's views, see NEEDHAM, *supra* note 13, at 102-45.

114. Indeed, it may be a function of dualism generally to provide "a conceptual order." NEEDHAM, *supra* note 13, at 221.

including: alternative descriptions of newly emerging, post-cold war dichotomies;¹¹⁵ overlapping ethnic admixtures;¹¹⁶ cultural relativity;¹¹⁷ economic, environmental, and general interdependence;¹¹⁸ the equivalence¹¹⁹ of international law and

115. Kishore Mahbubani, *The West and the Rest*, NAT'L INTEREST, Summer 1992, at 3 (Such dichotomies are coined as battles between "the West and the Rest."). See also Samuel P. Huntington, *The Clash of Civilizations*, FOREIGN AFF., Summer 1993, at 41; Christopher C. Joyner & John C. Dettling, *Bridging the Cultural Chasm: Cultural Relativism and the Future of International Law*, 20 CAL. W. INT'L L.J. 275, 276 (1990) ("The problem for the future of international law is couched in the chasm between Western and non-Western notions of law and morality."). A permutation of "the West and the Rest" is the dichotomy of liberal and non-liberal states, based on the attribute of political democracy. See, e.g., Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 229, 236 (1993) [hereinafter Burley, *Dual Agenda*] (arguing for recognition of the "sovereignty paradox" in connection with the relations between "liberal and non-liberal states," addressing the argument that "a government founded on any principle other than some form of self-government should no longer qualify for recognition as an independent state"); see also Anne-Marie Slaughter Burley, *Law among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907 (1992) [hereinafter Burley, *Liberal Internationalism*] (arguing that the act of state doctrine helps to circumscribe a zone of "legitimate difference" among liberal states). Competing dichotomous characterizations of national taxonomies, such as North/South, Developed/Developing, First/Third World, also shape much international commentary. See, e.g., Greta Gainer, *Nationalization: The Dichotomy Between Western and Third World Perspectives in International Law*, 26 HOW. L.J. 1547, 1550 (1983).

116. Jeane J. Kirkpatrick, *Responses to Samuel P. Huntington's "The Clash of Civilizations": The Modernizing Imperative; Tradition and Change*, FOREIGN AFF., FALL 1993, at 22.

117. See ADDA B. BOZEMAN, *THE FUTURE OF LAW IN A MULTICULTURAL WORLD* (1971); see also Joyner & Dettling, *supra* note 115, at 275 ("[I]nternational lawyers must address critical questions about the 'limits of universalism,' especially in light of pervasive international conflict, widespread human rights abuse and, arguably, depreciation of the rule of law during this century.") (citing A. CARTY, *THE DECAY OF INTERNATIONAL LAW?* (1986)). Joyner states that "[t]he problem of cultural relativism is rooted in large part from the influx of more than 100 new, non-Western States into the international legal system since 1960." *Id.* at 276. Joyner points out that "[a] major thesis of cultural relativism is that many cultures stand in relation to each other in varying degrees of mutual unintelligibility." *Id.* at 279. However, an equally valid thesis might hold that there are also varying degrees of "intelligibility" upon which a common set of principles, norms, standards, and rules might be based. *Id.* at 312. "Cultures in many ways may be unique. [T]hey may also be in many ways strikingly similar." *Id.*

118. See, e.g., Berman, *supra* note 3, at 1621-22 (discussing the need for world law to address problems of global interdependence: "We are still stuck with a separation of international law from comparative law and of both of these from the customary law of communities that transcend national boundaries."). The strained relationship between cultural relativity and global interdependence is noted by Joyner: "[I]n an age of accelerating multifaceted global interdependence," the challenge of promoting cultural relativity as a universal value by future

politics;¹²⁰ and the indeterminacy¹²¹ of key distinctions between

international law "seems likely to become increasingly more difficult." Joyner & Dettling, *supra* note 115, at 291.

119. The prophetic accuracy of George Orwell's 1984 is still debatable; however, in at least one critical respect, Orwell may have accurately anticipated a modernist tendency to equate putative opposites. See GEORGE ORWELL, 1984 at 5 (1949) ("WAR IS PEACE[;] FREEDOM IS SLAVERY[;] IGNORANCE IS STRENGTH."). Equivalence, or the modernist "antipathy for, or rejection of, absolute polarities," is discussed in NORMAN F. CANTOR, TWENTIETH-CENTURY CULTURE: MODERNISM TO DECONSTRUCTION 38 (1988); the juxtaposition of "elements considered irreconcilable under traditional criteria of coherence" is discussed in Nathaniel Berman, *Modernism, Nationalism, and the Rhetoric of Reconstruction*, 4 YALE J. L. & HUMAN. 351, 354 (1992). Both sources are noted in Carl Landauer, *J.L. Brierly and the Modernization of International Law*, 25 VAND. J. TRANSNAT'L L. 881, 892 n.68 (1993) (discussing Brierly's "strategy of positing proximate opposites," such as between natural rights and natural law, and the fusion of "categories traditionally placed in sharp opposition," such as those of international and national law).

120. See ARISTOTLE, NICOMACHEAN ETHICS 1141b25-30 (1987) (contrasting law as "architectonic" with politics); Reisman, *Cult of Custom*, *supra* note 24, at B6 ("The factitious distinction between law and politics is nowhere more preposterous than in discussions of law-making."); LOUIS HENKIN, HOW NATIONS BEHAVE 22 (2d Ed. 1979) (law is politics), *later qualified in* LOUIS HENKIN, INTERNATIONAL LAW: POLITICS, VALUES AND FUNCTIONS (1989), *discussed in* Nicholas Greenwood Onuf, *Book Review*, 86 AM. J. INT'L L. 834 (1992); W. Michael Reisman, *Law from the Policy Perspective in INTERNATIONAL LAW ESSAYS 6* (Myres S. McDougal & W. Michael Reisman, eds. 1981) [hereinafter INTERNATIONAL LAW ESSAYS] at 6 ("A moment's reflection will show that this distinction between law and politics is artificial, even preposterous."). Although many describe the New Haven school of jurisprudence to which Reisman belongs as standing for the proposition that law is politics, Reisman's essay does not treat law and politics as equivalent. He views the relationship between law and politics alternatively as overlapping, relative, and interdependent. See *id.* For example, he writes further: "This does not mean that every exercise of power is lawful or that every putative act by someone in a manifest law role is effective." *Id.* at 6-7. In rejecting equivalence, Reisman accepts that they overlap in part. *Id.* at 8. He utilizes both relativity ("Power and authority are always co-present in varying degrees.") and interdependence ("[L]awful acts, to be such, will require a minimum degree of effectiveness, . . . over time, effective acts are likely to be deemed lawful."). *Id.* at 7. Reisman is not concerned so much with the distinction, except to the extent he rejects the dichotomy, but more so with the symbiosis between law and politics: "[P]ower and authority are in a sort of symbiotic relationship." *Id.* at 8. He is primarily concerned with "the very intimate and permanent relationship between them." *Id.* at 9. Several scholars are working to bridge the gap between the study of political science and international law. See Burley, *Dual Agenda*, *supra* note 115; Karen F. Botterud, *Crossing the Great Divide: Views of a Political Scientist Wandering in the World of International Law in Bridging the Gap Between Political Scientists and Lawyers*, 81 AM. SOC'Y INT'L L. 161 (1987).

121. Indeterminacy is the conclusion reached with the analytical tools of "deconstruction," a term derived from Derrida's French philosophy and popularized in legal literature by the critical legal studies movement, which has made inroads in international legal scholarship. The primary critical legal studies

the terms¹²² chosen to comprehend and reorder these changes. Likewise, international legal theorists use the same six principles as alternative ways of understanding key distinctions between public and private international law,¹²³ horizontal and vertical party structures¹²⁴ in international disputes,¹²⁵ and the international and national legal systems.¹²⁶

scholars in international law are David Kennedy and Martii Koskenniemi. See DAVID KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* (1987); KOSKENNIEMI, *supra* note 107. For an excellent discussion of this movement in international legal theory, see Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 HARV. INT'L L.J. 81 (1991). Deconstruction operates by arguing that because language is relational and circularly delimited, the meaning of any one term depends on the meaning of another, and concluding (however illogically) that because terms are interdependent in meaning they are indeterminate. This article argues that indeterminacy is only logical if one sets the standard of determinacy at the unattainable level of absolute, purely objective meaning. See discussion of indeterminacy, *infra* Section III.F. See generally CHRISTOPHER NORRIS, *DECONSTRUCTION: THEORY AND PRACTICE* (1982) (describing philosophical debate between deconstruction and ordinary language/speech act school).

122. Joyner & Detling, *supra* note 115, at 285 ("International lawyers undoubtedly will have to seriously examine the linguistic niceties and nuances of transcultural communication to discover what relevant indeterminacies exist in communicating legal precepts across cultures.")

123. See Hilary Charlesworth, et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991). Charlesworth notes that

[M]odern international law rests on and reproduces various dichotomies between the public and private spheres, and the "public" sphere is regarded as the province of international law. One such distinction is between public international law, the law governing the relations between nation-states, and private international law, the rules about conflicts between national legal systems. Another is the distinction between matters of international "public" concern and matters "private" to states that are considered within their domestic jurisdiction, in which the international community has no recognized legal interest.

Id. at 625. See also ELIZABETH JANEWAY, *MAN'S WORLD, WOMEN'S PLACE: A STUDY IN SOCIAL MYTHOLOGY* (1971); JEAN BETHKE ELSHTAIN, *PUBLIC MAN, PRIVATE WOMAN* (1981); *THE PUBLIC AND THE PRIVATE* (E. Gamarnikow et al. eds., 1983); Carole Pateman, *Feminist Critiques of the Public/Private Dichotomy*, in *PUBLIC AND PRIVATE IN SOCIAL LIFE* 281 (Stanley I. Benn & Gerald F. Gaus eds., 1983); Steinhardt, *supra* note 68.

124. See LEA BRILMAYER, *JUSTIFYING INTERNATIONAL ACTS* (1989); Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L. REV. 2277 (1991); Koh, *supra* note 50 (critiquing Brilmayer's vertical thesis).

125. See M.W. Janis, *Individuals as Subjects of International Law*, 17 CORNELL INT'L L.J. 61, 75 (1984) (noting that the distinction between public and private international law is based on an outmoded dichotomy between public and private subjects of international law).

126. See discussion of monism in J. G. Starke, *Monism and Dualism in the Theory of International Law*, 1936 BRIT. Y.B. INT'L L. 66. See also Ralph G. Steinhardt, *supra* note 25 (describing monism as the view that "the international and municipal legal systems comprise a single universal order . . .") (citing LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 140-41 (2d ed. 1988)

The broad and often conflicting use of these principles raises the question of how to evaluate each principle in the context of international law. For present purposes, this Article postulates that the choice of architectonic principle in legal interpretation should be (1) theoretically coherent (i.e., the conception of distinction should be empirically accurate and the reasoning supporting it should be logical);¹²⁷ (2) practicable (i.e., the terms

[hereinafter HENKIN, CASES AND MATERIALS]; HANS Kelsen, PRINCIPLES OF INTERNATIONAL LAW 553-88 (2d ed. 1966) [hereinafter Kelsen, PRINCIPLES]; Josef L. Kunz, *The "Vienna School" and International Law*, 11 N.Y.U. L.Q. 370, 399-402 (1934). Cf. IAN BROWNLEE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 33-35 (3d ed. 1979) (noting two traditional theories of public international law, monism, and dualism); Michael Bernard Bernacchi, *Standing for the Doctrine of Specialty in Extradition Treaties: A More Liberal Exposition of Private Rights*, 25 LOY. L.A. L. REV. 1377 (1992) (discussing the two schools of thought concerning the effect of international law on United States domestic practices: "monism" and "dualism"); HANS Kelsen, GENERAL THEORY OF LAW AND THE STATE 34 (1945) [hereinafter Kelsen, THEORY] (arguing that there is no distinction between national and international law); MANLEY O. HUDSON, CASES AND OTHER MATERIALS ON INTERNATIONAL LAW 10 (1937) (arguing that because international law is conceived as governing the relations between states, it exists separately from municipal law); Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185 (1993); Myres S. McDougal, *The Impact of International Law upon National Law: A Policy-Oriented Perspective*, 4 S.D. L. REV. 25 (1959); *The Effect of Treaties in Domestic Law*, 7 UNITED KINGDOM NATIONAL COMMITTEE OF COMPARATIVE LAW (Francis G. Jacobs & Shelley Roberts, eds., 1987); LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY AND FOREIGN AFFAIRS (1990) [hereinafter HENKIN, CONSTITUTIONALISM] ("All states have incorporated international law into their legal system to some extent in some ways, but states differ both as to extent and as to ways. States differ also as to what—if anything—is necessary to make a treaty part of national law and what are the jurisprudential consequences."); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 864 (1987) [hereinafter Henkin, *Chinese Exclusion*]; Christoph Sasse, *The Common Market: Between International and Municipal Law*, 75 YALE L.J. 695 (1966); M. WAELBROECK, TRAITES INTERNATIONALES ET JURIDICTIONS INTERNES DANS LES PAYS DU MARCHE COMMUN (1969); ILO V. LEARY, INTERNATIONAL LABOUR CONVENTIONS AND NATIONAL LAW: THE EFFECTIVENESS OF THE AUTOMATIC INCORPORATION OF TREATIES IN NATIONAL LEGAL SYSTEMS (1982); Gregory Marchildon & Edward Maxwell, *Quebec's Right of Secession Under Canadian and International Law*, 32 VA. J. INT'L L. 583 (1992); Joni S. Charme, *The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma*, 25 GEO. WASH. J. INT'L L. & ECON. 71 (1992). See generally GUYORA BINDER, TREATY CONFLICT AND POLITICAL CONTRADICTION: THE DIALECTIC OF DUPLICITY 103 (1988); Georg Ress, *Der Rang Völkerrechtlicher Verträge Nach Französischem Verfassungsrecht*, 35 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 445, 452-56 (1975) (positing that the French ruling concerning the internal validity of international law may be characterized as qualified monism).

127. That is, the conception of distinction should be empirically accurate and the reasoning supporting it should be logical. See FRANCK, *supra* note 10, at 15-16 (discussing non-coercive factors in explanations of obedience to law, e.g., legitimation, noting "the tradition of Aeschylus and Aristotle, who may have been

distinguished and the understanding of such distinctions should be consistent with preexisting law and administrable);¹²⁸ (3) reconcilable with alternative conclusions justifiably reached in specific cases; and (4) powerful as an intellectual technique for resolving disputes over the existence *vel non* of international legal sources.¹²⁹

Thus, the following, more specific, tests should guide the choice of architectonic principle to be applied to the distinction between treaty and customary law. First, the concepts should be shaped by the phenomena they describe. Second, a statement and its negation should not both be true. Third, one should work with the linguistic expressions already embodied in the law. Fourth, the method of understanding linguistic distinctions should satisfy common sense and fall within the limits of human capability. Fifth, the general choice of architectonic principle should be sufficiently open-ended and nonconclusory to allow the application of alternative architectonic principles in specific cases. Sixth, an approach to the interpretation of distinctions should be able to explain divergent views and resolve disputes over the application of terms to any particular phenomenon. Taken together, these criteria derive from the view that the treaty/customary law distinction in particular cases should determine the nature of generalizations, and conversely, conclusory characterizations should not control the outcomes of specific applications of the treaty/customary law distinction.

3. From Cross- to Sub-Referential Interpretation

The third problem with the relational quality of language and the net metaphor in particular is its superficiality. The alternative principles that order one's comprehension of distinctions often first assume binary opposition between distinguished terms; that is, one term is defined cross-referentially in negative opposition to the other. For example, one may not determine the law in the United States through a binary, cross-referential definition of legislation and judicial precedent; one must know the rules of recognition for each source before distinguishing between them. Cross-referential principles, by

the first in the Western tradition to have identified reasoned communication as an essential factor in securing social assent to elites' exercise of power."). As Franck notes, "the widely regretted fact that there is not more obedience to more norms . . . may be due to a lack of legitimacy in the rules and the institutional processes by which they are made, interpreted and applied." *Id.* at 21.

128. That is, the terms distinguished and the understanding of such distinctions should be both consistent with preexisting law and administrable.

129. See *supra* notes 25-26 and accompanying text in Section II.A.

defining one source in terms of the other, fail to identify the rule of recognition for each source. None of the cross-referential architectonic principles this Article critiques in Section III below makes it possible to identify customary law independently of treaty.¹³⁰ Before concluding that treaty and customary law are opposed to one another in some or all respects, one should suspend judgment on supposedly cross-referential relationships until after one applies the standards of recognition for each singular phenomenon. Cross-referential architectonic principles prejudice the determination of whether a particular treaty provision is also customary law. Of course, many cross-referential views are based on sub-referential differentiation, albeit overly narrow and skewed,¹³¹ and independent sub-reference to additional terms defining customary law does not circumvent the need for interpreting the scope of application of the term *qua* attribute. However, the interpretive technique proposed here, sub-referential threshold relativity (STR), would ensure that the oppositions (in respect of attributes) are not false and then identify and apply a threshold standard in order to make the distinction coherent and practicable. Thus, the relationship between treaty and customary law in any particular case would not be presupposed, but rather the conclusion would be supported by a rigorous application of the accepted attributes of customary law on a specific issue.

C. An Illustration: The Minivan Problem

The nature of the distinction between two concepts is of particular importance in addressing the significance of new phenomena.¹³² In order to introduce the issues this Article

130. However, in the case of treaty and customary law, the authoritative texts do not define one concept in terms of the other. These texts include treaty provisions themselves. See, e.g., STATUTE OF THE I.C.J., *supra* note 7, art. 38 and I.C.J. case law, discussed and referred to in text and notes *infra* in Sections III and IV.

131. See, e.g., *infra*, discussion in Section III.A. This section demonstrates, for example, how presumed cross-referential relationships of dichotomy (i.e., rules may be either treaty or customary but never both) are often combined with a narrow choice of differentiating characteristics (written/unwritten, instant/long, explicit/implicit, etc.) based on a perceived attribute of the better known concept (treaty law) and a projected negation of that attribute as a defining characteristic of the lesser known concept (customary law).

132. In this respect, minivans are particularly analogous to new problems in international legal source identification, problems which recur in an increasingly wide array of phenomena that (at least on their face) are neither treaty nor customary law. See RIO DECLARATION, *supra* note 74. International law

identifies and addresses, it is helpful to take as an example the distinction between cars and trucks, and the problem of classifying minivans.¹³³ Assuming decision-makers are forced to categorize minivans as either cars or trucks,¹³⁴ the process of categorization will require them to consider the precise nature of the distinction between the two types of vehicles. The choice of characterization is not merely of academic significance, because the result will affect the conflicting tariff, safety, and environmental regimes to which minivans are subject. If imported minivans are classified as cars, they are subject to a 2.5 percent tariff¹³⁵ and to safety, fuel, and emission standards that are stricter than the standards for trucks.¹³⁶ On the other hand, if minivans are trucks, they are subject to a twenty-five percent tariff¹³⁷ and more liberal regulatory standards.¹³⁸ In order to determine the correct classification of minivans, it is fruitful to consider the alternative ways of understanding the distinction between cars and trucks. Therefore, an array of architectonic possibilities should be considered and evaluated. This illustration will demonstrate that, in contrast to the six architectonic principles this Article critiques below, the minivan classification problem can be most coherently and practically resolved by the STR approach.

that is neither treaty nor customary law is discussed in Chodosh, *supra* note 6, at 97-105.

133. See *Marubeni America Corp. v. United States*, 35 F.3d 530 (Fed. Cir. 1994) (affirming Court of International Trade ruling that two-door, two-wheel, and four-wheel drive Nissan Pathfinder sport utility vehicles were properly classified as vehicles principally designed for the transport of persons). See Max Gates, *Nissan Challenges Tariff*, AUTOMOTIVE NEWS, Mar. 29, 1993, at 3 ("Nissan is appealing a 1989 ruling by the U.S. Treasury Department that made two-door sport-utility vehicles and cargo minivans subject to the 25% duty," claiming that "the two-door Pathfinder was designed and marketed as a passenger vehicle. . .").

134. Obviously, it is possible to avoid these difficulties by rejecting the categorical totality itself through more precise and knowledgeable rule-drafting. That is, concluding that minivans are neither cars nor trucks, it is possible to create a third category and a set of rules to apply to minivans, thereby ostensibly resolving the problem. Although this removes some of the attention placed on the car/truck distinction, it shifts this attention to the distinction between minivans and the other two previously recognized vehicles (risking the difficulties of trichotomy rather than dichotomy). It also shifts attention to the distinction between minivans and potentially fourth or fifth categories of vehicles (e.g., luxury trucks). Another equally obvious option would be to eliminate the regulatory distinction altogether.

135. Gates, *supra* note 133, at 4.

136. Renee Bergen & William R. Mattox Jr., *Import Tax on Minivans Would Hit Families Hard*, USA TODAY, Mar. 23, 1993, at 13a.

137. *Id.*

138. *Id.*

First, a dichotomy of mutual exclusivity between cars and trucks is of little assistance. Neither the statement that no cars are trucks nor the statement that no trucks are cars provides any guidance as to whether minivans are either cars or trucks. Dichotomy only suggests the conclusion that a minivan may not simultaneously be a car and a truck. Stated otherwise, with dichotomy, either result is possible: (1) minivans are not cars and are therefore trucks; or (2) minivans are not trucks and are therefore cars.¹³⁹ Thus, dichotomy offers no resolution.

Second, relaxation of the dichotomy through the recognition of categorical overlap, in which some cars may be trucks and some trucks may be cars, is equally unhelpful. If minivans fall within the overlapping category of both cars and trucks, one is still left with no guidance on the application of the rule. Again, as with a dichotomous conception, two conflicting results could logically follow: (1) minivans, though trucks, are also cars; or (2), minivans, though cars, are also trucks. Therefore, one must look to other conceptions.

Third, one may conceive of cars and trucks as two polar extremes bounded by a scale of degrees. According to this concept, minivans should be located somewhere along the spectrum of vehicles. Although relativity offers the most promise (as this Article will argue below), in the absence of a dispositive criterion that differentiates the two poles (e.g., passenger use), and a threshold of recognition (e.g., more than fifty percent for passenger use),¹⁴⁰ one is left without guidance for making a determination as to whether minivans are relatively more or less cars or trucks. Thus, relativity without modification is of no help.

Fourth, one may stress the dynamic relationship between the two poles represented at either extreme. Not only is the meaning of one polar opposite senseless without the other, the very magnetic force of one keeps the other in the opposite position. But here, too, positing that the meaning of cars is inconceivable without the concept of trucks, or that the sensory perception of

139. Of course, if it had already been predetermined that minivans are cars, then it would follow under a dichotomous view that they are not trucks, and thus the different tariff, fuel, and safety rules would not apply. This pattern differs from the treaty/customary law context because an international decision-maker is often presented with one or more treaties and must then decide whether the treaties may be used to support the claim of customary law and universal application, even to nontreaty parties.

140. As another example, in delimiting the term "orange" one may determine whether the phenomenon in question is that portion of the visible spectrum lying between red and yellow, evoked in the human observer by radiant energy with wavelengths of 590 to 630 nanometers.

one is dependent on the sensory perception of the other does not aid in the categorization of minivans.

Fifth, one may critique the dichotomy, yet confirm categorical overlap and dynamic interdependence, and conclude that the distinction is meaningless—the two are the same. Cars may be equated with trucks, however illogically, if some cars are trucks or if one category cannot exist without the other. Yet, once more, equivalence leaves decision-makers unable to make a determination. If cars are trucks in refutation of the distinction, trucks are also cars. The semantic edge of the rule is entirely abandoned. Either trucks, now also cars, may be treated as cars, or cars, now also trucks, may be treated as trucks. Accordingly, the determination regarding minivans may be made either way.

Finally, based on each of the inadequacies of the foregoing conceptual approaches to the distinction between cars and trucks, one may conclude that the question of classifying minivans is too indeterminate to satisfy the requirements of law itself. “Car-ness” or “truck-ness” exists only in the eye of the beholder. The distinction for the purpose of rendering counsel on the importation of minivans is hopelessly indeterminate. But this provides neither guidance nor comfort to one who is entrusted with making a determination one way or another.

Given the inadequacies of these six architectonic alternatives, the best and perhaps only one that is at once empirically accurate, logical, consistent with preexisting language, and practicable is relativity with certain modifications, sub-referential threshold relativity (STR). Using the STR approach, one first looks sub-referentially to affirmative attributes that define the terms “car” or “truck.” When given two possible categories, one must find the critical attributes that differentiate between the two categories.¹⁴¹ (Exclusive cross-reference to the terms “car” and “truck” is by itself superficial and unhelpful.) Second, one places such sub-referential attributes on a relative scale bounded by absolute polarities.¹⁴² Third, one establishes threshold standards

141. Although dichotomy is referred to as cross-referential, in one sense it is also sub-referential in that dichotomy tends to set up a sub-referential threshold opposition. Dichotomy, however, is a cruder conceptual tool than sub-referential relativity in at least three critical respects. First, dichotomy does not necessarily focus on the most critical differentiating attribute. Second, it often bases the opposition on knowledge of only one side of the opposition (e.g., cars transport passengers; therefore, trucks do not). Finally, it states oppositions in such confident terms that it presupposes that making distinctions in grey areas is an easy task).

142. For example, if one is distinguishing between water and ice, one must identify the key differentiating attribute of temperature, place the two phenomena on a common scale of fahrenheit or centigrade, and identify a threshold at which

or ranges of recognition to differentiate between gradient degrees of satisfaction or dissatisfaction of the attributive standard. Finally, one applies the evidence of compliance with the standard to the threshold thus established.¹⁴³

Applying this approach to the problem of minivans, first, one identifies the underlying attribute of "cars," in this case, that attribute that is not shared by trucks. This attribute serves as the basis for statutory differentiation. Therefore, the choice of differentiating attribute is the first hurdle. Alternative attributes that differentiate cars and trucks include origin (e.g., the origin of manufacturing design or the division of the company responsible for manufacture), or primary use as a passenger¹⁴⁴ or cargo vehicle. The selection of differentiating attributes should be justified by its connection to the policies achieved by treating cars and trucks differently. If the critical attribute of cars is one of primary purpose as a passenger vehicle (Step One), this attribute may be set on a scale of degrees bound by the extremes of vehicles that do not carry any passengers and vehicles that only carry passengers (Step Two). Degrees may be quantified by evidence of actual use in accordance with the social purpose or by a physical proxy of vehicle space or other features designed for passengers, as distinct from cargo space. Once the scale of polar extremes is established, one may establish a threshold for differentiating passenger from cargo use (e.g., more than fifty percent) (Step Three).¹⁴⁵ Evidence may be gathered regarding the actual use of minivans or the physical aspects of design among minivans for either passenger or cargo use.¹⁴⁶ Finally, the

point water becomes ice (i.e., freezing levels of zero degrees centigrade or thirty-two degrees fahrenheit).

143. In the event of more than one standard and the related conjunctivity or disjunctivity of multiple standards, one applies the same four-step analysis.

144. See Gates, *supra* note 133, at 4. (In its complaint, "Nissan argued that two-door sport utility vehicles are typically bought by families with two or more children and are principally used as a large station wagon.")

145. See *Marubeni America Corp. v. United States*, 35 F.3d 530, 534. The Harmonized Tariff Schedule of the United States heading for "motor vehicles principally designed for the transport of persons" requires that vehicles be designed "more' for transport of persons than goods," and the Court of Appeals held that a vehicle would not properly be classified thereunder if it is equally designed for the transport of goods and persons, but it is not required that vehicles be uniquely constructed for the purpose of transporting persons to the exclusion of any other use. *Id.*

146. In *Marubeni*, the Court of Appeals applied several indicia of both structural and auxiliary design features. *Id.* at 535 (noting structural design features of placement of gas tank and spare tire to accommodate rear passenger seat, new rear suspension providing smoother ride for passengers, intrusion on cargo space by rear seat (folded down) and spare tire, carpeted cargo area, pop-up tailgate to accommodate loading and unloading of small packages, and auxiliary

evidence should be applied to the threshold standard (Step Four). If the evidence shows that more than fifty percent of minivan use is for passenger transportation,¹⁴⁷ or that more than fifty percent of the space is used for such purpose, as distinct from cargo use, then minivans may be justifiably classified as cars under the statute.¹⁴⁸

This analysis demonstrates, at least in a limited context, that dichotomy, overlap, relativity (without modification), interdependence, equivalence, and indeterminacy have no resolving power; whereas STR shows promise as an approach to the interpretation of legal distinctions.

III. AN INTERPRETIVE THEORY OF INTERNATIONAL LAW: THE TREATY/CUSTOMARY LAW DISTINCTION

The identification and classification of sources of international law pose problems similar to those found in the classification of minivans.¹⁴⁹ The minivan analysis in Part C of Section II demonstrates the failings of dichotomy, overlap, relativity, interdependence, equivalence, and indeterminacy as well as the promise of STR as an approach to the interpretation of legal distinctions. This Section provides a detailed exploration of these interpretive problems in the context of the treaty/customary

design features of lower vehicle height, reclining rear seats, rear seat stereo outlets, ashtrays, cubby holds, arm rests, handholds, footwells, seat belts, child seat tie down hooks, etc.). The Court also noted that the Court of International Trade in its trial "evaluated both marketing and engineering design goals (consumer demands, off the line parts availability, etc.)". *Id.* at 536.

147. See Bergen & Mattox, *supra* note 136 (noting a problem with the classification of minivans as trucks: "They haul kids, not dirt." This article also quoted a Ford official as saying: "We know that the people who purchase both minivans and compact utilities typically replace passenger cars, rather than trucks, and use them primarily as people-movers, not cargo-movers.").

148. Of course, other concerns may counsel the classification of minivans as trucks. The Clinton Administration, for example, argues that were minivans to be reclassified as cars, domestic manufacturers would have to do the same in order to apply consistent standards to imported and domestic minivans. Assuming consistency is necessary, U.S. minivan manufacturers, too, would have to meet such standards, which would be likely to increase the cost of manufacturing and, subsequently, the cost to the consumer. The increase in cost is estimated at between \$3,000 and \$6,000 on the price of Toyota Previas, Mazda MPVs, and Isuzu Troopers. See Bergen & Mattox, *supra* note 136. However, classification of minivans as passenger vehicles is favored by environmental advocates.

149. See, e.g., Maarten Bos, *The Recognized Manifestations of International Law, A New Theory of "Sources,"* 1977 GERM. Y.B. INT'L L. 9.

law distinction,¹⁵⁰ and evaluates each competing principle in terms of its theoretical coherence (empirical accuracy and logic), practicability, (consistency with existing law and administrability), reconcilability with other competing conceptions,¹⁵¹ and resolving power.

This Section concludes that none of the architectonic principles applied to the treaty/customary law distinction, except overlap, is both theoretically coherent and practicable. Furthermore, none of the principles is reconcilable with each of the other competing principles, and, with limited exceptions, none has any resolving power in particular disputes involving at least one nontreaty party. The common disadvantage of each architectonic principle discussed in this section rests in the cross-referential nature of the competing conceptual understandings of the distinction between treaty and customary law.

The findings of this Section are as follows: First, the dichotomous view of the treaty/customary law distinction is logical and arguably administrable, but is empirically inaccurate, inconsistent with the law, irreconcilable with other architectonic principles, and has limited resolving power.¹⁵² Second, the overlapping view is logical, administrable, empirically accurate, consistent with the law, but is irreconcilable with dichotomy and (unmodified) relativity, and has no resolving power in particular disputes,¹⁵³ other than to refute conclusory utilization of other architectonic principles.¹⁵⁴ Third, the relative view, without some sub-referential attribution, is illogical, nonadministrable, empirically inaccurate, inconsistent with the law, not reconcilable with overlap or equivalence, and has no resolving power in particular disputes.¹⁵⁵ Fourth, the interdependent view is logical,

150 As noted above, the nature of the treaty/customary law distinction has received much scholarly attention. See *supra* note 5.

151. Secondly, the reconcilability of each principle with the other five is noted. The purpose in noting irreconcilability is to point out that generalizations (often cross-referential) about the relationship between treaty and customary law tend to prejudice specific case-by-case determinations. Any analysis of the relationship between treaty and customary law should be nonprejudicial; therefore, the conceptual approach implemented in particular cases should be able to render a wide array of results.

152. See *infra* Section III.A.

153. See *infra* Section III.B.

154. For such an analysis, see criticism in Thomas K. Plofchan, Jr., Note, *A Concept of International Law: Protecting Systemic Values*, 33 VA. J. INT'L L. 197, 229-30 (1992) (discussing Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27), which rejected a U.S. claim that multilateral treaty reservations barring adjudication also barred claims based on even identical rules under customary international law).

155. See *infra* Section III.C.

empirically accurate, consistent with the law, and reconcilable with each principle except dichotomy, but is not easily administered and has no resolving power in particular disputes.¹⁵⁶ Fifth, the equivalent view is arguably easy to administer, but is empirically inaccurate, illogical, inconsistent with the law, irreconcilable with all but interdependence,¹⁵⁷ and has only limited resolving power in particular disputes. Finally, the indeterminate view is reconcilable with all but dichotomy, but is illogical, inconsistent with the law, nonadministrable, and has no resolving power in particular disputes.¹⁵⁸

A. *The Dichotomous View*

Applying a dichotomous architectonic principle to the treaty/customary law distinction, the two sources appear not only to have independent authority,¹⁵⁹ but also to be "isolated,"¹⁶⁰ mutually exclusive,¹⁶¹ and analogous to "parallel lines in Euclidean geometry,"¹⁶² which never intersect or touch one another. Dichotomies draw rigid boundaries¹⁶³ of generalized associations between two concepts or things,¹⁶⁴ and are more frequently value-laden than value-neutral.¹⁶⁵ A dichotomous

156. See *infra* Section III.D.

157. See *infra* Section III.E.

158. See *infra* Section III.F.

159. See generally Waldock, *supra* note 8.

160. Gamble, *supra* note 5, at 306.

161. As David Kennedy observed, "The sense that it is important to elaborate a theoretical boundary which has an on-off quality reflects the shared understanding among those doing this work that the abstract categories will control the content of the norms, rather than merely register them." KENNEDY, *supra* note 121, at 21.

162. Gamble, *supra* note 5, at 307.

163. David Kennedy has written that Article 38 "develop[s] the boundaries of these categories." KENNEDY, *supra* note 121, at 12. However, nothing in the listing of sources indicates anything in particular about the nature of such "boundaries" or "categories."

164. Such boundaries may push one of two differentiated phenomena closer to a third phenomenon or concept. For example, Koskenniemi points out that "[t]he initial differentiation between custom and treaty tends constantly to push the former into natural law." KOSKENNIEMI, *supra* note 107, at 353.

165. See NEEDHAM, *supra* note 13, at 18.

The Pythagoreans reported by Aristotle placed 'right' in the column to proper right, and 'left' in the column to proper left; male, straight, light, and good were in the right column, and female, crooked, darkness, and evil were in the column of the left. When read in Greek or English, the first term in each contrast appears to be superior in some respect or another to the second term [I]t has become a standard expectation that an arrangement in two columns is meant to be read as expressing contrasts not only in terms but also in values. It is not a matter of

architectonic principle is often used to bolster the conclusion that the two concepts exist in a hierarchical relationship¹⁶⁶ with one opposite superior to the other.¹⁶⁷

Most scholars who adopt a dichotomous view conclude that treaty is superior¹⁶⁸ to customary law.¹⁶⁹ This view is supported by describing attributes¹⁷⁰ of the two sources in ways that

indifference, therefore, whether we write below/above or above/below, and so on.

Id. Thomas Mann once wrote: "We are most likely to get angry and excited in our opposition to some idea when we ourselves are not quite certain of our own position, and are inwardly tempted to take the other side." BUDDENBROOKS Part VIII, Chap. 2 (1903).

166. See generally Dumont, *supra* note 113, applying the hierarchical principle to binary classifications, (e.g., the opposition between right and left). For a discussion of the hierarchical relationship between treaty and customary law, see Michael Akehurst, *The Hierarchy of the Sources of International Law*, 195 BRIT. Y.B. INT'L L. 273, 275-78 (1974).

167. Opposites, in and of themselves, do not necessarily determine positive and negative associations. See MILAN KUNDERA, *THE UNBEARABLE LIGHTNESS OF BEING* 5-6 (1985):

We might find this division [by Parmenides] into positive and negative poles childishly simple except for one difficulty: which one is positive, weight or lightness? Parmenides responded: lightness is positive, weight negative. Was he correct or not? That is the question. The only certainty is: the lightness/weight opposition is the most mysterious, most ambiguous of all.

Id.

168. See GODEFRIDUS J.H. VAN HOOF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* 113-16, 117-19 (1983); Bin Cheng, *Custom: The Future of General State Practice in a Divided World*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW* (Macdonald & Johnston eds., 1983); Reisman, *Cult of Custom*, *supra* note 24 (arguing that customary law alone is insufficient to address increasingly complex world problems).

169. Some international legal scholars find the opposite hierarchy in the qualified application of treaty "expressly recognized by contesting States" and the absence of any such qualification for international custom. STATUTE OF THE I.C.J., *supra* note 7, art. 1, para. a & b. See, e.g., Anthony A. D'Amato, *Wanted: A Comprehensive Theory of Custom in International Law*, 4 TEX. INT'L L.J. 28 (1967) [hereinafter D'Amato, *Comprehensive Theory*]. Customary law is often perceived as superior due to its universally binding character. See ANTHONY A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 4 (1971) [hereinafter D'AMATO, *CONCEPT OF CUSTOM*] ("[O]f [treaty and custom], perhaps custom is the more important, for it is generally regarded as having universal application, whether or not any given state participated in its formation or later 'consented' to it . . ."). For views of custom as superior to treaty, see also KELSEN, *PRINCIPLES*, *supra* note 126, at 445-46; TERRY NARDIN, *LAW, MORALITY AND THE RELATIONS OF STATES* 166-73 (1983). For a general critique of the contemporary definitions of customary law, see Chodosh, *supra* note 6.

170. It should be noted that attributes are not necessarily definitional. Water may be blue, but blue is not a definitional attribute of water. One

connote—if not always denote—positive and negative associations. This approach supports arguments that customary law is inferior because it is presumed to be “unwritten,”¹⁷¹ temporally long in the making,¹⁷² “unconscious, unintentional,”¹⁷³ nonconsensual,¹⁷⁴ “soft,”¹⁷⁵ implicitly behavioral (*jus*

overriding problem with the attributions discussed directly below is that many of them are nondefinitional. Cf. STATUTE OF THE I.C.J., *supra* note 7.

171. Chodosh, *supra* note 6, at 97 n.38 (“Although Justinian divided all law into *ius scriptum* [written law] and *ius non scriptum* [unwritten law], [Francisco] Suarez pointed out in the seventeenth century that the very term ‘law’ to most Roman writers meant written law, and custom was only labeled for convenience of classification as *ius non scriptum*.”). D’AMATO, CONCEPT OF CUSTOM, *supra* note 169, at 238 (citing Francisco Suarez, *A Treatise on Laws and God the Law Giver*, in 2 SELECTIONS FROM THREE WORKS 446-47 (The Classics of International Law No. 20, 1944)). The view of customary law as unwritten would, of course, foreclose “the recognition of codified customary (international) law.” Chodosh, *supra* note 6, at 98. For a discussion of the equation of custom with unwritten law in previously nonliterate societies, see POSPIŠIL, *supra* note 12, at 194 (cited in Chodosh, *supra* note 6, at 92). Ted Stein noted the trend toward codification when he wrote that the “ambiguity of language has replaced the ambiguity of nature or of events as the central problem of international law analysis.” Ted Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT’L L.J. 457, 464 (1985).

172. See 2 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES (The Classics of International Law No. 3, 1925) (describing “unbroken custom”); 3 EMERICH DE VATTIEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND OF SOVEREIGNS (The Classics of International Law No. 4 1916) (describing custom as “consecrated by long usage”); see also Levy, *supra* note 92 (“Aside from the uncertainties surrounding the elements of customary rules of international law, such rules are generally vague and slow to develop.”); Chodosh, *supra* note 6, at 98 (“[T]he requirement of long use forecloses the recognition of customary rules developed in periods of rapid legal change.”).

173. See KELSEN, PRINCIPLES, *supra* note 126, at 441 (“Legislation is conscious and deliberate law-making . . . custom is unconscious and unintentional law-making. In establishing a custom, men do not necessarily know that they create by their conduct a rule of law, nor do they necessarily intend to create law.”) (cited in Gamble, *supra* note 5, at 312); see also Chodosh, *supra* note 6, at 107-110 (critiquing Reisman’s views of customary law as “inferior because it is made implicitly and less democratically by a ‘few politically relevant actors, who are frequently unaware that law is being, or has been, made,’” and as “indistinguishable from the aggregate flow of community behavior.”); Reisman, *Cult of Customs*, *supra* note 120, discussed in Chodosh, *supra* note 6, at 108-09.

174. Some scholars view the arguable lack of a consent-based requirement as an advantage to the creation of a universal law, binding on all nations. See Charney, *supra* note 2, at 551 (“[G]eneral [customary] international law may be established on the basis of less formal indications of consent or acquiescence. This makes worldwide law possible; it cannot be done through treaties alone.”).

175. The equation of international “soft” law with customary law is dubious. See Chodosh, *supra* note 6, at 96 (describing the distinction between customary and declarative [soft] law). The more common distinction between hard and soft law is based on the criteria of precision (hard) or vagueness (soft) of the rule or standard in question. See Weil, *supra* note 10, at 414 (“hard law’ [is] made up of the norms creating precise legal rights and obligations, [whereas, “soft” law] is so vague, so un compelling, that A’s obligation and B’s right all but elude the mind.”).

dispositivum), ambiguously aspirational (*jus cogens*),¹⁷⁶ or weak in its political foundations in domestic law.¹⁷⁷ Conversely, according to this dichotomous view, treaty is explicit,¹⁷⁸

Weil would also add another criterion to differentiate law from nonlaw, regardless of precision: whether the rule is practically "compelling." *Id.* at 415 n.7. Although the presumed express character of treaty and the puntatively inferred character of custom would lead one to align the hard/soft distinction with the treaty/custom dichotomy, such over-generalizations are best avoided. See *infra* note 190 (discussing the softness of some treaty provisions, and citing Weil). An alternative criterion for differentiating "soft" from "hard" law is found in the context of structuralist critiques on international legal argumentation. The association of consent-based norms with "hard" law and non-consent-based norms with "soft" law is adopted by KENNEDY, *supra* note 121, at 11-99 (in particular at 29) ("A 'hard' argument will seek to ground compliance in the 'consent' of the state to be bound. A 'soft' argument relies upon some extraconsensual notion of the good or the just."). However, here again, no coterminous associations with customary law or treaty are made. Kennedy does not see any one particular source as hard or soft. He identifies arguments based on consent or justice inhering in all international legal argument based on source.

176. For a comprehensive discussion of the two categories of customary international law, see Alfred Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT'L L. 55 (1966); Stefan A. Riesenfeld, *Jus Dispositivum and Jus Cogens in International Law: In the Light of Recent Decision of the German Supreme Constitutional Court*, 60 AM. J. INT'L L. 511, 514-15 (1966). *Jus Cogens* is defined in Article 53 of the Vienna Convention as "a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on Succession of States in Respect of Treaties, Aug. 22, 1978, U.N. Doc. A/CONF. 80/31, as corrected by U.N. Doc. A/CONF.80/31/Corr.2, Oct. 27, 1978 [hereinafter Vienna Convention]. For a stimulating—albeit brief—discussion of this provision in an analysis of self-referential statements in the law, see Rogers and Molzon, *supra* note 111, at 1015-16 (discussing alternative propositions, such as (i) "the article states a rule of law only if the article itself is a peremptory norm"; otherwise, Art. 53 could be superseded by a subsequent treaty; (ii) Art. 53 might "be interpreted to say that new peremptory norms cannot arise by treaty"). This latter argument would lead to the paradoxical proposition that "[t]his peremptory norm cannot be a peremptory norm." *Id.*

177. See Trimble, *supra* note 87 (arguing that customary law is inferior to treaty). Trimble argues that "because of the 'weak political foundation of customary international law' at the domestic level, [custom] 'is less authoritative than treaty law'" and that "it is erroneous to think about the two types of international law in the same way' at the international level as well." Chodosh, *supra* note 6, at 110 (quoting Trimble, *supra* note 87, at 669).

178. See Teresa M. O'Toole, *Amerada Hess Shipping Corp. v. Argentine Republic: An Alien Tort Statute Exception to Foreign Sovereign Immunity*, 72 MINN. L. REV. 829, 831 n.9 (1988) ("Treaty law consists of express obligations set forth in international agreements freely adhered to by states, while customary international law consists of obligations inferred from state practice.") (citing Trimble, *supra* note 87, at 669).

contemporaneous, conscious, deliberate, consensual,¹⁷⁹ "hard," real, and firmly grounded in domestic law.¹⁸⁰

A dichotomous view need not necessarily be value-laden. One such value-neutral, yet dichotomous, view of treaty and customary law sees customary international law as "that international law not embodied in treaties."¹⁸¹ This view, stemming from the recognition of two primary sources,¹⁸² renders the relationship between the two sources a "zero-sum game of sources of international law—if law is not being made by treaty, then . . . custom swing[s] into place . . . [to pick] up the slack."¹⁸³

179. KOSKENNIEMI, *supra* note 107, at 351 ("Custom is distinguished from treaty by its less consensual character."). It is important to note that this is only true for those states that do not exhibit conformity with general practice accepted as law. In other words, if a generality of states engage in a practice accepted as law, customary law is consensual for such practicing states, but if applied to other states who do not exhibit adherence to the rule, customary law is not consensual for such nonpracticing states.

180. See Trimble, *supra* note 87.

181. Chodosh, *supra* note 6, at 88. Koskenniemi discusses the commonly assumed view that "[c]ustom is the all-important network of non-treaty-based, generally applicable standards." KOSKENNIEMI, *supra* note 107, at 343. "Custom" has become a generic name for nearly all nonconventional standards, including acts and decisions of international organizations and conferences." *Id.* at 346. In effect, Kelsen adopted this view of customary law as a gap-filler in a frequently quoted passage:

That neither conventional nor customary international law is applicable to a concrete case is logically not possible . . . If there is no norm of conventional or customary international law imposing upon the state (or another subject of international law) the obligation to behave in a certain way, the subject is under international law legally free to behave as it pleases; and by a decision to this effect existing international law is applied to the case.

KELSEN, PRINCIPLES, *supra* note 126, at 438-39 (quoted in KOSKENNIEMI, *supra* note 107, at 28). Viewed as a completeness theory, in which international law itself determines whether it imposes obligations, this statement poses a self-referential paradox—whether international law applies is determined by international law. Such paradoxes are discussed above in notes 111 and 176 (discussing Rogers and Molzon). This view ignores other sources of authority (e.g., national law) to determine whether international law applies. This demonstrates the importance of treating source and system as dynamically interrelated. Kelsen, himself a "monist," viewed the international (superior) and national (inferior) legal orders as one. Accordingly, his view of system (as one) allowed him to ignore other sources of authority for the proposition that international law does not apply.

182. See, e.g., IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 3-4 (1966).

183. See Gamble, *supra* note 5, at 314. See *The Paquete Habana*, 175 U.S. 677, 700 (1900) (in ascertaining international law, "where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . ."); see also D'AMATO, CONCEPT OF CUSTOM, *supra* note 169, at 4 ("[L]egal argumentation tends to be based upon 'custom' because there was not treaty or agreement covering the situation.");

As this Section argues, the dichotomous view suffers from many difficulties. Although easy to comprehend, it is empirically inaccurate, inconsistent with current law, irreconcilable with alternative conceptions, and lacking in any resolving power in specific disputes, unless one concedes that the disputed rule falls into at least one of the possible categories.

1. Theoretical Incoherence

Whereas the dichotomous view is not illogical, both the value-laden and value-neutral dichotomous views of treaty and customary law distort the understanding of treaty and customary law in several key respects. First, these characterizations are hyperbolic and overly general. Some customary law is often expressly codified¹⁸⁴ (in treaties themselves),¹⁸⁵ occasionally considered "instant,"¹⁸⁶ based on the conscious belief of legal obligation,¹⁸⁷ and universally binding.¹⁸⁸ In contrast, treaty may

O'Toole, *supra* note 178, at 831 n.9 ("Rules of international law fall into the categories of treaty law and customary international law." (citing Gamble, *supra* note 5, at 305-06)).

184. See H. W. A. THIRLWAY, *INTERNATIONAL CUSTOMARY LAW AND CODIFICATION* (1972); Chodosh, *supra* note 6, at 100 n. 50 ("*ius non scriptum*, or unwritten law, is another criterion of the classical definition [of customary law] that has been appropriately relaxed. In fact, it has become so obvious that customary law need not be unwritten that this criterion has almost completely disappeared from contemporary literature.").

185. See Weisburd, *supra* note 1, at 17.

186. See, e.g., *North Sea Continental Shelf (F.R.G. v. Den. and Neth.)*, 1969 I.C.J. 4; *RESTATEMENT OF FOREIGN RELATIONS*, *supra* note 54, § 102, note 2; Bin Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law?*, 5 *INDIAN J. INT'L L.* 23 (1965) (arguing that long usage was not needed to establish, after World War I, the principle of national sovereignty over superjacent airspace or the principle of nonsovereignty over the outer-space path of Sputnik I after it orbited the earth); Chodosh, *supra* note 6, at 101 ("[T]emporality is not a necessary criterion of customary law."). For a critical view of "instant" customary law in the context of UNCLOS III, see Hugo Caminos & Michael R. Molitor, *Perspectives on the New Law of the Sea: Progressive Development of International Law and the Package Deal*, 79 *AM. J. INT'L L.* 871, 889 (1985) (arguing that "the true test for the existence of a customary norm of international law is state practice").

187. The second requirement for customary law posited in Article 38 of the Statute of the I.C.J. is "acceptance as law," often referred to as *opinio juris sive necessitatis* or its shorthand form *opinio juris*. See Chodosh, *supra* note 6, at 89 n.6. The Restatement of Foreign Relations law defines this second element as practice "followed from a sense of legal obligation." *RESTATEMENT OF FOREIGN RELATIONS*, *supra* note 54, § 102(2).

188. For a discussion of the effects of treaty law on noncontracting states, see Luke T. Lee, *The Law of the Sea Convention and Third States*, 77 *AM. J. INT'L L.* 541, 542-43 (1983) ("many provisions in the Convention [are applicable] to states not parties either because such provisions are codifications of antecedent

be unwritten,¹⁸⁹ equally soft,¹⁹⁰ frequently ambiguous in order to obtain maximum agreement,¹⁹¹ time-consuming in negotiation,¹⁹²

customary law, or because they reflect what has become customary law during and as a result of the Conference on the Law of the Sea. It suggests that in some respects, perhaps, the Convention is generating customary law for the future and many provisions therefore may come to apply to nonparty states at some time soon.”).

189. See Article 2 of the Vienna Convention, *supra* note 176, cited by JOSEPH GABRIEL STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 297 (7th ed., 1972). Starke defines a treaty as:

[A]n agreement whereby two or more States establish or seek to establish a relationship between themselves governed by international law. So long as an agreement between States is attested, any kind of instrument or document, or any oral exchange between States involving undertakings may constitute a treaty, irrespective of the form or circumstances of its conclusion.

Id. However, some authorities distinguish between rights and duties when discussing a written requirement. See KELSEN, PRINCIPLES, *supra* note 126, at 345-50; Lee, *supra* note 188, at 544 (discussing provisions in Article 35 of the Vienna Convention on the Law of Treaties which require that third states' acceptance be "in writing" in the case of obligation. In the case of rights, however, Article 36(1) states that "assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.").

190. To demonstrate the "softness" (i.e., the imprecise character of treaty law), Weil cites many examples, including the 1963 Moscow Treaty banning certain nuclear weapon tests, Article IV of which provides, *inter alia*, that "each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country." 1963 Moscow Treaty, Aug. 5, 1967, art. IV, 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43, *cited in* Weil, *supra* note 10, at 414 n. 4; *see also* FRANCK, *supra* note 11, at 206 ("[A]n indeterminate new treaty may exert a less powerful pull to compliance than a venerable and clearly understood custom.").

191. See discussion of constructive and destructive aspects of ambiguity in FRANCK, *supra* note 11. For example, the North American Free Trade Agreement (NAFTA) appears on its face not to apply directly to subnational political units (e.g., states or provinces) which would allow for state regulations in restraint of trade and would cause significant embarrassment to the United States and Canada, which have represented in the negotiations with Mexico, which lacks such a federalist structure, that such sub-national authorities would be equally bound. This ambiguity in the treaty may have allowed greater probability of passage, wherein the United States and Canada could have its cake (i.e., Mexico thinks NAFTA applies to states) and eat it too (i.e., states and provinces think NAFTA does not apply to them). The issue of states' rights abrogated by treaty has a long history. See Francesco Fancioni, Book Review, 87 AM. J. INT'L L. 493 (1993) (reviewing MARIA CLARA KAFFSI, LA PROTEZIONE INTERNAZIONALE DELLE SPECIE ANIMALE MINACCIATE (1993)) (noting the decision of *Missouri v. Holland*, 252 U.S. 416 (1920) (Holmes, J., holding that the "conservation of wild birds under a treaty with Great Britain was a proper subject for federal regulation and that states could not oppose such a treaty and the implementing statute on the basis of the 'original' jurisdiction guaranteed by the Tenth Amendment").

192. See Charney, *supra* note 2, at 551 ("Treaties often require considerable time to be negotiated, adopted, and brought into force.").

inelastic,¹⁹³ preventative of "rapid modifications to cope with new needs,"¹⁹⁴ entered into unwittingly,¹⁹⁵ presumed to be nonbinding on noncontracting states,¹⁹⁶ and not always considered exclusively authoritative by domestic courts.¹⁹⁷ However inaccurate the dichotomous view may be, there is nothing illogical about the notion of mutual exclusivity it entails. The illogic manifests itself only when one holds the two to be mutually exclusive, despite the empirical evidence of overlap, which is shown below.

2. Impracticability

By making distinctions facile, and by assuming polar, mutually exclusive opposites, the dichotomous view is inconsistent with the current state of the rules that inform the treaty/customary law distinction. Indeed, the treaty/customary law dichotomy is contradicted by both I.C.J. case law and

193. Although treaty provisions may be considered rigid once they are agreed to, the process of treaty reservations draws criticism as being too flexible. See Edward F. Sherman, Jr., *The U.S. Death Penalty Reservation to the International Covenant on Civil and Political Rights: Exposing the Limitations of the Flexible System Governing Treaty Formation*, 29 TEX. INT'L L.J. 69 (1994).

194. Christas L. Rozakis, *Treaties and Third States: A Study in the Reinforcement of the Consensual Standards in International Law*, 35 ZEITSCHRIFT FÜR AUSLÄNDISCHES OFFENTLICHES RECHT UND VOLKERRECHT 1, 39-40 (1975) (quoted in KENNEDY, *supra* note 121, at 23 n.21).

195. This comment is without publicly acknowledged support, but rather relies on several private conversations with professionals who work as international negotiators and who have remarked that many countries do not pay much attention to the precise implications of particular treaties. It is perhaps also generally true that in most countries less political attention is paid to treaty issues, than to exclusively domestic legislation.

196. 1 LASSA OPPENHEIM, INTERNATIONAL LAW 925-26 (8th ed. 1955) (treaty rights and obligations are legally limited to contracting parties); see also *Free Zones of Upper Savoy and the District of Gex*, 1932 P.C.I.J. (ser. A/B) No. 46, at 141 (June 7, 1932) ("Article 435 of the Treaty of Versailles is not binding upon Switzerland who is not a Party to the Treaty, except to the extent to which that country accepted it."); *Upper Silesia Case*, 1926 P.C.I.J. (ser. A) No. 7, at 29 (May 25, 1926) ("A treaty only creates law as between the States which are parties to it; in case of doubt no rights can be deduced from it in favour of third States."); *U.S. v. Cadena*, 585 F.2d 1252 (5th Cir. 1978) (upholding conviction of Colombian nationals abducted on Canadian vessel by U.S. Coast Guard more than approximately 200 miles off U.S. coastline, reasoning neither Canada nor Colombia (as noncontracting parties) could rely on provisions of the Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 82, 13 U.S.T. 2312, T.I.A.S. No. 5200)).

197. *Societe Nationale Aerospatiale v. United States Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522 (1987) (holding Hague evidence treaty not exclusive source of transnational discovery rules).

pertinent treaty provisions related to source.¹⁹⁸ In *Nottebohm*, the I.C.J. ruled that treaty provisions may be evidence of customary international law, even as between nontreaty, litigating parties.¹⁹⁹ In *Military and Paramilitary Activities*,²⁰⁰ the I.C.J. recognized that treaties do not necessarily override customary rules on the same subject.

Moreover, Article 38 of the Vienna Convention excludes the automatic dichotomization (or mutual exclusivity) of treaty and customary law, by providing that "[n]othing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law."²⁰¹ Thus, where two categories of source overlap on the same issue, one (treaty) need not entirely override the other (customary law).

Finally, the dichotomous view ignores the rules of recognition that are stipulated in Article 38 of the Statute of the I.C.J. Article 38 does not refer to the polarities noted above: written/unwritten, explicit/implicit, long/short use, conscious/unconscious, consent/nonconsent, or soft/hard. The characteristics frequently attributed to treaty and customary law are therefore extralegal.

If understood merely as cross-referential, the dichotomous view of treaty and customary law is easily administrable provided that the decision-maker determines as a preliminary matter that an alleged source of international legal obligation is one or the other. However, if that determination is not made, categorization requires sub-reference to an attribute that differentiates the two sources in a polar relationship. As is discussed below in the analysis of relativity, the precise distinction between the attribute and its opposite presents practical interpretive difficulties.

3. Irreconcilability

The dichotomous view excludes the possibility of other architectonic views of the treaty/customary law distinction. First, it does not allow for an accurate classification of rules that are

198. The dichotomous treatment of treaty and customary law and the inconsistency between this treatment and the current state of the law itself may be related to the *a priori* nature of dichotomy itself. See NEEDHAM, *supra* note 13, at 219-20 (citing the point made by Kant as fundamental that "all *a priori* division of concepts must be by dichotomy." (Citation omitted)).

199. See, e.g., *Nottebohm*, Second Phase (Liech. v. Guat.) 1955 I.C.J. 4, 21-23 (Apr. 6) (holding that provisions in bilateral "Bancroft treaties" enabled Mr. Nottebohm's Liechtenstein nationality to be invoked against Guatemala, even though the treaties were not in force between the disputing states).

200. *Military and Paramilitary Activities* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

201. *Id.*

both treaty and customary law, as would be emphasized in an overlapping conception,²⁰² or one of equivalence, wherein treaty and customary law are equated, (e.g., treaty as evidence of customary law). Second, this view does not convey the relativity of the oppositional attributes that dichotomy interpolates, (e.g., long/short, conscious/unconscious), whether manifested in treaty, customary law, or some other form of legal authority.²⁰³ Third, dichotomy does not allow one to see the interplay between treaty and customary law, (e.g., treaty codification of customary law, the passing of treaty into customary international law,²⁰⁴ or the interdependence between the two concepts).²⁰⁵ For example, treaty enforcement often depends on the customary rule of respecting legal obligation (e.g., the principle of *pacta sunt servanda*);²⁰⁶ customary law depends on rules of recognition contained in international agreements (e.g., Article 38 of the Statute of the I.C.J.). Finally, value-neutral dichotomizations of treaty and customary law presume that these are the only two sources or manifestations of international law. Applying the treaty/customary law dichotomy, nontreaty, noncustomary sources of international obligation necessarily²⁰⁷ fall into one of two groups. Either the source is (1) "included in one of the two . . . categories,"²⁰⁸ and is therefore deemed to be customary law because the "less clearly defined is the more likely candidate for expansion,"²⁰⁹ or the source is (2) "excluded from the realm of law altogether."²¹⁰ Any additional source of international law is thereby excluded.

202. See discussion *infra* Section III.B.

203. See discussion *infra* Section III.C.

204. The most illuminating studies of this relationship appear in treatments of the United Nations Conferences on the Law of the Sea. These scholarly examinations of treaty codification of customary law and recognition of customary law based on treaty are cited herein at notes 5, 188, 267, 268, 270, 272 and 304.

205. See discussion *infra* Section III.D.

206. This principle, itself, initially derived from treaty. D'AMATO, CONCEPT OF CUSTOM, *supra* note 169, at 65. See generally GEORG SCHWARZENBERGER, THE FRONTIERS OF INTERNATIONAL LAW (1962).

207. Conversely, relaxation of the dichotomy would allow the recognition of nontreaty, non-customary law, which I have called "declarative international law." See Chodosh, *supra* note 6, at 89.

208. *Id.* at 90.

209. *Id.*

210. *Id.*

4. Lack of Resolving Power

The dichotomous view of treaty and customary law may be effective at reaching source determinations, but only where it is conceded that the rule is derived from one source and the issue remains whether the rule falls into the second category as well. For example, if it is conceded that a human rights rule is one of treaty, the dichotomous view would conclude that it may not also be one of customary law; therefore, nontreaty parties would not be bound by the rule. If, on the other hand, it is not conceded that the rule is derived from one or the other source, knowing only that the sources are mutually exclusive provides no assistance in reaching a determination.

B. *The Overlapping View*

According to the overlapping architectonic principle, treaty and customary law are distinct, yet overlapping, categories of international law. Certainly, this conceptual structure allows one to see the same rule of international law as treaty in some instances and customary law in others,²¹¹ and to treat treaty as a

211. Gamble, *supra* note 5, at 312 (casting treaty and custom as "intertwined threads in the fabric of international law" (citing MANUAL OF PUBLIC INTERNATIONAL LAW 129 (Max Sorensen ed. 1968))). "[S]ome rules of international law then are of a mixed sort . . . [e.g.,] codification, . . . also where a practice originally based on particular treaties acquires those characteristics of generality and continuity which the process of creation of customary rules demand." *Id.*; see also Bos, *supra* note 149, at 74 ("[A] rule of customary international law may be prevailing between more than two States and is codified [in treaty] only between a restricted number of them."); *Report of the International Law Commission to the General Assembly, reprinted in* [1950] 2 Y.B. Int'l L. Comm'n 364, 368, U.N. Doc. A/CN.4/SER.A/1950/Add.1. "A principle or rule of customary international law may be embodied in a [treaty, binding on the State parties thereto]; yet it would continue to be binding as . . . customary international law for other States."; *Report of the International Law Commission to the General Assembly, reprinted in* [1950] 2 Y.B. Int'l L. Comm'n 364, 368, U.N. Doc. A/CN.4/SER.A/1950/Add.1.

A principle or rule of customary international law may be embodied in a bipartite or multipartite agreement so as to have, within the stated limits, conventional force for the States parties to the agreement so long as the agreement is in force; yet it would continue to be binding as a principle or rule of customary international law for other States.

Id. See also Luke T. Lee, *The International Law Commission Re-Examined*, 59 AM. J. INT'L L. 545, 545-46 (1965); Baxter, *supra* note 5, at 101; Hersch Lauterpacht, *Codification and Development of International Law*, 49 AM. J. INT'L L. 16, 29 (1955); MANUAL OF PUBLIC INTERNATIONAL LAW, *supra*, at 129; D'AMATO, CONCEPT OF CUSTOM, *supra* note 169, at 107-08 (referring to "double source of obligation"); Vierdag, *supra* note 5, at 786 (referring to a "double regime").

source of customary international law.²¹² The overlapping view is empirically accurate, logical, consistent with current law, and administrable. However, it is not reconcilable with each of the other conceptual conclusions, and by itself the overlapping view contains no resolving power in particular disputes, other than to refute other conclusory conceptions.

1. Theoretical Coherence

Relaxation of the dichotomy between treaty and customary law allows one to explore an overlapping conception of the treaty/customary law distinction. The distortions of putative mutual exclusivity noted above are rejected by the overlapping view because an overlapping architectonic principle provides a means of arguing that treaty and customary law are not hierarchically dichotomous. In his frequently cited critical treatment of the treaty/customary law dichotomy, John Gamble concludes his criticism of the dichotomy by drawing diagrams that depict treaty and customary law as overlapping categories.²¹³ The overlapping view does not conclude prematurely which rules of treaty and customary law overlap; it merely allows for the conclusion in specific cases that one or the other or both may apply, depending on the independent rules of recognition for each source.

2. Practicability

An overlapping architectonic principle also may be used to reconcile disagreement generated by the applications of the dichotomous and interdependent principles that distort existing law. Such abstractions have practical, juridical consequences. In one notable instance, a commentator²¹⁴ criticized the I.C.J. for "wholly" severing positive treaty and customary international law

212. See Gamble, *supra* note 5, at 313 ("[T]reaties, if repeated often enough, can form the basis of customary international law."). Taken to its extreme (the phrase "if repeated often enough"), this view of the relationship between treaty and customary law is not substantially different than the view allowed by the equivalent architectonic principle discussed *infra* Section III.E; see also MARK JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 9-34 (1988) (nonparty to a treaty may nonetheless be bound by its terms when the "rules of a treaty pass into customary international law").

213. Gamble, *supra* note 5, at 318. Both diagrams drawn by Gamble to represent the competing traditional and suggested views reflect overlapping conceptions; the second merely reflects greater overlap.

214. Plofchan, *supra* note 154, at 229-30.

in its opinion, *Military and Paramilitary Activities*.²¹⁵ This commentator argued that "the International Court erred by treating customary international law and international treaty as two separate and unrelated sources of international law."²¹⁶ This criticism of the I.C.J. treats customary law itself as a source of secondary rules of recognition upon which the primary rules of treaty depend and with which they interact symbiotically.²¹⁷ However, this commentator's view that customary law provides secondary rules and treaty provides primary rules is not only another dichotomization; it contradicts the treaty source of Article 38 of the I.C.J. statute, which the I.C.J. is bound to observe.

In the *Military and Paramilitary Activities* opinion, the I.C.J. did not dichotomize treaty and customary law, nor did it necessarily deny any alleged "symbiotic" relationship. It merely treated customary law as an independent—albeit overlapping—source of international obligation. The I.C.J. held that the overlap of treaty and customary law (i.e., when "a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content")²¹⁸ does not provide "a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability . . ."²¹⁹

It should be noted that I.C.J. case law supporting the overlapping view is not inconsistent with treaty provisions relating to sources of law. Although Gamble suggests that Article 38 "obscures the fact that these two principal sources interrelate,"²²⁰ other than in an arguable implication of a slight hierarchy²²¹ in the sequence, the mere enumeration of sources is silent on the

215. *Military and Paramilitary Activities* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) (rejecting U.S. claim that multilateral treaty reservations barring adjudication also barred claims based on even identical rules under customary international law).

216. Plofchan, *supra* note 154, at 229-30.

217. D'Amato also views "custom [a]s a secondary rule for discovering the content of primary or substantive rules of international law." D'AMATO, *CONCEPT OF CUSTOM*, *supra* note 169, at xiii, 41-44. Plofchan, *supra* note 154, at 229-30.

218. *Military and Paramilitary Activities* (Nicar. v. U.S.), 1986 I.C.J. 14, 93-96.

219. *Id.* Contrary to the views expressed in the Plofchan note, *supra* note 154, the substantive rules of customary international law themselves are not secondary rules; rules concerning the recognition of customary international law (e.g., satisfaction of general practice and acceptance as law) are secondary. See Chodosh, *supra* note 6, at 96.

220. Gamble, *supra* note 5, at 307.

221. *Id.* Arguably, one may infer that a priority has been placed on those items first mentioned in any list; however, the inference may suggest nothing more than the expectation that the I.C.J. would be applying treaty more often than customary law.

relationship between them. Moreover, the overlapping view is also supported by pertinent provisions in the 1969 Vienna Convention on the Law of Treaties.²²² First, as noted above, Article 38 of the Vienna Convention excludes the automatic dichotomization of treaty and customary law, by providing that “[n]othing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law.”²²³ Second, as noted below, Article 34 of the Vienna Convention excludes the automatic equivalence of treaty and customary law, according to which the existence of a treaty provision itself, with little more, would provide evidence of a customary, universal legal obligation. Article 34 provides in pertinent part that a “treaty does not create either obligations or rights for a third State without its consent.”²²⁴ Thus, treaties, alone do not make customary law.

The overlapping view is a matter of simple categorization. It carries no administrative difficulties; however, it presupposes an independent analysis of the satisfaction *vel non* of the rules of recognition for each independent category. Thus, the overlapping conception, unlike dichotomy, is a nonprejudicial conclusion, rather than an interpretive method for the recognition of sources based on interpolated oppositions.

3. Irreconcilability

The overlapping conception is reconcilable with each alternative conceptual conclusion except the dichotomous view and relativity. It is inconsistent with dichotomy because, logically, categories cannot be both mutually exclusive and overlapping.²²⁵ It is inconsistent with a relative view because, if treaty and customary law represent two polar extremes (e.g., hard and soft, or consensual and nonconsensual), a rule may not be logically both hard and soft or both consensual and nonconsensual. However, the overlapping view is consistent with interdependence, which at most suggests overlap (i.e., if treaty creates customary law, the two overlap) or at least is silent on overlap (i.e., customary law is codified in treaty, which by its terms supersedes customary law). The most extreme form of overlap is consistent with equivalence (i.e., where treaty and

222. Vienna Convention, *supra* note 176.

223. *Id.*

224. *Id.*

225. Compare Needham's critique of Dumont's pronouncement as fallacious (“[G]ood must contain evil while still being its contrary.”). NEEDHAM, *supra* note 13, at 133.

customary law overlap completely, they are the same).²²⁶ Finally, overlap is not necessarily inconsistent with the notion that the distinction between treaty and customary law is so subjective that it is too indeterminate to be law.

4. Lack of Resolving Power

Despite the foregoing advantages of the overlapping conception, it merely provides a way to conceptualize a conclusion that some rules are both treaty and customary law and others are only one. The statements that some treaty is customary law and that some customary law is treaty do not provide any particular guidance in the resolution of whether there is overlap in a specific case. Therefore, one must look to other conceptions to resolve issues of source recognition.

C. *The Relative View*

Applying a relative architectonic principle to the understanding of treaty and customary law, one sees the distinction between treaty and customary law as a matter of relative degrees. Without a determination of (1) the defining attribute(s) consistent with preexisting law, (2) the thresholds for satisfaction of such defining attribute(s), and (3) the extent to which those thresholds are met in specific cases, relativity is empirically inaccurate, illogical, inconsistent with existing law, inadministrable, inconsistent with the overlapping and equivalent architectonic principle, and devoid of any resolving power.

1. Theoretical Incoherence

Relativity may be either cross-referential or sub-referential. However, even cross-referential, relative views of nonoppositional terms, such as treaty and customary law, require sub-reference to an attribute considered to differentiate between two terms (e.g., hard/soft, consensual/nonconsensual). Thus, the cross-referential, relative view of treaty and customary law presumes the dichotomous view in one critical respect. In order for treaty and customary law to represent opposite ends of the international normative spectrum, it is necessary to imbue the two sources

226. This does not imply that equivalence is a justifiable conclusion based on overlap alone: "[I]t is an illicit use of 'identical' to say that a part of anything is identical with the genus under which it is subsumed." NEEDHAM, *supra* note 13, at 129 (critiquing Dumont's statement that a part is "identical" to the whole, in an attempt to argue that because it is also not identical, the "double relation" produces a "logical scandal").

with polar attributions, like those enunciated in the dichotomous view (e.g., written/unwritten, intentional/unintentional, explicit/implicit, etc.).²²⁷ The critical disadvantage of relativity, which it shares with dichotomy, is not that it refers to the attributes that differentiate treaty from customary law, but that such attributions are frequently inconsistent with the well-settled expressions of defining characteristics, which in the case of treaty and customary law are *not* counterposed.

In theory, relativity is the most empirically accurate of the architectonic principles identified herein because of its attention to differences of degree. For example, in his discussion of the quasi-legislative nature of General Assembly resolutions, Richard Falk suggests that there is a "rather indefinite line that separates binding from non-binding norms governing international behavior."²²⁸ The indefinite nature of the line allows new phenomena to be categorized as law: "Thus the formal limitations of status, often stressed by international lawyers, may not prevent resolutions of the General Assembly, or certain of them, from acquiring a normative status in international life."²²⁹ Falk justifies this position by asserting that "[t]he degree of authoritativeness that a *particular* resolution will acquire depends upon a number of contextual factors." He includes many related criteria of consent and effective power (e.g., "the expectations governing the extent of permissible behavior, the extent and quality of the consensus, and the degree to which effective power is mobilized to implement the claims posited in a resolution").²³⁰ Thus, relativism holds the advantage of making a fine-tuned, multifactored case-by-case analysis possible. Relativity provides the opportunity to view the existence *vel non* of customary law as a question dependent upon relative contexts.²³¹ The relativist view of treaty and customary law, in particular of the latter source, would reject the "formalistic distinction between binding

227. See *supra* Section III.A.

228. Richard A. Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 AM. J. INT'L L. 782, 784 (1966).

229. *Id.* at 786.

230. *Id.* at 786 (cited in KENNEDY, *supra* note 121, at 19-20 n.17); see also Gregory J. Kerwin, *The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts*, 1983 DUKE L.J. 876, 877 (concluding that "[r]esolutions serve as valuable hortatory evidence of emerging legal principles, they should not constitute independent, authoritative sources of international law").

231. See ZDENEK J. SLOUKA, *INTERNATIONAL CUSTOM AND THE CONTINENTAL SHELF* 174 (1968) (describing the factors creating a customary norm as "relative to the conditions in which those factors operate") (cited in D'AMATO, *CONCEPT OF CUSTOM*, *supra* note 169, at 12).

and nonbinding law. The distinction between more or less binding norms reflects the natural intuition that some norms *are* more important than others and should be so treated."²³² However, in practice, relativity carries propensities for profound impracticability.

By itself, relativity, unless applied to true oppositions, is illogical. Without attribution, one is left without a consistent scale of gradient degrees on which to evaluate arguable rules. That is, relativity is only logical when distinguishing between two oppositionally defined terms. If treaty and customary law are deemed opposites in the dichotomous ways described above (e.g., soft/hard, long/short, etc.), there is nothing illogical about relativity. However, if treaty and customary law are defined by independent standards of recognition that are not necessarily counterposed, then relativity may be considered illogical in its propensity to reconfigure the standards, without justification for the adjustment, according to an underlying dichotomous framework.

2. Impracticability

As with the dichotomous view, the relative view effectively rewrites the rules of recognition contained in Article 38 of the I.C.J. Statute. As noted above, Article 38 does not refer to the polarities suggested by many of the scholars utilizing either a dichotomous or relative view.²³³ The characteristics attributed to treaty and customary law are therefore extralegal.

According to the treaty that guides the International Court of Justice in its source determinations, treaties are "international conventions, whether general or particular, establishing rules expressly recognized by the contesting States."²³⁴ In contrast, customary law is "international custom, as evidence of general practice accepted as law."²³⁵ Many standards of recognition of treaty and customary law therefore are not necessarily counterposed.²³⁶ Customary law must be general, but treaties

232. KOSKENNIEMI, *supra* note 107, at 348 (describing those who view the relativism of customary law as a positive phenomenon).

233. See discussion *supra* Section III.A.

234. STATUTE OF THE I.C.J., *supra* note 7, art. 38, 1(a).

235. *Id.* art. 38, 1(b). Although the order of the words custom and practice should be arguably reversed, see Chodosh, *supra* note 6, at 98 n.46, the difference in order is insignificant: "What is clear is that the definition of custom comprises two distinct elements: (1) 'general practice' and (2) its 'acceptance as law.'" HENKIN, CASES AND MATERIALS, *supra* note 126, at 36.

236. See RESTATEMENT OF FOREIGN RELATIONS, *supra* note 54, §102(2) (defining customary law as "a general and consistent practice of states followed by them from a sense of legal obligation").

may be general or particular. Customary law must be not only general, but also practiced. No such practice requirement, however, applies to the recognition of treaty. For treaties to become law, decision-makers need not wait to observe practice before applying treaty as binding because, if that were the rule, treaties would never be deemed binding for lack of a first instance of practice. Treaty must be expressly recognized, whereas customary law must be "accepted as law," whether explicitly or implicitly. None of these standards requires that customary law necessarily be unwritten, temporally long in the making, unintentional, nonconsensual, soft, implicit, or ambiguous. Therefore, many relative understandings of treaty and customary law are subject to the same criticisms of empirical inaccuracy lodged against the dichotomous view.

Academic support for relativity is countered by Prosper Weil's searing critique.²³⁷ Weil illuminates the legal implications of relativity in undermining the settled rules of recognition for customary international law. The expansion of customary law, in part based on the relaxation of the criteria²³⁸ of recognition, presents "a danger of imposing more and more customary rules on more and more states, even against their clearly expressed will."²³⁹ Weil warns of the great risk that "a majority or representative proportion of states is considered to speak in the name of all and thus be entitled to impose its will on other

237. See generally Weil, *supra* note 10; see also Fernando R. Tesón, *International Human Rights and Cultural Relativism*, 25 VA. J. INT'L L. 869 (criticizing normative relativism as it applies to international human rights). The following sources are cited in Charney, *supra* note 5, at 993 n.92, as examples of General Assembly resolutions as law: Western Sahara 1975 I.C.J. 12, 29-36 (Advisory Opinion of Oct. 16); AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102, reporters' notes at 2 (Tent. Draft No. 6); M. BEDJAOU, TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER 134-44 (1979); G. TUNKIN, THEORY OF INTERNATIONAL LAW 165, 168, 172 (1974); S.K. Agrawala, *The Role of General Assembly Resolutions as Trend-Setters of State Practice*, 21 INDIAN J. INT'L L. 513 (1981); Cheng, *supra* note 168; Richard A. Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 AM. J. INT'L L. 782 (1966); Gross, *The United Nations and the Role of Law*, 19 INT'L ORG. 537, 555-58 (1965); Hiyashi, *The Role of Resolutions of the United Nations General Assembly in the Formative Process of International Customary Law*, 25 JAPANESE ANN. INT'L L. 11 (1982); Oscar Schachter, *The Evolving International Law of Development*, 15 COLUM. J. TRANSNAT'L L. 1, 3-6 (1976); Oscar Schachter, *The Relation of Law, Politics and Action in the United Nations*, 109 R.C.A.D.I. 165, 173-84 (1963).

238. Weil, *supra* note 10, at 436 ("[T]he generality of practice has been reduced to a minimal requirement, [while] the generality of the normative effects of customary rules has been undergoing the reverse process of constant expansion.").

239. *Id.* at 434. See Chodosh, *supra* note 6, at 104-05.

states."²⁴⁰ The shading of treaty into customary law is no exception to this trend: "[T]he profound transformations . . . affecting the substance of the sources of law, and more particularly the theory of customary law and the interrelation of [treaty] and customary rules, have been gradually fostering the idea that there are certain obligations that are incumbent on every state without distinction."²⁴¹ Weil attacks the blurring of the "normativity threshold: i.e., the line of transition between the nonlegal and the legal, between what does not constitute a norm and what does."²⁴² Without a threshold to differentiate between the legal and the nonlegal, there is insufficient means to determine what is law and what is not.

The one critical difference between the dichotomous and relative views is the presumed simplicity or complexity of making such distinctions between polar opposites. With a dichotomous view, nothing falls between extremes, and the determination of whether grey is black or white is considered an easy task. On the other hand, with a relative view, differentiating black and white is a matter of degree. Therefore, each of the potential oppositions may be understood as representing extreme characterizations of more subtly differentiated phenomena. Focusing on the grey renders the determination, previously thought so simple, extremely difficult. For example, is a transcript of an oral statement written or unwritten?²⁴³ Is an interpretive inference explicit or implicit? Is five years a sufficient period of time for "long use" or does it remain too short?²⁴⁴ Are statements regarding international responsibilities the basis for imposing obligations or mere puffing?²⁴⁵ How many states must consent for a rule to be consensual?²⁴⁶ What amount of domestic

240. Weil, *supra* note 10, at 420.

241. *Id.* at 422.

242. *Id.* at 415 (citing, *inter alia*, Oscar Schachter, *The Twilight Existence of Non-Binding Agreements*, 71 AM. J. INT'L L. 296 (1977), and Michael Bothe, *Legal and Non-Legal Norms: A Meaningful Distinction in International Relations?*, 9 NETH. Y.B. INT'L L. 65-95 (1980)).

243. See Chodosh, *supra* note 6, at 97-98 (discussing traditional focus on distinction between written and unwritten law in defining customary law). An interesting anecdote illustrates this problem well. One senior colleague at another law school attempted to give an oral exam in one of her classes. She was informed that oral exams were against university policy based on the perception that students would be unable to challenge grades not based on a written performance. When this colleague suggested reasonably that a tape recording of the exam could be made and, if necessary, a transcript typed from the recording, these arguments did not prevail, and the right to give an oral exam was denied.

244. See *id.* at 100-101 (stating that element of long use not necessarily used to determine whether customary law has been formed).

245. Nuclear Tests Case (N.Z. v. Fr.), 1974 I.C.J. 457 (Dec. 20).

246. See Chodosh, *supra* note 6, at 102-03 (on generality requirement).

tradition is necessary in order to characterize a type of normative source as being deeply rooted in municipal legal culture?²⁴⁷ Relativity, without guiding the selection of differentiating attributes or thresholds designed to distinguish the satisfaction/nonsatisfaction of these standards, renders the treaty/customary law distinction inadministrable.

Hence, the relativity principle may have the advantage of subtlety and empirical accuracy. However, as Weil stated, it tends to subvert the distinctions with which one begins: it risks "succumb[ing] to the heady enticements of oversubtlety and loose thinking" and "risks launching the normative system of international law on an inexorable drift towards the relative and the random."²⁴⁸ Law poses a particularly practical problem for relativity. Academic endeavors aimed at comprehension of graded phenomena do not necessarily suit the legal decision-maker. "It is one thing for . . . sociologist[s] to note down and allow for the infinite gradations of social phenomena. It is quite another thing for [their] example to be followed by [legal decision-makers], to whom a simplifying rigor is essential."²⁴⁹ Weil's emphasis on the impracticality of relativity led him to this conclusion, drawing attention to the imprecise legal character of resolutions of international organizations.²⁵⁰ He accordingly criticizes the relativist view, writing that "there is no longer any straightforward either/or answer to the problem of the normative force of the acts of international organizations; it is all a matter of degree."²⁵¹

247. Trimble, *supra* note 87, at 669-70.

248. Weil, *supra* note 10, at 440-41.

249. *Id.* at 441.

250. As Koskenniemi points out, one school of critics of recent developments argues that

[N]ot only are many such standards ambiguous but their relative importance and methods of verification have become uncertain. The distinction between binding and non-binding standards becomes blurred. The tendency of international law-making to move from treaty into instruments of the most varied kinds (decisions, recommendations, reports etc.) has put strains on the ascertainment of valid law. Its normativity has become a matter of 'more or less' . . .

KOSKENNIEMI, *supra* note 107, at 346-347 (citing Helmut Strebler, *Quellen des Völkerrechts als Rechtsordnung*, 36 *ZaoRV*, 331, 331-32 (1976); Weil, *supra* note 10, at 415-18, and THIRLWAY, *supra* note 184, at 71-79).

251. Weil, *supra* note 10, at 416 ("[T]here are no tangible, clear, juridical criteria that demarcate with precision the zones of binding force'; there are only 'hazy, intermediate, transitional, embryonic, inchoate situations.' Even if resolutions do not attain full normative stature, they nevertheless constitute 'embryonic norms' of 'nascent legal force,' or 'quasi-legal rules.'") (citing expressions found "with variants," from the writings of several contemporaries, borrowed from JORGE CASTANEDA, *LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS*

Weil's critique of relative normativity does not refute the view that normativity may be determined by degree.²⁵² Weil's attack is more practical: the relative view of normativity is "quite beyond the grasp of intellect."²⁵³ He distinguishes between phenomena, such as resolutions, that may reflect the evolution of norms, and the actual norms themselves.²⁵⁴ He seeks to preserve certain

176 (1969)); cf. Jorge Castaneda, *La Valeur juridique des resolutions des Nations Unies*, 129 R.C.A.D.I. 205, 320 (1970). Weil also cites the award in *Texaco/Calasiatic v. Libya*: "UN resolutions 'have varying legal value,' 'while it is now possible to recognize that resolutions of the United Nations have a certain legal value, this legal value differs considerably.'" Weil, *supra* note 10, at 416 (citing 17 I.L.M. 28-29, paras. 83 and 86 (1978)).

252. Franck distinguishes between legal obligations, as absolute (e.g., pedestrian street-crossing rules) and social rules, as matters of degree (e.g., the social convention of keeping appointments). See FRANCK, *supra* note 11, at 37.

The legality of a law (as distinct from its legitimacy) is not a matter of degree, even if the laws' enforcement may at times be lax or corrupt. . . , [whereas the] social rule about keeping appointments is not a law and its ability to achieve compliance is not an either/or proposition but a matter of degree, which, in turn, depends on whether, and how much the subjects of the rule believe themselves obliged—despite their countervailing self-interest—to act in accordance with the rule.

Id. According to this formulation, customary "law" is not law and thus a matter of degree because the identification of customary "law" itself depends on "whether, and how much the subjects of the rule believe themselves obliged . . . to act in accordance with the rule," which is a restatement of the acceptance-as-law requirement of customary international law, *opinio juris sive necessitatis*. *Id.* Franck defends his application of relativity to international rules by arguing that there is a fundamental distinction between law as binary—"a text either is or isn't law"—and rules as matters of degree—"the degree to which a rule is obeyed affects the degree to which it is cognizable as a valid obligation; [r]eciprocally, the extent to which a rule is cognizable as a legitimate obligation affects the extent to which it is obeyed." *Id.* The distinction at the core of Franck's differentiation between law and rules is remindful of the linguist's quip about the difference between a language and a dialect—unlike a dialect, a language has an army and a navy. Similarly, Franck restates the positivist's distinction between law and nonlaw—law has a legislature, courts with compulsory jurisdiction, and centrally organized sanctions. FRANCK, *supra* note 11, at 40 (citing HART, *supra* note 16, at 206) (discussing misgivings about application of the term "law" in the international context). Surely, as Franck would concede, the mere existence of legislatures, courts and police does not prevent the perception that violations of street-crossing rules are "legal" in innumerable jurisdictions because there is no expectation of any meaningful court or police sanction resulting from violation of the expressed rule. Likewise, even where sanctions may be expected (e.g., speed limit violations), studies have shown that a change in the rules may have little effect on actual behavior. See, e.g., Editorial, N.Y. TIMES, July 24, 1995, at A13 (discussing limited effect of rise in speed limit from 55 to 65 mph on actual highway speed).

253. Weil, *supra* note 10, at 416.

254. *Id.* at 417 ("Resolutions, as the sociological and political expression of trends, intentions, wishes, may well constitute an important stage in the process

formal requirements, or rules of recognition, to distinguish norms from nonnorms. Unlike other scholars for whom shades of obligation are more readily classified as law, Weil acknowledges the difficulty in identifying the line between the legal and the nonlegal, but he does not shrink from the assertion that a dividing line exists nonetheless.²⁵⁵ However, asserting the clarity of such a line, Weil tends to deny shades of grey in the application of standards to behavioral phenomena by emphasizing the distinction as one between black and white: “[O]n one side of the line, there is born a legal obligation . . . on the other side, there is *nothing* of the kind.”²⁵⁶ Without a clearly delineated threshold, identifying legal obligations is not so facile as Weil insists.

3. Irreconcilability

The relative view is consistent with every architectonic principle except the overlapping and equivalent structures. As mentioned above, it is very similar to the dichotomous view. It is concurrently reconcilable with interdependence, which does not deny the polar extremes, but adds a dynamic dimension to the relationship between poles. Among its inadequate features, it is consistent with indeterminacy, which emphasizes the lack of guidance relativity offers in differentiating shades of satisfaction/nonsatisfaction of legal standards. However, relativity is inconsistent with the overlapping view to the extent that grey must be either black or white but not both.²⁵⁷ It is also inconsistent with equivalence; soft and hard lose their meaning if

of elaborating international norms; in themselves, however, they do not constitute the formal *source* of new norms.”).

255. *Id.* at 417 (“True, it is not always easy to draw the frontier between the prelegal and the legal It is nonetheless true that the threshold does exist.”).

256. *Id.* at 417-18 (emphasis added). Weil is not only critical of the relativity between norms and non-norms, but also between different norms; some are “now held to be of greater specific gravity than others, to be more binding than others.” *Id.* at 421.

257. The extent of overlap is a relative question. For example, in his attack on the dichotomous view of treaty and customary law, Gamble employed two diagrams: the first shows little overlap between treaty and customary law; the second shows significant overlap between the two. Gamble, *supra* note 5, at 318. Gamble then attributed the inaccuracy of the first diagram to the Statute of the World Courts rather than to any extra-textual reading of it. *Id.* Gamble’s conclusion is a relative one: treaty and customary law overlap more than not, but this is more a matter of conclusory perception than empirical investigation. The relative view is supported by the foregoing overlapping one. Any overlapping architectonic principle assumes a relative one because the overlapping architectonic principle, by itself, does not translate into a quantification of the degree to which treaty and customary law overlap.

they turn out to be the same.²⁵⁸ Finally, if, like dichotomy, relativity posits treaty and customary law as opposites, then it precludes recognition of phenomena that are neither treaty nor customary law.²⁵⁹

4. Lack of Resolving Power

Without a determination of the defining attribute(s), the thresholds for satisfaction of such defining attribute(s), and the extent to which those thresholds are met in specific cases, relativity has no explanatory power.²⁶⁰ Relativity informs decision-makers that distinctions are relative, but does not inform the specific degree of deepness of grey that should be classified as black.

D. *The Interdependent View*

Drawing in large part on the overlapping principle, applying the interdependent architectonic principle, it is possible to see treaty and customary law as "interrelating," when customary rules are codified in treaty, or when treaty is sufficiently general to meet the requirements for recognition as customary law.²⁶¹

258. See KENNEDY, *supra* note 121, at 31.

259. See Chodosh, *supra* note 6, at 89 (identifying declarative international law as neither treaty nor custom:

Although it is often mistaken for customary law, declarative international law is a distinct, identifiable body of law. Like customary law, declarative international law is not based exclusively on treaties and may evolve through an informal law-making process. However, declarative international law differs from customary law in one key respect: declarative law is not accepted as law by a generality of states. . . . Declarative rules are those that are declared as law by a majority of states but not actually enforced by them, or rules that are both practiced and accepted as law, but only by a minority of states.

Id. (citations omitted)).

260. See discussion, *infra* Section IV.

261. Gamble, *supra* note 5, at 319 (concluding "[t]he interesting point to be watched in the future is how these sources or evidence of international law [treaty and custom] . . . will interact, vie for position, and influence one another.") (quoting Baxter, *supra* note 5, at 103-04) (citations omitted). As Anthony A. D'Amato aptly noted in an adaptation from his many articles in *Treaty-Based Rules of Custom*, in D'Amato, ANTHOLOGY, *supra* note 112, at 95, many writers at the turn of the twentieth century rejected the dichotomous view of Oppenheim that treaties never generated new customary norms. *Id.* (citing WILLIAM HALL, A TREATISE ON INTERNATIONAL LAW 7-8 (A.P. Higgins ed., 8th ed. 1924); 1 LASSA OPPENHEIM, INTERNATIONAL LAW 733-34 (Hersch Lauterpacht 8th ed. 1995)). See, e.g., D'AMATO, ANTHOLOGY, *supra* note 112 (citing BLUNTSCHLI, LE DROIT INTERNATIONAL CODIFÉ 5 (4th ed. 1886); DESPAGNET, DROIT INTERNATIONAL PUBLIC 76-77 (4th ed. 1910); 1 CALVO, LE DROIT INTERNATIONAL THEORETIQUE ET PRACTIQUE

Relativism often evolves into an interdependent architectonic principle. For example, one scholar observed that the treaty/customary law "relationship is not so much one of a distinction as of a reciprocating effect . . . [because] . . . the line between codification and 'progressive' development is a shadowy one," and analogous to the equally shadowy "line between custom as a material source of a codificatory treaty provision and a treaty provision as a material source of new rules of customary international law."²⁶²

Interdependence may be achieved in three ways, each of which is distinguished by distinct causal and temporal processes: treaty (retrospectively) may reflect preexisting customary law; treaty (contemporaneously) may create customary law; and treaty (prospectively) may anticipate it.²⁶³

160 (5th ed. 1896); 1 FIORE, TRATTATO DI DIRITTO INTERNAZIONALE PUBBLICO 147 (4th ed. 1904); 1 FAUCHILLE, TRAITE DE DROIT INTERNATIONAL PUBLIC 53-54 (M. Henry Bonfils, ed., 8th ed. 1922); 1 HAUTFEUILLE, DROITS DE NATIONS NEUTRES xiv-xv (3rd ed. 1868); 1 PRADIER-FODERE, TRAITE DE DROIT INTERNATIONAL PUBLIC 82-86 (1885); 1 PHILLIMORE, COMMENTARIES ON INTERNATIONAL LAW 53 (3rd ed. 1879); 1 NYS, LE DROIT INTERNATIONAL 161-66 (2d ed. 1912); LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 99 (7th ed. 1910); SMITH, (EARL OF BIRKENHEAD), INTERNATIONAL LAW 25 (6th ed. 1927); 1 WESTLAKE, INTERNATIONAL LAW 16 (2d ed. 1910); WHEATON, ELEMENTS OF INTERNATIONAL LAW 24 (8th ed. Dana, 1866); CAVAGLIERI, LEZIONIDI DIRITTO INTERNAZIONALE 25-27 (1925); POLITIS, THE NEW ASPECTS OF INTERNATIONAL LAW 16 (1928)).

262. R.Y. Jennings, *The Discipline of International Law*, in INTERNATIONAL LAW ASSOCIATION, REPORT OF THE FIFTY-SEVENTH CONFERENCE HELD AT MADRID 620, 624 (1976).

263. See Charney, *supra* note 5, at 971 (International agreements "can codify" preexisting customary law, "they can cause the law to crystallize, and they can initiate the progressive development of new law.") (citing *North Sea Continental Shelf* (F.R.G. v. Den. and Neth.), 1969 I.C.J. 3, 37-38). Charney points out that "with the exception of some recent judgments, [citing ocean boundary decisions relating to UNCLOS III, e.g., *Continental Shelf* (Malta v. Libyan Arab Jamahiriya), 1985 I.C.J. 13, 29-30; *Maritime Boundary in the Gulf of Maine Area* (Can. v. U.S.), 1984 I.C.J. 246, 294; *Continental Shelf* (Tunisia v. Libyan Arab Jamahiriya), 1982 I.C.J. 3, 38, 48-49], the [International] Court [of Justice] had been clear that state practice dehors the agreements and *opinio juris* were the principal considerations, and that international agreements played limited roles."). Charney, *supra* note 5, at 971-22. See also RESTATEMENT OF FOREIGN RELATIONS, *supra* note 54, § 102(3) (1986) ("International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted."). Weil noted the difficulties of such differentiation:

Everybody knows how difficult, yet at the same time how necessary, it is to distinguish within such a convention between, on the one hand, what is declaratory of an already formed customary rule or crystallizes a customary rule that had been in process of formation, and, on the other hand, what constitutes a development of the law (i.e., a new norm). It is

The interdependent view of the treaty/customary law distinction is theoretically sound, being both empirically accurate in specific cases and not illogical. It is practicable in that it is consistent with current international law; however, it is very difficult to administer in specific instances. Still, the interdependent view may be reconciled with other principles, except the dichotomous view. Finally, it may accurately describe a process of customary law formation by treaty or treaty formation by codification of customary law. However, alone it provides no resolving power in particular cases.

1. Theoretical Coherence

Theoretically, there is nothing empirically inaccurate about the statement that treaty and customary law are interdependent. The rules of recognition for customary law itself are contained in various treaties.²⁶⁴ Treaties are interpreted against customary principles of treaty formation, interpretation, and enforcement.²⁶⁵ However, an overly generalized view of interdependence is blind to particular customary rules that do not depend on treaty, as well as to treaty rules that do not codify customary law.

Logically, it is not invalid to suggest that two phenomena, even those considered to be oppositional, depend on one another. Such interdependence may be one of meaning alone (e.g., the meaning of white depends on the meaning of black). Alternatively, the phenomena themselves may exhibit interdependence. Either way, the interdependent view of treaty and customary law is not illogical.

2. Practicability

The interdependent view is consistent with both the rules of recognition for each treaty and customary law and the rules concerning the relationship between them. As this Article notes above, Article 38 of the Vienna Convention excludes the automatic dichotomization (or mutual exclusivity) of treaty and

difficult because the two categories are often closely intermingled; necessary, because, in the first case, provisions are involved expressive of rules opposable to all states, even those not parties to the convention, whereas in the second case only the parties are bound.

Weil, *supra* note 10, at 427-28.

264. STATUTE OF THE I.C.J., *supra* note 7, art. 38; Vienna Convention, *supra* note 176, arts. 34, 38.

265. For example, *pacta sunt servanda* (pacts shall be served) and *rebus sic stantibus* (circumstances change). See MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 9, 11, 23, 32-33, 54 (1988).

customary law, by providing that "[n]othing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law."²⁶⁶ Thus, customary law may derive from treaty. Yet, nothing in the law suggests that interdependence is necessary. Such a claim would be inconsistent with the current state of the law.

The ability to differentiate any particular provision as reflecting, creating, or anticipating customary law causes enormous epistemological problems. The interdependence between treaty and customary law is difficult to apply in particular cases.²⁶⁷ When a treaty both codifies existing customary rules and develops new conventional rules, determining which provisions fall into each category may present considerable difficulties.²⁶⁸

3. Irreconcilability

The interdependent view may be reconciled with some but not all architectonic views of the treaty/customary law distinction. First, because it accurately describes a potential process of customary law formation by treaty or treaty formation by customary law, it is inconsistent with the dichotomous view. Second, it is not inconsistent with the overlapping view because interdependence allows for a rule to be both customary and treaty. Third, it is consistent with relativity because the interaction of polar opposites may produce one phenomenon or the other (e.g., a male and a female together may produce either a male or a female). Fourth, interdependence is also consistent with equivalence in the case of equating treaty with customary law because treaty crystallized or created customary law. Finally, it is even consistent with the indeterminate view in its more self-critical forms of concession that it is hard to tell when treaty has created customary law and when customary law is codified in treaty.

266. Vienna Convention, *supra* note 176, art. 38.

267. See Howard, *supra* note 5 (discussing practical problems of deriving customary rules from severed, albeit general, treaty provisions agreed to as a package deal); Scott & Carr, *supra* note 5.

268. Caminos & Molitor, *supra* note 186, at 880 (discussing juridical implications for the traditional treaty/customary rules in cases of interdependent treaty provisions in UNCLOS III).

4. Lack of Resolving Power

Due to the impracticality of applying interdependence as a method of source identification, this principle provides no explanatory power in particular cases. Identifying two terms or phenomena as generally interdependent by itself does not mean that this relationship is either necessary or universal. Interdependence, then, is only a conclusion, the justification for which one must look elsewhere.

E. *The Equivalent View*

The more overlapping and interrelated the concepts, the more frequently they will be viewed as effective equivalents. The equivalent architectonic principle tends to deny the distinction between putative opposites.²⁶⁹ Hence, *treaty is customary law*.²⁷⁰ In some writings and expressions of foreign policy, there is a tendency to recognize customary law in treaty rules²⁷¹ even if unratified,²⁷² without ensuring satisfaction of the basic

269. See, e.g., HENRY FIELDING, *THE HISTORY OF TOM JONES* Book VI, Ch. 13 (1749) ("Distinction without a difference."); JAMES BOSWELL, *LIFE OF SAMUEL JOHNSON* 266 (1791) ("If he does really think that there is no distinction between virtue and vice, why, sir, when he leaves our houses let us count our spoons.")

270. See, e.g., Baxter, *supra* note 5, at 275; Leslie M. MacRae, *Customary International Law and the United Nations' Law of the Sea Treaty*, 13 CAL. W. INT'L L.J. 181, 221-22 (1983) ("The United Nations Law of the Sea Treaty, despite protestations to the contrary, has codified with almost unanimous international consent, customary law of the sea."); Anthony D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1138, 1146-47 (1982) (concluding that "generalizable provisions in treaties (especially multilateral treaties) *ipso facto* generate customary rules," but leaving open the possibility of a temporal requirement of "reasonable time").

271. For a comprehensive effort to differentiate treaty rules that give rise to new custom, see Charney, *supra* note 5, at 971 ("Recently, . . . writers, international courts, and statesmen have given support to the view that international agreements, with little more, could give rise to new customary international law that is binding on all states regardless of whether or not they participated in the negotiations or became parties to the agreement.")

272. *Id.* ("There is even some support for the view that international agreements that are not yet in force could give rise to instant international law."). After the 1982 UNCLOS, the United States Government subsequently stated its position that the Convention, with the exception of the deep seabed mining provisions, reflected existing customary international law. See President's EEZ proclamation of March 10, 1983, 19 WEEKLY COMP. PRES. DOC. 383-84 (Mar. 10, 1983), reprinted in 77 AM. J. INT'L L. 619-20 (1983); see also Lee, *supra* note 188, at 542-43; S. EXEC. DOC. L., 92D CONG., 1ST SESS. 1 (1971) ("[A]lthough [the Vienna Convention is] not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law and practice."); Preference of South Africa in Namibia, 1971 I.C.J. 16, 47 (Advisory Opinion of June 21 on Namibia) ("The rules laid down by the Vienna Convention on the Law of Treaties concerning termination of a treaty relationship on account of breach

requirements of customary international law under the conventional definition.²⁷³ As Charney writes, "Such developments [of equating treaty rules with customary law] in the rules for establishing customary international law could have profound implications for the international legal system."²⁷⁴

As noted above, equivalence, draws on interdependence and may be achieved in three ways, to be distinguished by distinct causal and temporal processes. Treaty may reflect preexisting customary law (retrospectively); treaty may create customary law (actively); and treaty may anticipate it (prospectively).²⁷⁵ In its most extreme form, the equivalence principle supports not only the first and third views (better understood in the context of the interdependence of treaty and customary law), it also supports the second—treaty with little more can itself constitute customary law.²⁷⁶ For example, Anthony D'Amato argues that "generalizable

(adopted without a dissenting vote) may in many respects be considered as a codification of existing customary law on the subject."

273. See Chodosh, *supra* note 6, at 89 n.2 ("Customary international law and treaty law now appear to be increasingly interdependent and overlapping, rather than mutually exclusive or hermetically sealed bodies of international law. However, it does not follow that all treaty law is customary law simply because the two categories overlap."). For an argument that treaty may become customary law, but for specific reasons, see Caminos & Molitor, *supra* note 186, at 880.

Therefore, those treaty provisions which traditionally create rights and obligations for third states may do so for two reasons: either they reflect custom that existed prior to the negotiation of the treaty or, as a result of the place within the treaty of a particular provision, it has provided the impetus for the creation of a new customary rule.

Id.

274. Charney, *supra* note 5, at 971.

275. See *supra* Section III.D.

276. See Louis B. Sohn, "Generally Accepted" *International Rules*, 61 WASH. L. REV. 1073, 1077-78 (1986) and THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 80 (1989) (arguing that the "customary character" of universal human rights treaties may obligate "states that are not parties to the instrument in which the norm is stated") (both cited in FRANCK, *supra* note 11, at 189-90, 281 n.441) ("[A] treaty ratified and implemented by most states may . . . create a prevalent pattern of behavior, which as 'customary law' obligates states that have not accepted the treaty."). In contrast to the views that equate treaty with customary law, Franck's formulation preserves (in slightly different terms) the standards of recognition for customary international law, e.g., "most states" (generality), "prevalent pattern of behavior" (practice), "ratified and implemented" (accepted as law). Additionally, Franck does not focus on interpretation of Article 38 of the Statute of the I.C.J. as "a secondary rule, or rule of recognition," instead, Franck's study concentrates on what he calls the "ultimate rule of recognition," the question of "why those, or any other, rules should determine the outcome of a dispute." FRANCK, *supra* note 11, at 190. This Article, in contrast, is concerned with interpretation of the secondary rules of recognition that define the potential sources of obligation.

provisions in bilateral and multilateral treaties generate customary rules of law binding upon all states."²⁷⁷ He suggests "that [such generalizable] treaties become customary law at the moment they are ratified."²⁷⁸ But generalizability should not be equated with generality.

The following Section will argue that the equivalent view of the treaty/customary law distinction, though arguably easy to administer, is empirically inaccurate because treaty alone does not satisfy the rule of recognition for customary law, illogical in its conclusion that practical problems of differentiation are indicative of equivalence, inconsistent with the law as interpreted by the I.C.J., and reconcilable with only extreme versions of the overlapping and interdependent principles. Moreover, the equivalent view has only limited resolving power in particular disputes.²⁷⁹

1. Theoretical Incoherence

The critique of equivalence is similar to the relativity critique. Weil views both relative normativity and treaty/customary law equivalence through the same critical lens. Both relativity and equivalence share the common feature of erosion of the "autonomy of the conventional rule vis-a-vis the customary rule."²⁸⁰ Weil acknowledges the inadequacy of the dichotomous view of treaty and customary law,²⁸¹ and the historical acceptance of the interdependent view.²⁸² However, Weil is

277. D'AMATO, CONCEPT OF CUSTOM, *supra* note 169, at 104, 163-64.

278. See Chodosh, *supra* note 6, at 101. Weil argues that the North Sea Continental Shelf Case lends itself to the conclusion that "nothing more [than a conventional rule] was needed to prompt the conclusion that, in the eyes of the Court, a provision of treaty law adopted by enough sufficiently representative states could undergo instantaneous transmutation into a rule of customary international law," noting that the Court in the *Barcelona Traction* case explicitly mentioned "international instruments of a universal or quasi-universal character." Weil, *supra* note 10, at 435 (quoting *Barcelona Traction*, 1970 I.C.J. 32).

279. Equivalence, like dichotomy, has resolving power if applied to disputes in which a treaty rule is argued to apply to a nontreaty state. However, it reaches the opposite result. Equivalence would resolve the dispute in favor of the state party to the treaty by arguing that treaties *are* customary law, and thus universally binding, even on a nontreaty state.

280. Weil, *supra* note 10, at 428.

281. *Id.* ("Admittedly, these two categories have never been divided by an insuperable barrier . . .").

282. *Id.* at 438 ("[I]t has always been accepted that a treaty could codify or contribute to the formation of a customary norm."). Weil also cites to the S.S. Wimbledon case, in which "J. Basdevant spoke of a rule possessing 'the dual quality of being both a conventional rule and a customary rule.'" *Id.* at 438 n.100

critical of the "three variant erasers of the frontier between conventional and customary norms"²⁸³ (i.e., treaty reflects customary law, treaty creates customary law, and treaty anticipates customary law), resulting in "a veritable deconventionalization of conventional rules."²⁸⁴

The equivalence architectonic principle in D'Amato's writing is supported by his view that the temporal threshold at which point a treaty becomes customary law is indeterminate. He utilizes a descriptive indeterminacy to support equivalence by arguing illogically that "the fact that no one can specify a time" at which a treaty passes into customary law suggests that "there is no such dividing line."²⁸⁵ In other words, because one cannot identify, by sound alone, when the tree fell, it has already fallen. This position is seriously flawed not only because distinctions may be made, but more importantly because such distinctions *must* be made. Otherwise, parties have no way of forecasting what customary law is or will be. Moreover, sound does not determine whether a tree has fallen.

Stated otherwise, D'Amato creates an attributional "strawman" by implying that time or its length is the defining attribute of customary law. Not only is this an extratextual attribution nowhere contained in the contemporary rules of recognition regarding customary international law,²⁸⁶ but more importantly he states that it is impossible to determine the threshold of temporality allegedly defined by that attribute. Therefore, he defines customary law in part by identification of an attribute that is impossible to recognize and therefore (however illogically) deemed to be nonexistent. Accordingly, because the attribute posited as differentiating customary law from treaty is unrecognizable and does not even exist, one may equate customary law and treaty. In sum, treaty equals instantaneous customary law because no one can specify the amount of time required for treaty to become customary law.

Time, however, is not a defining factor. Rather, at least in I.C.J. jurisprudence, the conjunctive standards contained in the phrase "general practice accepted as law" define customary international law. Thus, the equivalent view tends to interpose a

(citing *S.S. Wimbledon (Gr. Brit., Fr., Italy, and Japan v. Ger.)*, 1923 P.C.I.J. (ser. C) No. 3-I, at 182 (Aug. 17)).

283. Weil, *supra* note 10, at 438 (citing Baxter, *supra* note 5, at 73).

284. Weil, *supra* note 10, at 430.

285. D'AMATO, CONCEPT OF CUSTOM, *supra* note 169, at 163-164 (quoted in Chodosh, *supra* note 6, at 101 n.60).

286. See Chodosh, *supra* note 6, at 100-01 (describing the lack of temporal requirements for recognition of customary law).

nondefinitional factor and then posits that because it is inadministrable it does not really apply. This view leads to an inaccurate identification of customary law as evidenced in treaty, regardless of the independent rules of recognition for customary law.²⁸⁷

For these reason, equivalence suffers from faulty logic. First, it is based on a false premise that time is an important factor in differentiating treaty and customary law. Then, it points out the difficulties in applying a temporal test. Finally, it concludes that, because one cannot determine *how much* time is required, *no* time is required.

2. Practicability

Like those who apply a dichotomous framework to the understanding of treaty and customary law, as well as those who reject such a view, D'Amato turns some attention to Article 38 of the I.C.J. Statute. He argues not only that the "statute does not attempt to separate treaties from customary law, nor to exclude the effect of one upon the other . . .," but that the "opposite may be closer to the truth."²⁸⁸ D'Amato presents a strained argument that because paragraph (a) "is restricted to rules in treaties that are 'expressly recognized by the contesting states', . . . [c]onsiderable room is left in paragraph (b) for the impact of treaties upon general custom."²⁸⁹ It does not necessarily follow, however, that if the I.C.J. is only to apply treaty rules expressly recognized by contesting states, treaties are to be applied *qua* customary law to states that do not expressly recognize those rules. D'Amato's argument at best supports an overlapping view; but it certainly does not support an equivalence of treaty and customary law.

Indeed, equivalence is patently inconsistent with both I.C.J. jurisprudence and the pertinent treaty provisions. First, the I.C.J. has repeatedly counseled for caution in reaching the conclusion that treaty is evidence of customary law.²⁹⁰ Second,

287. Another related approach to equating treaty and customary law is to deemphasize the contractual features and to exaggerate the noncontractual features of treaty law in order to draw it closer to customary law, which is not necessarily based on contractual arrangements between states. See, e.g., D'AMATO, ANTHOLOGY, *supra* note 112, at 96 (arguing that a "treaty isn't a contract").

288. D'AMATO, CONCEPT OF CUSTOM, *supra* note 169, at 109.

289. *Id.*

290. North Sea Continental Shelf (F.R.G. v. Den. and Neth.), 1969 I.C.J. 3 (Feb. 20). See also I. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 23 (2d ed. 1984) ("[T]he [North Sea] judgment suggests clearly defined limits to the process of generation by treaty of customary rules, and these limits involve the

the I.C.J.'s views are supported by Article 34 of the Vienna Convention, which excludes the automatic equivalence of treaty and customary law, so that the existence of a treaty provision itself, with little more, provides no conclusive evidence of a customary, universal legal obligation. Article 34 provides in pertinent part that "[a] treaty does not create either obligations or rights for a third State without its consent."²⁹¹ Thus, treaties alone do not make customary law.²⁹²

The modern tendency not only to define customary law in terms of treaty, but to equate the two is strong. However, the International Court of Justice has resisted this tendency in many prominent cases.²⁹³ For example, the I.C.J. rejected the equivalent view of treaty and customary law in the *Asylum* case (Colombia/Peru)²⁹⁴ and the case of the *North Sea Continental Shelf* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands).²⁹⁵

In *Asylum* and *North Sea*, the I.C.J. rejected the view that treaty necessarily reflected preexisting customary law, crystallized or anticipated customary law, which was formed in later reaction

consideration of criteria external to the treaty itself."); D. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 285 (3d ed. 1983) ("The North Sea Continental Shelf Cases have shown that it must not be too readily assumed that a treaty provision even in a 'law-making' treaty states a rule of customary international law.").

291. Vienna Convention, *supra* note 176, art. 34.

292. Article 38 (rejecting the dichotomy) does not "modify" Article 34 (rejecting the equivalence), as Gamble suggests. See Gamble, *supra* note 5, at 306-07. Article 38 merely ensures that one does not illogically conclude a mutual exclusivity from the rejection of equivalence. Taken together, the two provisions reject dichotomy and equivalence as ways of structuring comprehension of the distinction. Treaty and customary law are not mutually exclusive opposites, see Vienna Convention, *supra* note 176, art. 38; nor are they necessarily equivalent, *id.* at art. 34. Stated otherwise, that treaty does not necessarily create customary law (Art. 34) and does not imply that the two categories are mutually exclusive (Art. 38). There is nothing contradictory in these provisions; treaty is not necessarily customary law (Art. 34) but in some cases (i.e., where the rules of recognition of custom are satisfied) treaty law may also be customary law (Art. 38).

293. Cases discussed more briefly in this section and more thoroughly in Section IV illustrate the extent to which judicial decision-makers take the STR approach proposed in this article. These decisions are generally consistent with this approach in viewing customary international law according to its own definitional attributes, but inconsistent to the extent that they do not identify specific thresholds that differentiate the satisfaction *vel non* of such defining standards. See discussion *infra* Section IV.

294. *Asylum Case* (Colombia v. Peru), 1950 I.C.J. 266 (Nov. 20).

295. *North Sea Continental Shelf* (F.R.G. v. Den. and Neth.), 1969 I.C.J. 3 (Feb. 20).

to or acceptance of treaty. In *Asylum*,²⁹⁶ for example, the I.C.J. rejected Colombia's assertion that "a large number of extradition treaties"²⁹⁷ and cases in which asylum was granted according to the asylum-granting State's claim to unilateral and definitive qualification were sufficient to identify the existence of customary law binding on Peru, which had not ratified such treaties. The I.C.J. held that Colombia's evidence of customary law was insufficient to qualify under Article 38 as general practice accepted as law. The I.C.J. based its holding on several interrelated observations. The I.C.J. cited the irrelevance of the cited treaties,²⁹⁸ the lack of generality of states that ratified them,²⁹⁹ the lack of practice,³⁰⁰ and the lack of indication that such practice was followed out of a sense of legal obligation.³⁰¹ In this way, the I.C.J. rejected Colombia's equivalence of treaty with customary law. Likewise, in *North Sea*, the I.C.J. rejected the view that treaty necessarily reflects customary law. The court concluded that the relevant treaty provision "did not embody or crystallize any pre-existing or emergent rule of customary law."³⁰² The court recognized that a rule was embodied in the treaty, "but

296. The case of the North Sea Continental Shelf, *id.*, is discussed more extensively *infra* Section IV.

297. *Asylum Case*, 1950 I.C.J. at 277.

298. The I.C.J. found that Colombia cited conventions and agreements "which [did] not contain any provision concerning the alleged rule," and invoked conventions which had not been ratified by Peru, such as the Montevideo Conventions of 1933 and 1939. *Id.*

299. Second, the I.C.J. observed that the 1933 convention had been ratified by "not more than eleven States" and the latter 1939 convention "by two States only." *Id.* In particular, the I.C.J. rejected Colombia's contention that the Montevideo Convention of 1933 "merely codified principles which were already recognized by Latin-American custom, and that it [was] valid against Peru as a proof of customary law." The I.C.J. stressed "the limited number of States which [had] ratified [the] Convention" and the language of the Preamble, which stated that the convention modified a previous convention, rather than codified customary law. *Id.* The I.C.J. further rejected Colombia's claim that the conventions codified specific, Latin American customary law. *Id.*

300. In reviewing the facts, the I.C.J. observed "so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others" that "it is not possible to discern in all this any constant and uniform usage." *Id.*

301. The I.C.J. did not find sufficient evidence in Colombia's citation to "a large number of particular cases in which diplomatic asylum was in fact granted and respected" that asylum was granted in such situations out of a sense of legal obligation, rather than for "for reasons of political expediency." *Id.*

302. *North Sea Continental Shelf (F.R.G. v. Den. and Neth.)*, 1969 I.C.J. at 3, 41 (Feb. 20).

as a purely conventional rule."³⁰³ In both cases, the I.C.J. resisted the tendency to equate treaty with customary rules.

On its face, the equivalent view could not be more easily administered. If a rule is one of "generalizable" treaty, then it is also customary law—this is the formula for equivalence. However, under this view, it is necessary to define "generalizable" vs. nongeneralizable treaty provisions,³⁰⁴ as well as to delimit what, beyond more than the existence of the treaty, is required for customary law to exist. Both present profound practical difficulties.³⁰⁵

3. Irreconcilability

Equivalence cannot be reconciled with the dichotomous and the relative views, because, logically, X may not also be not-X, unless X is meaningless.³⁰⁶ Equivalence is reconcilable with the overlapping view to the extent that complete overlap may be considered effective equivalence. The equivalent view is only illogically reconcilable with interdependence: the inherence of two terms in one another is not incompatible with a distinction between them.³⁰⁷ Equivalence is necessarily reconcilable with indeterminacy, because indeterminacy is premised on postulated dichotomies that are later contradicted. But, as D'Amato's views reflect, equivalence may also lead to the view that if treaty is always customary law; customary law has, by itself, no independent meaning.

4. Lack of Resolving Power

Given the existence of a widely executed treaty addressing global issues, such as human rights or the environment, the equivalent view renders such treaties customary law as well, thereby extending the binding obligations contained in such treaties to nontreaty parties. However, even accepting the

303. *Id.*

304. See, e.g., L.A. Howard, *The Third UN Conference on the Law of the Sea and the Treaty/Custom Dichotomy*, 16 TEX. INT'L L. J. 321 (1981); R.Y. Jennings, *Law Making and Package Deal*, in *MÉLANGES OFFERTS A PAUL REUTER*, 347-55 (1981).

305. See John K. Gamble & Maria Frankowska, *The 1982 Convention and Customary Law of the Sea: Observations, a Framework, and a Warning*, 21 SAN DIEGO L. REV. 491 (1984).

306. See Rogers & Molzon, *supra* note 111.

307. See application of architectonic principles, including the principle of equivalence, to Reisman's description of law and politics. *INTERNATIONAL LAW ESSAYS*, *supra* note 120.

equivalent view of treaty and customary law, if one does not already have a treaty in hand, if various treaty regimes conflict,³⁰⁸ or if a previously recognized customary rule conflicts with a new treaty rule,³⁰⁹ the equivalent view has little or no resolving power. Without relevant treaty provisions, the equivalent view of treaty and customary law could not inform a determination of customary law on its own terms. Moreover, equivalence does not by itself determine which of conflicting treaty provisions should be considered customary law. Finally, the equivalent view, far from heightening the importance of customary law, dictates that customary law has no independent force when treaty conflicts with previously deemed customary rules.

F. *The Indeterminate View*

When applying an indeterminate architectonic principle, the distinction between treaty and customary law becomes meaningless, and takes the relative degree of overlap or interdependence as evidence of the indeterminacy of these sources of law. The view of customary law—if not treaty—as indeterminate is neither new nor novel.³¹⁰ Although the

308. Compare approaches in the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 20 I.L.M. 656 (*permitting* transboundary movement and disposal), currently ratified by thirty-three countries, with those of the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Waste Within Africa, Jan. 30, 1991, 30 I.L.M. 775 (*banning* transboundary movement and disposal). Although not yet in force, the Bamako Convention has been ratified by ten countries.

309. See *Maritime Delimitation in the Area between Greenland and Jan Mayen* (Den. v. Nor.), 1993 I.C.J. 38, 134 (June 14) (“[A] later custom . . . prevails over an earlier treaty.”) (citing PAULE REUTER, INTRODUCTION TO THE LAW OF TREATIES 107-08, para. 216 (1989)). The I.C.J. stated that an “integrated legal system would provide some method of determining which rule [when two or more conflict] ultimately prevails; for the same facts cannot at one and the same time be subject to two contradictory rules.” *Id.* at 179.

310. See C. WILFORD JENKS, THE PROSPECTS OF INTERNATIONAL ADJUDICATION 263 (1964); HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 378 (1958); ALF ROSS, A TEXTBOOK OF INTERNATIONAL LAW 91 (1947); Hans Kelsen, *Theorie du Droit International Coutumier*, I *Revue Internationale de la Theorie du Droit* 253, 266 (1939); SORENSEN, LES SOURCES DU DROIT INTERNATIONAL 110 (1946). All of the foregoing authors are cited in D’AMATO, CONCEPT OF CUSTOM, *supra* note 169, at 17 n.23-27 for the argument, with which D’Amato disagrees, that “proof of custom is a matter for the ‘arbitrary discretion’ or ‘free appreciation’ of courts.” D’Amato’s disagreement with this view is based in part on the very complexity of their theories. *Id.* (“[L]ong, complex and unresolved inquiries into the theoretical nature of custom . . . constitute not a theory but the absence of one, as they give neither the reader nor the judge himself any idea of how to proceed to find proof of custom.”). In contrast, D’Amato attempts to “show that custom is not founded upon unfettered discretion

fundamental advantage of the indeterminacy architectonic principle is its critical nature,³¹¹ it fails to reconstruct what it deconstructs.³¹²

The seeds of indeterminacy inhere in the equivalent view of customary law as "a style of legal argumentation,"³¹³ rather than as a set of legal phenomena. Under this view, customary law is a process³¹⁴ of competitive persuasiveness,³¹⁵ rather than a set of phenomena that meet a list of predetermined, "objective" standards of recognition. The question is not whether certain phenomena meet the standards of recognition as customary law *per se*, but which litigant has a more persuasive argument in a particular case. This latter form of casuism provides fuel for the critical fire of the indeterminacy school. The view of customary law as a process of legal argumentation is bolstered by the view that customary law is a vacuous subset of international law (i.e., an empty hole in the net), defined in terms of what it is not (i.e., treaty), rather than what it is. As D'Amato writes, "legal argumentation tends to be based upon [custom] because there was no treaty or agreement covering the situation."³¹⁶

but rather upon objectively determinable and replicable procedures of legal methodology." *Id.* This view, however, is difficult to reconcile with D'Amato's self-described "claim-oriented" theory. *Id.* at 18. A "process by which the better of two claims prevails" that "takes account of the *relative* superiority of persuasiveness" is patently inconsistent with so-called "objectively determinable" methodology. *Id.* D'Amato's claim of freedom from "subjective discernment" is incompatible with his claim-oriented approach. *Id.*

311. Indeterminacy in the law is not necessarily always considered to be a negative characteristic. See, e.g., *supra* note 11, discussing Franck's views of constructive indeterminacy in treaty texts; KENNEDY, *supra* note 121, at 294 ("[T]he interminability of international law seems the subtle secret of its success.").

312. For a critique of indeterminacy as it applies in different fields of law, see Rogers & Molzon, *supra* note 111. See also STEVEN J. BURTON, *JUDGING IN GOOD FAITH* (1992).

313. D'AMATO, *CONCEPT OF CUSTOM*, *supra* note 169, at xiii.

314. See *id.* at vii (Richard A. Falk's Foreword to D'Amato) (describing the "shift away from the largely deductive orientation toward inquiry of the classical jurisprudence of international law" as involving "the acceptance of law as *process* . . .").

315. Compare RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 283 (1977) (describing legal propositions as "true" if they are more consistent with the theory of law that best justifies settled law than the contrary proposition). Unlike Professor Dworkin, I would not define truth as a function of consistency, because a legal proposition may be consistent *and* false, but I do believe that consistency in the law is one of several important standards of justice, which is necessary for the stability and predictability of legal outcomes.

316. D'AMATO, *CONCEPT OF CUSTOM*, *supra* note 169, at 4. This statement may seem inconsistent with equivalence; it is, but only in one direction. The

But indeterminacy makes an even bolder claim, drawing on the technique of "deconstruction." According to this view, because language is relational, distinctions are necessarily indeterminate. The logical leap from descriptive relativity to conclusory indeterminacy may be found in Koskenniemi's explanation of his critical methods.³¹⁷ He writes that a deconstructive study sees international law as "constituted by a conceptual opposition."³¹⁸ Koskenniemi describes the international legal discourse as an argument over which opposition takes priority over the other. In this sense, indeterminacy descriptively postulates a dichotomous set of concepts: apology/utopia (the is/ought nature of international law), normativity/concreteness (the standards of recognition), and ascending/descending (the trajectories of legal argumentation). He argues that priority can never be established because of the interdependent meaning of the opposing terms: "[A]lthough the participants [in the discourse] believe that the terms are fundamentally opposing (that is, that their meanings are non-identical), they turn out to depend on each other,"³¹⁹ and therefore "alternative arguments" are "not alternative at all" because "they rely on the correctness of each other."³²⁰

Herein lies the critical weakness of indeterminacy's logic. It begins by postulating that differentiated terms or concepts are necessarily either "fundamentally opposing" (dichotomous) or "identical" (equivalent). No other relationships are possible. Whenever indeterminacy identifies significant exceptions or qualifications to the absolute dichotomy (e.g., overlap, relativity, or interdependence), it concludes that the previously considered absolute distinction (dichotomy) is really no distinction at all (equivalence). In such cases, indeterminacy concludes that "law" is indeterminate, subjective, and thus, political. Applying its own rigid opposition between law and politics, indeterminacy concludes that international "law" is not really law.³²¹ Ironically,

statement that all treaty equals customary law does not logically necessitate the conclusion that all customary law equals treaty.

317. See KOSKENNIEMI, *supra* note 107, at xx-xxi.

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.* For an excellent critical review of Koskenniemi's work, which has greatly influenced this analysis, see Iain Scobbie, Note, *Towards the Elimination of International Law: Some Radical Scepticism about Sceptical Radicalism*, 1990 BRIT Y.B. INT'L L. 339, 349 (1991) (noting in particular the opposition between objectivity and subjectivity at the core of Koskenniemi's analysis, and pointing out that "in giving content to standards . . . , the judge surely does not rely on some objective or subjective meaning; rather, an intersubjective assessment will be

but not surprisingly, Koskenniemi falls into his own trap by posing his conception of law in an absolute dichotomous relationship with politics. If legal systems are "absolutely determinate"³²² (a utopian and ascending postulate), and if they evidence any indeterminacy (an apologetic, concrete, descending observation), then such indeterminacy renders such a system political and nonlegal.

The following subsections argue that the indeterminate view of the treaty/customary law distinction is frequently empirically accurate due to nonrigorous applications of the rule of recognition for customary law and reconcilable with other principles except dichotomy, but it is illogical because of its rigidly structural interpolations, inconsistent with the law in its restatement of the rules, and nonadministrable possibly due to its overly critical emphasis. Furthermore, the indeterminate view has no resolving power in particular disputes because it fatalistically concludes that the concepts of international law themselves are too indeterminate to resolve disputes in an objective way.

1. Theoretical Incoherence

If the indeterminacy critique of the applications of customary international law is empirically accurate, it is not for the reasons claimed by scholars of that school. There is nothing inherent in the concepts of treaty and customary law that makes source identification hopelessly indeterminate. The indeterminacy of customary international law lies in the ignorance of preexisting rules of recognition and in the frequent lack of rigor in applying them.

That the distinctions between treaty and customary law may be indeterminate does not in itself support the hyperbolic assessments and faulty logic used to reach that conclusion. The progression from the view of customary law as an empty hole to indeterminacy is rather immediate. As Koskenniemi writes, "[M]odern legal argument lacks a determinate, coherent concept of custom. Anything can be argued so as to be included within it as well as so as to be excluded from it."³²³ The very definition of customary law—general practice accepted as law—incorporates the two forms of dichotomous legal argumentation that Koskenniemi identifies. First, he denominates as "ascending"

made in much the same way as a municipal judge determines the requirements of standards such as 'the reasonable man' or 'the officious bystander.'").

322. KOSKENNIEMI, *supra* note 107, at 16.

323. *Id.* at 361-62.

those trajectories of argumentation that base order and obligation on ideas of justice, nature, progress, etc., as "anterior, or superior, to State behaviour."³²⁴ This trajectory correlates to the acceptance-as-law requirement of customary law. Second, he identifies as "descending" those trajectories of argumentation that base "order and obligation on State behaviour, will or interest."³²⁵ This trajectory correlates to the "general practice" requirement of customary law.

Koskenniemi argues that ascending and descending forms of argumentation are mutually exclusive: "Either the normative code is superior to the State or the State is superior to the code. A middle position seems excluded."³²⁶ However, the definition of customary law incorporates both criteria conjunctively (i.e., both must be satisfied to reach a finding of customary law). The exclusion of the middle position is not a result of the opposing lines of argumentation. It is one of Koskenniemi's own creation, an either/or fabrication. If judicial findings of customary law are indeterminate, that is not because "modern legal argument lacks a determinate, coherent concept of customary law" but rather because the determinacy and coherence of the traditional concept are eroded by nonrigorous applications of Article 38's rule of recognition.

2. Impracticability

In order to hold fast to the indeterminacy conclusion, one must largely ignore the rules of recognition embodied in the operable authorities. Indeterminacy is a function of ill-attention to these defining standards; it is not the result of any inherent incompatibility between the alleged retrospective "apology" of "general practice" and the prospective "utopia" of "acceptance as law." It is not inherently inconsistent to support a rule of recognition claiming that nations should behave in the future (utopia) as they have generally behaved in the past (apology). Unless absolutely anything may be legitimately categorized as (1) general, (2) practice, (3) accepted, *and* (4) law, then the indeterminacy view is at best hyperbolic and at worst deliberately ignorant of the rules of recognition currently—albeit at times loosely—applied by the I.C.J. and other fora.

324. *Id.* at 40.

325. *Id.* at 41.

326. See David Kennedy, *Theses about International Legal Discourse*, 23 GERM. Y.B. INT'L L. 353 (1980) (arguing that sovereign authority and community membership constitute the contradiction that controls a variety of opposing doctrines).

Koskenniemi offers no alternative concept that would meet his standards of determinacy and coherence. In this respect, indeterminacy is a self-fulfilling prophecy, for it may lead decision-makers to shrink from their responsibilities, fearing that subjective discretion corrodes a process that is presumed to be purely objective. This appears to make best the enemy of good.³²⁷ As one scholar puts it, "To identify existing customary international law in a treaty text is not always easy but is indispensable."³²⁸ Koskenniemi's argument that "international law is singularly useless as a means for justifying or criticizing international behavior"³²⁹ only serves to criticize, not to reconstruct, and thus tends to undermine international law itself. Koskenniemi's indeterminacy argument is itself based again on a dichotomous distinction between law and politics. Hence, the argument: if international law is political, it is not law, and thus useless.³³⁰

3. Irreconcilability

Indeterminacy is inconsistent with the claims of dichotomy, except insofar as some of the dichotomous views agree that customary law is a hopelessly indeterminate source. However, indeterminacy draws strongly on the other principles: overlap (as support for rejecting rigid dichotomies), relativity (as support for illuminating the lack of determinate thresholds), interdependence (as support for showing interreliance between purported opposites) and equivalence (as support for the view that customary law may be whatever the beholder wishes, even its purported opposite, treaty).

4. Lack of Resolving Power

The purpose of the indeterminate view is mainly critical. It does not purport to determine what characterizes either treaty or customary law, because it concludes that any source distinction is too indeterminate to apply consistently with the objective standards presumed to accompany *legal* determinations. Therefore, rather than attempting to resolve the difficulty in

327. The Honorable Guido Calabresi, former Dean of Yale Law School, is fond of admonishing scholars to avoid this tendency.

328. LEE, *supra* note 188, at 554.

329. KOSKENNIEMI, *supra* note 107, at 48.

330. Koskenniemi "attack[s] the idea that international law provides a non-political way of dealing with international disputes." *Id.* at 50.

making distinctions, indeterminacy simply criticizes, but fails to offer any better, more determinate approach to these problems.

IV. SUB-REFERENTIAL THRESHOLD RELATIVITY (STR) AS AN APPROACH TO THE TREATY/CUSTOMARY LAW DISTINCTION

A. *Summary of Problems*

As Section III discusses, none of the architectonic principles applied above to the treaty/customary law distinction is at once theoretically coherent (i.e., empirically accurate and logical), practicable (i.e., consistent with preexisting law and administrable), and generally reconcilable with each of the others in case-specific contexts. Finally, with limited exceptions, none has any resolving power in particular disputes involving at least one nontreaty contesting party.

The dichotomous view is logical and arguably administrable, but also is empirically inaccurate, inconsistent with the law, has limited resolving power,³³¹ and is irreconcilable with other architectonic principles.³³² The overlapping view is logical, administrable, empirically accurate, consistent with the law, and reconcilable with other architectonic principles (except dichotomy and relativity), but it has no resolving power in particular disputes, other than to refute conclusory utilization of other architectonic principles.³³³ The relative view, without some sub-referential attribution and threshold identification, is illogical, nonadministrable, empirically inaccurate, inconsistent with the law, and not reconcilable with overlap and equivalence, and has no resolving power in particular disputes.³³⁴ The interdependent view is logical, empirically accurate, consistent with the law, and reconcilable with each principle except dichotomy, but it is not easily administered and has no resolving power in particular disputes.³³⁵ The equivalent view of the treaty/customary law distinction is arguably easy to administer, empirically inaccurate, illogical, inconsistent with the law, and irreconcilable with other

331. Dichotomy has resolving power if applied to disputes in which a treaty rule is argued to apply to a nontreaty state. Dichotomy would resolve this dispute in favor of the nontreaty state by arguing that, if a rule of treaty applies, the customary rule must be different or nonexistent.

332. See *supra* Section III.A.

333. See *supra* Section III.B.

334. See *supra* Section III.C.

335. See *supra* Section III.D.

views except extreme forms of overlap and interdependence.³³⁶ Moreover, it has only limited resolving power in particular disputes.³³⁷ Finally, the indeterminate view is reconcilable with other views except dichotomy, but it is illogical, inconsistent with the law, nonadministrable, and has no resolving power in particular disputes.³³⁸

B. *The Common Problem of Cross-Reference*

The common disadvantages of each of the foregoing architectonic principles applied to the treaty/customary law distinction rest in the cross-referential nature of the competing conceptual structures. The dualism between treaty and customary law presupposed by the foregoing, cross-referential views is unfortunate, because treaty and customary law (general practice accepted as law) are not inherently counterposed.³³⁹ The distinction between treaty and customary law is different in this sense than cross-referential, polar oppositional distinctions, such as hot and cold or hard and soft. To say that treaty and customary law should not be understood as a dualism is not to conclude that, as legal-linguistic phenomena, they may not overlap and interact. For example, from the overlapping viewpoint, H₂O may be both hot and soft (water), and cold and hard (ice). From the interdependent viewpoint, heat (above freezing) causes H₂O to be soft (water) and cold (below freezing) causes H₂O to be hard (ice).³⁴⁰ But simply because heat may cause H₂O to be soft and cold may cause H₂O to be hard, it does not necessarily follow that hot is soft and cold is hard. Nor does it necessarily follow that because soft and hard (and hot and cold) are interdependent expressions in meaning, they necessarily are interdependent as phenomena. The heat does not depend on the

336. See *supra* Section III.E.

337. Equivalence, like dichotomy, has resolving power if applied to disputes in which a treaty rule is argued to apply to a nontreaty state. However, dichotomy and equivalence reach the opposite results. Unlike dichotomy, equivalence would resolve the dispute in favor of the state that is party to the treaty by arguing that treaties are customary law, and thus universally binding, even on a nontreaty state.

338. See *supra* Section III.F.

339. Koskenniemi hints at the inadequacy of this dualism when he writes that "discourse does not maintain a neat threefold distinction between a fully naturalistic principle, custom and fully consensual treaty. The initial differentiation between custom and treaty tends to push the former into natural law." KOSKENNIEMI, *supra* note 107, at 353.

340. It is of interest to note that application of the terms hot and cold requires a threshold, freezing, or 32 degrees fahrenheit or 0 degrees centigrade, to distinguish the two.

cold any more than softness depends on hardness, even though one term is meaningless without the other. Finally, if soft and hard and hot and cold are interdependent in meaning, it does not follow that the distinction is either nonexistent or indeterminate. The argument here is that the distinction between treaty and customary law is more similar to the distinction between soft and hot³⁴¹ (possibly, but not necessarily, overlapping and interdependent) than it is to the distinction between soft and hard. Generally speaking, the two sources of obligation may overlap, and they may even be interdependent in that one generated the other. But neither the overlapping conception nor the interdependent one alone informs the determination of what conditions need be satisfied to make such a conclusion of softness or heat.³⁴²

C. Proposed Solution: Sub-Referential Threshold Relativity (STR)

This Article proposes the approach of sub-referential threshold relativity (STR) and argues that it is more theoretically coherent, practicable, and powerful than common, cross-referential conceptions of the treaty/customary law distinction. STR involves a four-step approach to source determination. First, STR refers to the independent standards of recognition for customary international law (e.g., Article 38, 1(b) of the I.C.J. Statute, describing international customary law as "evidence of general practice accepted as law"),³⁴³ rather than to another source³⁴⁴ (e.g., treaty, defined in Article 38, 1(a), as "international

341. Cf. NEEDHAM, *supra* note 13, at 84 (An oppositional link between two terms "would seem strange if the oppositions were instead right/below or left/above [and] is less obvious in the case of sun/moon, and not at all so with such Kaguru oppositions as red/white or sperm/blood.") (citing T. O. Beidelman, *Kaguru Symbolic Classification*, in RIGHT & LEFT: ESSAYS ON DUAL SYMBOLIC CLASSIFICATION 151 (Rodney Needham ed., 1973)).

342. In this critical respect, STR may be differentiated from the overlapping conception, which is static and merely categorical, and which does not provide any explanatory power in the determination of which phenomena satisfy the criteria for inclusion into the overlapping category. Only sub-reference provides the criteria; and only relativity, as described herein with the modifications of establishing a polar context and thresholds, has the ability to determine coherently and accurately whether those standards are satisfied.

343. STATUTE OF THE I.C.J., *supra* note 7, art. 38. This author has argued that *general practice* and *acceptance as law* (*opinio juris sive necessitatis*) are two criteria of the traditional definition of customary international law that should not be relaxed, but rather more rigorously applied. See Chodosh, *supra* note 6, at 103-05.

344. Thus, instead of seeing customary law as (i) dichotomous to treaty, (ii) overlapping with treaty, (iii) relative to treaty, (iv) interdependent with treaty, (v) the equivalent of treaty, or (vi) in indeterminate relationship to treaty, STR would define customary international law according to defining attributes that are not in

conventions, whether general or particular, establishing rules expressly recognized by the contesting States").³⁴⁵ Second, STR places such sub-referential attributes on a relative scale bounded by absolute polarities.³⁴⁶ Hence, generality would be placed on a scale bounded by the extremes of no states on one end and all states on the other. Third, it is necessary to establish threshold³⁴⁷ standards or ranges of recognition, to differentiate

any way related to treaty. Such defining attributes of customary law, i.e., general practice accepted as law, bear no necessary or intrinsic relation to treaty, i.e., international conventions "establishing rules expressly recognized." STATUTE OF THE I.C.J., *supra* note 7, art. 38.

345. *Id.*

346. *See, e.g.,* NEEDHAM, *supra* note 13, at 207-09 (discussing the distinction between day and night in making the case against natural oppositions). Needham's analysis postulates that the attribute that differentiates day and night is the existence *vel non* of natural light. Needham's example establishes a scale in which "the upper horizontal (+) stands for a maximum intensity of light; this is an arbitrary limit, but we can imagine it as that of the naked sun. The lower horizontal (-) stands for a complete absence of light; this limit is not arbitrary, though it is virtual and not real." *Id.* at 207. If one were to record on a photometer the "circumambient light such as would normally impinge on the human eye," *id.*, the points of maximum and minimum intensity both "will fall within . . . certain range[s]." *Id.* at 208. Needham argues that there "is no clear line of natural contrast between day and night except by means of the arbitrary, and hence culturally variable, criteria of collective representations." *Id.* at 209. However, Needham's diagram quantifies these points of collective variation in such a manner as to allow an estimation of photometric differentiation between day and night. *Id.* at 208, fig. 5. See also his treatment of the distinction male/female and related references to alternative differentiating attributes (e.g., chromosomal, social), *id.* at 210-12, and that of right/left ("As an act of classification, moreover, it depends on the tracing of a vertical boundary, such as the median line postulated by the Temne, between what are thereby distinguished as the two sides."). *Id.* at 214. Needham writes: "Let us imagine a vertical center line within the body, and stipulate that 0/360° is straight ahead. Ideally it might be taken that right would be at an angle of 90° and left on a bearing of 270° In ordinary discourse, 'right' can easily be any direction within, say 45 degrees and 135 degrees." *Id.* at 216.

347. *See* CHARLES K. OGDEN, OPPOSITION 58-59 (1967) (*quoted in* NEEDHAM, *supra* note 13, at 65: "Opposites . . . may be either the two extremes of a scale or the two sides of a cut; the cut marking the point of neutrality, the absence of either of two opposed characters in the field of opposition."). I refer to the two extremes as absolute polarities denoting a maximum difference of contrariness in Aristotelean terms and to the "cut" as a threshold that marks the proper categorization of phenomena as belonging to different parts of the "scale." Needham points out the challenges of determining the precise location of the "cut" by giving a legal illustration:

[W]hen someone is charged under English common law with breaking and entering, it has to be determined whether or not he was inside the property in question. There are numerous cases demonstrating that this is in fact an imprecise and contentious matter, and sometimes such as has to be settled by a judgment of the court. The uncertainty is not the

between gradient degrees of satisfaction or dissatisfaction³⁴⁸ of the attributive standard.³⁴⁹ This counters the further erosion of the generality requirement.³⁵⁰ A threshold of four-fifths of relevant³⁵¹ states may be established as the standard for

result of ignorance of where precisely the boundary to the property is; this may be absolutely sure, and yet there can be doubt as to whether or not the defendant was inside it. So in such a case the conceptual clarity of inside/outside is not replicated in the assessment of an action.

NEEDHAM, *supra* note 13, at 67. As Needham points out, Ogden's cut should not be understood to preserve the dichotomy; rather, any boundary between inside and outside "is a point, more or less precisely determined, midway on a scale running through a field of referents." *Id.* at 69. The cut that delimits the inside and the outside of a house, for example, assuming utilization of the doorway as the point of most common ingress and egress, may be equated spatially with the threshold.

348. See, e.g., NEEDHAM, *supra* note 13, at 40 (describing sides of a cylinder).

With this, there is strictly speaking no discrete side but instead the visible portion of a continuous curve. Nevertheless, this facing surface is spoken of as a side, and it actually has an opposite side. This is a notional and relative surface, not of course one given by the conformation of the object; it is defined by reference to a line projected from the viewer through the middle of the visible surface, and diametrically through the center of the can, to an opposite point on the invisible and converse curve. All the same, there is no falling off in the careful accuracy with which it is said that a particular point, say an emblem or a letter on the label, is opposite some other mark on the far side of the cylinder.

Id.

349. Developing such thresholds would serve to make distinctions between different sources of law more legitimate. As Franck writes, "[t]o be legitimate, a rule must communicate what conduct is permitted and what conduct is out of bounds." FRANCK, *supra* note 11 at 57. However, one prominent threshold provided by Franck appears to be the traditional "hah-hah" test: "[a] rule's determinancy may thus be tested by measuring how far exculpatory definitions can be stretched before those doing the stretching are—in Ezekiel's phrase—laughed to scorn." *Id.*

350. As I have noted elsewhere, Chodos, *supra* note 6, at 102 n.69-70, the United States Supreme Court and the Permanent Court of International Justice have deduced rules of customary international law from the practice of fewer than a dozen states. See, e.g., *The Paquete Habana*, 175 U.S. 677 (1900); *S.S. Wimbledon* (Gr. Brit., Fr., Italy, and Japan v. Ger.), 1923 P.C.I.J. (ser. A) No. 1, at 15, 25, 28 (Aug. 17) (citing Suez Canal and Panama Canal "regimes" as "precedents" for the rule involving the Kiel Canal); *S.S. Lotus*, (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 4, 29 (Sept. 7) (citing as decisive precedents cases involving only five states: France, Italy, Great Britain, Germany, and Belgium).

351. Depending on the subject matter, the relevant states may be delimited (without limitation) by region, stages of technological or economic development, or trade relationships. This qualification of relevance obviously creates greater indeterminacy. However, it may be important to allow specific customary law to develop without requiring universal participation. Frequently, "relevant" means the most powerful. As Jonathan Charney wrote, "when authorities examine the evidence necessary to establish customary law, they consider actions of a limited

satisfaction of generality. In order to undo the circularity of the acceptance-as-law criterion, one may establish the sub-referential standard of the state's internalization of the rule into domestic law and practice (e.g., "a ratified treaty or domestic legal restraints on the use of force").³⁵² Finally, at this point, STR applies the evidence of compliance with the standard to the threshold thus established.³⁵³ In the event of more than one standard and the attendant conjunctivity or disjunctivity of multiple standards, STR would apply the same four-step analysis to the remaining standards.

As an approach to international legal source identification and in comparison to the competing cross-referential conceptions that Section III critiques, STR is more empirically accurate in its attention to degree and its ability to grasp and classify rules that are arguably simultaneously general, practiced, and accepted as law,³⁵⁴ logical in its interpretive steps, more consistent with current law in its attention to preexisting standards of recognition, and more administrable than any of the competing

number of states, often the largest, most prominent, or most interested among them." Charney, *supra* note 2, at 537. This demonstrates that what courts and scholars have frequently referred to as customary international law is not customary at all, due to the lack of generality necessary to support the rules of recognition for customary international law. I have referred to this as declarative international law or *ius*; it may also be referred to as "authoritarian" law. See generally Chodosh, *supra* note 6, at 95, n.26 (citing Pospíšil, *supra* note 12, at 27).

352. This proposal was first made in Chodosh, *supra* note 6, at 104.

353. This is consistent with the idea of developing and measuring legitimacy of international rules and institutions, propounded by Professor Franck, and the theoretical coherence and practicality of understanding relative factors by reference to hypothetical absolutes between which are posited gradient degrees. See, e.g., FRANCK, *supra* note 11, at 204-05.

Legitimacy is to rules as the Greenwich Mean Longitude is to time, or as the Paris Metre Bar is to distance. It is a hypothetical *absolute*, contrived to facilitate the understanding of some *relative* factor—distance, for example, or time The common assumption of a meter bar also permits the making of further logically deducible subsidiary assumptions, such as minutes or centimeters, as well as aggregate assumptions, such as months and kilometers. . . . Legitimacy is not a measure accepted by states, anymore than people any longer specifically "accept" the meter, or time. These simply exist as functions of living in a society which uses those measures.

Id.

354. To the extent that the I.C.J. and other tribunals have failed to apply the rules of recognition for customary international law, the STR approach would be inconsistent with those opinions; however, it is consistent with the standards that—if they were not—should have been applied, according to established rules of recognition.

approaches.³⁵⁵ Furthermore, this approach is not only reconcilable with other architectonic principles³⁵⁶ as general conclusions about the treaty/customary law relationship,³⁵⁷ but it also has the greatest resolving power in particular disputes.

1. Theoretical Coherence

STR is more empirically accurate than competing views in three critical respects. First, by referring to independent defining standards of recognition, STR rejects cross-referential generalizations that tend to prejudice determinations in specific cases. For example, acceptance of either dichotomy or equivalence makes determinations of customary law dependent on the existence of treaty; however, the rule of recognition for customary law makes reference neither to treaty nor to any particular attribute of treaty. Second, by acknowledging the relativity of language, STR avoids conclusory applications of terms to phenomena. Accurate determinations require the realization that the term "general" is not only located somewhere on the scale between the polar extremes of "no" states on the one end and "all" states on the other, but farther along the scale than the point of acceptance by merely a "few" states. Third, by seeking a threshold to differentiate satisfaction from nonsatisfaction of defining standards of recognition, STR has the capacity for

355. Yet another advantage of STR, related to accuracy, consistency, administrability, and resolving power, is the transparency of this approach. Even when there is disagreement about the attributes selected as defining customary law, or the particular threshold articulated and applied, such disagreement would be transparently expressed, rather than implicitly made in conclusory decisions.

356. The STR approach may be reconciled with each of the other competing architectonic principles. The only critical difference would be that the other architectonic principles would be conclusions based on utilization of relativity in specific disputes, rather than conclusory assumptions that skew the analysis. Applying STR, a particular treaty rule may be the rejection (mutual exclusion) of the customary rule, or it may overlap. The treaty rule may be seen as dependent on the customary rule, where the former codifies the latter, or the customary law may be dependent on the treaty, where the treaty has been accepted as law by a generality of states. In both instances, the treaty and the customary law may be equivalent.

357. Only after one has made independent determinations on a case-by-case basis of whether the alleged norm belongs to one source or the other, or to both, neither or some other source, may one accurately structure general knowledge about the relationship between the two sources. Each architectonic understanding of the treaty/customary law relationship is then possible. In particular cases, treaty and customary law may be mutually exclusive and contradictory, overlapping, interdependent, equivalent, or indeterminate. Knowledge is better structured as a conclusion from rigorous analysis than as an assumption that prejudices legal analysis in specific cases.

greater precision in making accurate identifications of international legal sources.

STR is also logical; it carries no propensity to reconfigure the independent standards of recognition for customary law based on associational reactions to treaty standards. STR assumes neither mutual exclusion nor equivalence between treaty and customary law. In contrast, dichotomy, relativity, equivalence, and indeterminacy define customary law in terms of treaty, whether those terms are opposed, relational, equivalent, or some combination thereof. STR does not interpolate standards of recognition for customary law based more on conceptions of what it is not, rather than what it is. STR thereby avoids many of the conceptual problems encountered in the false opposition of treaty and customary law and the equally binary, cross-referential attacks on the dichotomous view (e.g., equivalence and indeterminacy in particular).

2. Practicability

Compared particularly to the dichotomous and equivalent views of the treaty/customary law distinction, the STR approach is more consistent with the current rules of recognition for international law. In addition, STR does not deny that treaty and customary law may generally overlap, be interdependent, or even carry relative ambiguities or indeterminacies in their identification. Although the case law does not expressly take the STR approach, many courts implicitly employ one or more steps of this approach.

As noted above, the I.C.J. employed many of the STR steps in rejecting claims that states were bound by customary law based on treaty in two exemplary cases: the *Asylum Case* (Colombia/Peru),³⁵⁸ and the case of the *North Sea Continental Shelf* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands).³⁵⁹ In neither *Asylum* nor *North Sea* did the I.C.J. define or seek to identify customary law cross-referentially in terms of treaty. Instead, the opinions applied the independent, sub-referential attributes that define customary legal obligation.

In *Asylum*, the I.C.J. stated that a party that bases its claim on customary international law must prove that it has become "established in such a manner that it has become binding on the

358. *Asylum Case* (Colombia v. Peru), 1950 I.C.J. 266 (Nov. 20).

359. *North Sea Continental Shelf*, 1969 I.C.J. at 3 (Feb 20).

other Party.”³⁶⁰ In the court’s opinion, the general practice criterion can be satisfied by a “constant and uniform usage practiced by the States in question”³⁶¹ and the acceptance-as-law attribute requires that “this usage [be] the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State.”³⁶² Although the I.C.J. did not identify specific tests for determining the satisfaction/nonsatisfaction of these articulated standards, the I.C.J. rejected Colombia’s assertion that “a large number of extradition treaties”³⁶³ and cases in which asylum was granted according to a claim of unilateral and definitive qualification by the State granting asylum were sufficient to identify the existence of customary law binding on Peru, which had not ratified such treaties.

The I.C.J. held that Colombia’s evidence was insufficient to qualify under Article 38 as general practice accepted as law. Consistent with the STR approach, the I.C.J. based its holding on several interrelated observations, including the irrelevance of the cited treaties, the nongenerality of states that ratified them, the lack of consistent practice, and the lack of indication that such practice was followed out of a sense of legal obligation.

First, the I.C.J. found that Colombia cited conventions and agreements “which [did] not contain any provision concerning the alleged rule,”³⁶⁴ and “invoked conventions which [had] not been ratified by Peru, such as the Montevideo Conventions of 1933 and 1939.”³⁶⁵ Second, the I.C.J. observed that the 1933 convention had been ratified by “not more than eleven States” and the latter 1939 convention “by two States only.”³⁶⁶ In particular, the I.C.J. rejected Colombia’s contention that the Montevideo Convention of 1933 “merely codified principles which were already recognized by Latin-American custom, and that it [was] valid against Peru as a proof of customary law.”³⁶⁷ The I.C.J. stressed “[t]he limited number of States which [had] ratified [the] Convention”³⁶⁸ and the language of the preamble, which stated that the convention modified a previous convention, rather than codified customary law.³⁶⁹ The I.C.J. further rejected Colombia’s claim that the

360. Asylum Case, 1950 I.C.J. at 276 (citing Art. 38 of the STATUTE OF THE I.C.J., *supra* note 7).

361. *Id.*

362. *Id.*

363. *Id.* at 277.

364. *Id.*

365. *Id.*

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.*

conventions codified specific, Latin American customary law.³⁷⁰ Third, in reviewing the facts, the I.C.J. observed "so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others . . . [that] . . . it is not possible to discern in all this any constant and uniform usage. . . ."³⁷¹ Finally, the I.C.J. did not find sufficient evidence in Colombia's citation to "a large number of particular cases in which diplomatic asylum was in fact granted and respected"³⁷² that asylum was granted in such situations out of a sense of legal obligation, rather than "for reasons of political expediency."³⁷³ In each of these points, the I.C.J. identified sub-referential, definitional criteria of customary law, and found evidence of satisfaction of these attributes to be insufficient. Although not consistent with the STR approach, the court did not identify what level of general practice and acceptance-as-law would have been required to support a finding of customary law. Had Colombia's assertions come closer to meeting the court's implicit threshold standards, however, it would, could, and should have articulated and applied such threshold standards.

As in *Asylum*, in *North Sea* the I.C.J. rejected the view that treaty necessarily reflects customary law. The court concluded that: "[T]he Geneva Convention did not embody or crystallize any pre-existing or emergent rule of customary law."³⁷⁴ The court treated the rule that "the delimitation of continental shelf areas between adjacent States must, unless the Parties otherwise agree, be carried out on an equidistance-special circumstances basis,"³⁷⁵ which was embodied in Article 6 of the Convention, as a "purely conventional rule."³⁷⁶ Consistent with the STR approach,

370. [E]ven if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it by refraining from ratifying the Montevideo Conventions of 1933 and 1939, which were the first to include a rule concerning the qualification of the offence in matters of diplomatic asylum.

Id. at 277-78.

371. *Id.* at 277.

372. *Id.*

373. *Id.*

374. *North Sea Continental Shelf* (F.R.G. v. Den. and Neth.), 1969 I.C.J. 3, 41 (Feb. 20).

375. *Id.* at 41.

376. *Id.*

the I.C.J. reached this conclusion by rigorous application of the general practice and, in particular, the acceptance-as-law³⁷⁷ standards of recognition for customary law.³⁷⁸

The court based this conclusion on an inference from the faculty of reservation contained in the treaty for the Article 6 rule. The court argued that if a state may make a reservation from a particular provision of the treaty, thereby exempting itself, and if customary law does not allow for such exemption, then the treaty cannot be said to reflect customary law.³⁷⁹ In other words, even the general practice of failure to make reservations cannot be said by itself to reflect acceptance-as-law, since the treaty by its own terms makes such election voluntary and not obligatory. If each state is free to reserve or not to reserve, then it cannot be assumed that an election either way reflects that state's sense of legal obligation to do one or the other. The opportunity to state reservations on adherence to Article 6 was thus central to the court's view that this treaty provision did not reflect customary law. At the time of the I.C.J. opinion, there had been four reservations to Article 6, none of which "purported to effect such a total exclusion or denial,"³⁸⁰ but at least one of which "was somewhat far-reaching."³⁸¹ The I.C.J. could have inferred from this general lack of reservations that a generality of states had expressed their acceptance of this provision by not stating any reservations. However, the I.C.J. rejected this argument,³⁸²

377. Inconsistent with the STR approach, however, the court at one point treated the acceptance-as-law requirement somewhat tautologically to mean "acceptance as customary law." *Id.* at 44.

378. The court interpreted the faculty for reservation in light of its contextual observation that customary law and treaty differed in at least one critical respect. Unlike treaty, customary law has "equal force for all members of the international community and therefore cannot be the subject of any right of unilateral exclusion." *Id.* at 38.

379. *Id.* at 39. The I.C.J. opined: "The normal inference would therefore be that any articles that do not figure among those excluded from the faculty of reservation under Article 12, were not regarded as declaratory of previously existing or emergent rules of law; and this is the inference the Court in fact draws in respect of Article 6 (delimitation). . . ." *Id.*

380. *Id.* at 40.

381. *Id.*

382. The I.C.J. also rejected the contention of Denmark and the Netherlands:

that although prior to the [Geneva Convention], continental shelf law was only in the formative stage, and State practice lacked uniformity, . . . 'the process of the definition and consolidation of the emerging customary law took place through the work of the International Law Commission, the reaction of governments to that work and the proceedings of the Geneva Conference'; and this emerging customary law became 'crystallized in the adoption of the Continental Shelf Convention by the Conference'.

observing that "no valid conclusions can be drawn from the fact that the faculty of entering reservations to Article 6 has been exercised only sparingly and within certain limits."³⁸³

Consistent with the STR approach, by rejecting equivalence, and treating customary law as an independent source of law, the I.C.J. did not embrace dichotomy. Indeed, the I.C.J. acknowledged that treaty and customary law were not mutually exclusive sources of law; rules that are conventional or contractual in origin may pass "into the general *corpus* of international law, . . . accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention."³⁸⁴ The court expressed "no doubt that this process is a perfectly possible one and does from time to time occur."³⁸⁵ The I.C.J. acknowledged that "it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed."³⁸⁶ However, the I.C.J. admonished against a knee-jerk equivalence of treaty and customary rules: "At the same time this result is not lightly to be regarded as having been attained."³⁸⁷

Particularly consistent with the STR approach, the court reviewed compliance with the "elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law."³⁸⁸ It rejected time as

Id. at 40. The I.C.J. pointed out that the International Law Commission proposed the relevant treaty provision

with considerable hesitation, somewhat on an experimental basis, at most *de lege ferenda*, and not at all *de lege lata* or as an emerging rule of customary international law. This is clearly not the sort of foundation on which Article 6 of the Convention could be said to have reflected or crystallized such a rule.

Id. at 40.

383. *Id.* at 41. Here the I.C.J. applied a dichotomous view of the distinction between treaty and customary law based on the distinguishing criterion of consent. If the treaty itself treats the reservation as an "affair exclusively of those States which have not wished to exercise the faculty, or which have been content to do so only to a limited extent, [t]heir action or inaction cannot affect the right of other States to enter reservations to whatever is the legitimate extent of the right." The court, however, did leave open the possibility that the rule could eventually emerge as customary law—"[w]hether it has since acquired a broader basis remains to be seen"—but the I.C.J. did not provide any guidance as to the extent of practice or acceptance of the rule reflected in a general lack of stated reservations. *Id.*

384. *Id.* .

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.* at 42.

a necessary attribute of customary law,³⁸⁹ and held that the generality requirement was not satisfied,³⁹⁰ even while noting that the "cases constituted more than a very small proportion of those potentially calling for delimitation in the world as a whole."³⁹¹ The court neither defined the relevant group of states³⁹² to be considered nor the precise proportion of relevant states that need accept a rule in practice prior to its classification as customary law and its application as universally binding law.³⁹³ However, short of expressing a more finite threshold standard of generality, the court nonetheless concluded that "the number of ratifications and accessions so far secured is, though respectable, hardly sufficient."³⁹⁴

Also consistent with the STR approach, the I.C.J. applied the general practice and acceptance-as-law standards as conjunctive

389. *Id.* ("[I]t might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected.")

390. Regardless of time, the I.C.J. emphasized that "State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved." *Id.* at 43.

391. *Id.* at 44.

392. The I.C.J. noted that "allowance [could be] made for the existence of a number of States to whom participation in the Geneva Convention is not open, or which, by reason for instance of being land-locked States, would have no interest in becoming parties to it." *Id.* at 42.

393. The court addressed the relevance *vel non* of the practice cited as the basis for the rule:

[I]t appears that in almost all of the cases cited, the delimitations concerned were median-line delimitations between opposite States, not lateral delimitations between adjacent States. . . . The case of median-line delimitations between opposite States is different in various respects, and as being sufficiently distinct not to constitute a precedent for the delimitation of lateral boundaries. In only one situation discussed by the Parties does there appear to have been a geographical configuration which to some extent resembles the present one, in the sense that a number of States on the same coastline are grouped around a sharp curve or bend of it.

Id. at 45. Additionally, the court rejected any analogous application of "plenty of cases (and a considerable number were cited) of delimitations of waters, as opposed to seabed, being carried out on the basis of equidistance—mostly of internal waters (lakes, rivers, etc.), and mostly median-line cases" as applicable to the continental shelf. *Id.*

394. *Id.* at 42. Even though the court found "over half the States concerned . . . presumably . . . acting actually or potentially in the application of the Convention," *id.* at 44, the court refused to draw from their action any "inference . . . as to the existence of a rule of customary international law in favour of the equidistance principle." *Id.* at 43.

requirements.³⁹⁵ The I.C.J. opined that “[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.”³⁹⁶ The court distinguished custom from customary law by emphasizing that “[t]he frequency, or even habitual character of the acts is not in itself enough.”³⁹⁷ With respect to the practice of states not party to the treaty, the court found “not a shred of evidence”³⁹⁸ that they acted out of a sense of legal obligation (*opinio juris sive necessitatis*). Merely “acting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridical nature.”³⁹⁹ Thus, the court recognized that even in circumstances of general practice (custom), if the acceptance-as-law requirement is not satisfied, a finding of customary international law is not merited.

In addition to being more consistent with the rules of recognition for customary law and the application of those rules by the I.C.J. in specific cases, the STR approach is also more administrable than competing conceptions of the treaty/customary law distinction in three key respects. First, unlike each of the competing views, in its sub-referential orientation, it points the decision-maker to the rules of recognition for customary law, rather than to those for treaty law combined with some presupposed or counterposed relation between treaty and customary law. Second, unlike dichotomy

395. *Id.* at 44 (“[T]wo conditions must be fulfilled.”).

396. *Id.* at 43.

397. *Id.*

398. *Id.*

399. *Id.* The court followed “the dictum of the *Lotus* case,” as stated in the following passage, the principle of which is, by analogy, applicable almost word for word, *mutatis mutandis*, to the present case (P.C.I.J., Series A, No. 10, 1927, at p. 28):

Even if the rarity of the judicial decisions to be found . . . were sufficient to prove . . . the circumstance alleged . . . it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty; on the other hand, . . . there are other circumstances calculated to show that the contrary is true.

Id. “There is no evidence that they so acted because they felt legally compelled to draw them in this way by reason of a rule of customary law obliging them to do so—especially considering that they might have been motivated by other obvious factors.” *Id.* at 44-45.

and equivalence, it acknowledges the difficulties posed by relational quality of the standards of recognition, which may be satisfied or not satisfied by degree. It is the grey cases that are difficult to resolve, and they cannot be coherently resolved by conclusory arguments that grey is black or grey is white. Third, unlike overlap, relativity, interdependence, and indeterminacy, it provides a method for making such determinations. Thresholds are not easy, but necessary, to articulate and apply if one is forced to classify some measure of international practice as sufficiently general and sufficiently accepted-as-law to merit a finding of customary law.

3. Reconcilability

The open-endedness of the STR approach makes it reconcilable with each of the other general views of the treaty/customary law distinction because this approach does not presuppose any particular relationship in any specific case. According to STR, in any particular case, the treaty/customary law relationship may be dichotomous, overlapping, relative, interdependent, equivalent, or indeterminate. However, STR does not prejudice the conclusion by assuming any of these architectonic views. There is nothing contradictory in holding a general view of the treaty/customary law distinction that conforms with one of the cross-referential views and applying STR in specific cases, as long as the general view is informed by the outcomes of STR rather than *vice versa*.

4. Resolving Power

Imagine the case of a dispute between a national government and foreign nationals. The foreign individuals claim that the government's assertion of power over them constitutes a violation of international law. Assume that there are treaties that restrict such assertions of governmental power, but there is no currently binding treaty in effect between the national government asserting jurisdiction and the nation of which the individuals are citizens. Nonetheless, the individuals claim that on the basis of customary international law the nation is unjustified in its action. The distinction between treaty and customary law is critical to the outcome of this dispute. Whereas treaties are binding only on contracting parties, customary international law is presumed binding on all nations. Thus, the principles that inform the

distinction between treaty and customary law may determine which party prevails.⁴⁰⁰

Applying the dichotomous view, if the rule is one of treaty, it is necessarily not one of customary law. The rhetorical dichotomous reasoning would follow that, if it were customary law, there would be no justification for codification into treaty. According to this view, the country would not be obligated to observe the treaty standard.⁴⁰¹

Applying an overlapping view, the rule or standard may be one of treaty *and* customary law. Thus, to determine whether the treaty rule is customary for purposes of binding a noncontracting state requires an independent investigation into the satisfaction of the rule of recognition for that legal source.

Applying a purely relative view, in which treaty and customary law are viewed as being on opposite ends of the same spectrum, neither supplies the specific attribute or set of attributes that provide the scale of differentiation, nor suggests the point along the spectrum at which one may differentiate between the two.

An interdependent view of treaty and customary law allows decision-makers to view treaty as reflecting, crystallizing, or anticipating customary law. But this alone does not aid the adjudicator in the determination of which of these three processes has or has not occurred. Although the interdependent view is more dynamic than the other views, it is not particularly helpful in resolving the issue of whether treaties not in effect between contesting parties nonetheless bind the parties as customary international law.

Equating treaty and customary law with one another will lead to the conclusion that the country is bound by the treaty rule based on the reasoning that if treaty provides a standard, the

400. This pattern differs from the minivan example in one critical respect. First, in the minivan example, discussed *supra* in Section II.C, there was no presupposition that minivans were cars, leaving only the one question open of whether they were also trucks. In this fact pattern, however, the arguably applicable rules are presupposed to be ones of treaty. The result of this alteration is that dichotomy and equivalence in this case will have resolving power, but lead to contradictory results.

401. At the risk of repetition, it is important to note that the I.C.J. recognizes that treaties do not necessarily override customary rules on the same subject. Moreover, Article 38 of the Vienna Convention excludes the automatic dichotomization (or mutual exclusivity) of treaty and customary law, by providing that "[n]othing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law." Vienna Convention, *supra* note 176, art. 38. Thus, where two categories of source overlap on the same issue, one (treaty) need not entirely override the other (customary law).

customary standard is the same.⁴⁰² Therefore, the nontreaty party is nonetheless bound by the treaty standard by way of customary international law.

Finally, indeterminacy criticizes the ambiguity of the distinction and the standards informing it. Customary law is in the eye of the person who wishes to see it. If the decision-maker's interests are furthered by recognition of customary law, customary law will apply; if they are not favored, customary law will not apply.

In contrast to the foregoing approaches, STR applies the following four-step approach to the source determination issue in the hypothetical. First, the decision-makers refer to the standards of recognition of the specific source in question (e.g., Article 38, 1(b) of the I.C.J. Statute, describing international customary law as "evidence of general practice accepted as law").⁴⁰³ Second, they place such sub-referential attributes on a relative scale bounded by absolute polarities. Third, they establish threshold standards or ranges of recognition to differentiate between gradient degrees of satisfaction or dissatisfaction of the attributive standard.⁴⁰⁴ Fourth, they apply the evidence of compliance with the standard to the threshold thus established. Finally, in the event of more than one standard and the according conjunctivity or disjunctivity of multiple standards, they apply the same four-step analysis.

Applying this approach to the dispute pattern outlined above, if the rule adopted by treaty parties is practiced by a generality of states (e.g., over four-fifths), the general practice requirement is satisfied. If the rule is practiced out of a sense of legal obligation, such that the generality of states has incorporated the rule into its domestic law and practice, the acceptance-as-law requirement is satisfied. If both standards of recognition are satisfied, the treaty rule is also one of customary law, and the nontreaty party would be bound. If at least one of the standards of recognition is

402. However, as noted earlier, Article 34 of the Vienna Convention excludes the automatic equivalence of treaty and customary law, whereby the existence of a treaty provision itself, with little more, provides evidence of a customary, universal legal obligation. Vienna Convention, *supra* note 176.

403. STATUTE OF THE I.C.J., *supra* note 7, art. 38.

404. As James Littlejohn points out, in order to distinguish between right and left all that is needed is a median line. See NEEDHAM, *supra* note 13, at 125 (citing James Littlejohn, *Temne Right and Left: An Essay on the Choreography of Everyday Life*, in RIGHT & LEFT, *supra* note 341, at 789. As noted above, *supra* note 351, depending on the subject matter, the relevant states may be delimited by region, stages of technological development, or trade relationships. This qualification of relevance obviously creates greater ambiguity; however, it may be important to allow specific customary law to develop without requiring universal participation.

not satisfied, the treaty rule is not one of customary international law and thus not binding on the nontreaty party. In this way, STR has the ability coherently and practicably to resolve disputes without prejudicing specific determinations with cross-referential generalizations. STR therefore has greater potential resolving power than competing views of the treaty/customary law distinction.

V. CONCLUSION

The development of an empirically accurate, logical, legally consistent, administrable, and powerful interpretive theory of international law is particularly important as the world pursues uniform rules to regulate international relations and conflicts caused by intensifications of cross-border activity. This Article attempts to provide such an interpretive theory.

This Article identifies several competing architectonic principles that structure comprehension of the distinction between two terms and the phenomena they seek to grasp. In the context of the important distinction between treaty and customary law, this Article compares and contrasts these principles in light of several interrelated jurisprudential goals: theoretical coherence (empirical accuracy and logic), practicability (consistency with current law and administrability), reconcilability with other general views, and resolving power. Each of the six architectonic principles (dichotomy, overlap, relativity, interdependence, equivalence, and indeterminacy) carries the disadvantage of a cross-referential orientation, according to which customary law is understood in terms of treaty. As a potential solution to the common problems associated with these six cross-referential principles, this Article proposes a new interpretive approach, called sub-referential threshold relativity (STR).

STR is a coherent, practicable, and powerful approach to the legal interpretation of distinctions. This approach consists of four steps: first, the identification of the standard of recognition; second, the setting of this standard on a universal scale bounded by polar opposites; third, the establishment of a threshold or range of recognition for the standard on such scale; and fourth, the application of evidence of compliance with such threshold standard. As applied to the distinction between treaty and customary law, this Article argues that STR better meets the interrelated goals of theoretical coherence, practicability, reconcilability, and resolving power.

The importance of STR as an approach to legal interpretation may extend beyond the limited context of the treaty/customary

law distinction. This approach to interpretation may be applied successfully to a wide number of distinctions within international and domestic legal doctrine and scholarship, such as those between national and international law, horizontal and vertical theses of international party structures, or substance and procedure. This approach aspires to cultivate an unexplored field of jurisprudential inquiry, which would facilitate evaluations of the manner in which legal knowledge is structured around distinctions, as well as the consequences of competing architectonic principles chosen to inform such distinctions. With these broader concerns in mind, this Article seeks to make a modest contribution both to the development of international law and to the related, albeit more general, endeavors of jurisprudential theory.