INTERNATIONAL LAW THROUGH TIME: ON CHANGE AND FACTICITY OF INTERNATIONAL LAW

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Abstract: International law has proved to be a highly dynamic legal order over time. However, dealing with change in international law is both analytically demanding and possibly normatively unsettling. The term 'change' regularly refers to distinct dimensions of change in relation to international law, ranging from alterations in its substantive content to the interplay between international law and its underlying social and physical reality. This conceptual heterogeneity has at times convoluted the consideration of the topic. Still, when conceptualizing international law as a process of continuous change over time, 'practice' emerges as the key normative vehicle enabling international law's dynamism. The continuous normative responsiveness of international law to social reality – international law's 'facticity' – actually operates as a defining characteristic of international law. The dynamic processes of change have regularly produced concerns about the stability of international law as a necessary precondition for international law's capacity to provide a stable framework for social action in the international domain. At the same time, commentators have suggested that international law's lawmaking tools may be inadequate for the realities of contemporary international relations due to the asynchrony between international law's formal sources and social acceleration. However, both of these apprehensions seem overstated.

1 INTRODUCTION: THE DYNAMIC INTERNATIONAL LAW

Change may be described as a central manifestation of time, if not time itself,[2] and considerations of change in international law are therefore essential to any exploration of the

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[2] Nina Emery, Ned Markosian and Meghan Sullivan, 'Time' in Edward Zalta (ed), *The Stanford Encyclopedia of Philosophy* (revised, Metaphysics Research Lab, Stanford University 2020) <https://plato-stanford-edu.nottingham.idm.oclc.org/entries/time/> accessed 27 January 2022; Pitirim Sorokin and Robert Merton, 'Social Time: A Methodological and Functional Analysis' (1937) 42 American Journal of Sociology 615; Barbara Adam, *Time and Social Theory* (Polity 1994), 50-55; Albert Tsao and ors, 'Integrating Time from Experience in the Lateral Entorhinal Cortex' (2018) 561 Nature 57. See also the introductory chapter in this volume.

relationship between international law and time. International law as any law continuously transforms over time and responds to changes in the social reality that it seeks to regulate. Indeed, without ongoing adaptation, international law could hardly retain its value in the normative structuring of interactions within the international domain.

Just within the last hundred years, international law has changed dramatically in a multitude of ways: on the level of its individual norms, in its normative categories, and even as a concept. Writing in 1933, Hersch Lauterpacht described international law as confined to the external relations of states and mainly an adjective law.[3] At present, international law is in large part substantive and reaches nearly all areas of human activity, including security, trade, the environment, human rights and public health; in fact, it encompasses the full range of concerns of states today.[4] International law has been employed to facilitate international cooperation in cross-border activities, such as aviation; to set up normative regimes for global commons, such as the deep seabed; and to bring matters firmly within the international agenda that had previously been reserved to exclusive municipal jurisdiction, such as human rights and the protection of the environment. Expansion in scope has been supported by the establishment of a large number of international institutions, including international courts. Structures of international law have shifted in ways that have been described as a move from the law of coordination to the law of cooperation.[5] International law's constituencies have expanded well

[3] Hersch Lauterpacht, *The Function of Law in the International Community* (reprint, Oxford University Press 2011) 256.

[4] See eg Joseph Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy' (2004) 64 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 548.

[5] Wolf Friedmann, *The Changing Structure of International Law* (Stevens 1964); Georg Schwarzenberger, *The Frontiers of International Law* (Stevens 1962); Jan Klabbers, *An Introduction to International Institutional Law* (2nd edn, Cambridge University Press 2009) 16-17.

beyond states and their diplomatic agents. Principal concepts such as sovereignty have been transformed,[6] as has the very thinking about international law.[7]

These changes of international law came about thanks to a number of complex and interwoven factors within the global social structures, through which the contemporary international system acquired new qualities.[8] Technological advances have facilitated intensification of cross-border interactions between individuals and collectives. The trans-border character of many significant human activities has led to the delocalization of much of the world's economic wealth and resources, generating the need for management of these exchanges and their effects. Cultural and social identities and associations surpassing state borders have emerged, and political mobilization has regularly taken place across state borders. States have largely lost their ability to consolidate power (especially economic power and power over political discourse) within their territories, as well as to exercise control over all activities by members of their populations.[9] Technology has also made accessible areas of the physical world that had previously been out of bounds. Alterations in the world's physical environment, including the rising ocean waters or the melting of the Arctic, have generated new problem areas, many of truly global nature. Democratization in many parts of the world has contributed to shifting expectations as to what should be regulated, how, and what values should be protected.

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[6] David Held, 'The Changing Structure of International Law: Sovereignty Transformed?' in David Held (ed), *The global transformations reader: an introduction to the globalization debate* (2nd ed, Polity Press 2003); Antony Anghie, 'International Law in a Time of Change: Should International Law Lead or Follow?' (2011) 26 American University International Law Review 1316, 1334-43; Samantha Besson, 'Sovereignty', *Max Planck Encyclopedia of Public International Law* (on-line version, 2011) < http://opil.ouplaw.com/home/EPIL> accessed 28 April 2017.

[7] See also Andrea Bianchi, 'Looking Ahead: International Law's Main Challenges' in David Armstrong (ed), *Routledge Handbook of International Law* (Routledge 2009), 392.

[8] Vast volumes of literature have analyzed the complex social processes involved, regularly under the label of globalization. See eg Saskia Sassen, *A Sociology of Globalization* (WW Norton & Company 2007); Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge University Press 1996); Jan Scholte, *Globalization: A Critical Introduction* (2nd edn, Palgrave Macmillan 2005); Jean-Marie Guehenno, 'Globalization and the International System' (1999) 10 Journal of Democracy 22.

[9] Jost Delbrück, 'The Changing Role of the State in the Globalising World Economy' in Peter Bekker, Rudolf Dolzer and Michael Waibel (eds), *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts* (Cambridge University Press 2010), 61.

International law has displayed remarkable flexibility and pragmatism in dealing with new social and physical realities, producing a highly dynamic system of law. Accordingly, many have characterized international law as anything but 'formalistic' in its ability to adapt.[10] The observed transformations naturally draw attention to processes of change relating to international law. However, as also evidenced by many chapters in this book, capturing and understanding change over time has been one of the discipline's ultimate challenges.[11] Dealing with change is inherently complex because of the continuously moving material, the difficulty (and possible fiction) of definitively establishing the state of international law at any given moment in time, and the intricacy of documenting and evidencing transitions.[12] One is reminded of (and can possibly take some consolation from) Heisenberg's uncertainty principle, according to which the more precisely the position of a particle is determined, the less precisely its momentum can be known (and vice versa).[13] Capturing dynamics and change is a challenge even in quantum physics.

[10] Joost Pauwelyn, Ramses Wessel and Jan Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking' (2014) 25 European Journal of International Law 733, 744; Andrea Bianchi, 'Law, Time, and Change: The Self-Regulatory Function of Subsequent Practice' in Georg Nolte (ed), *Treaties and Subsequent Practice* (Oxford University Press 2013), 135-36 and 139.

[11] It comes as no surprise that the theme of half of the annual meetings of the American Society of International Law since 2010 has related precisely to the issue of change ('International Law in a Time of Change' (2010); 'Confronting Complexity' (2012); 'International Law in a Mutipolar World' (2013); 'The Effectiveness of International Law' (2014); 'Adapting to a Rapidly Changing World' (2015); 'Charting New Frontiers in International Law' (2016). Even the 2018 annual meeting on 'International Law in Practice' considered 'how international legal practice has changed and is continuing to change in response to geopolitical shifts and contemporary challenges, including demands for greater transparency, accountability, legitimacy, and inclusion'. ASIL, ASIL 2018 Annual Meeting (*American Society of International Law*, undated) <https://www.asil.org/event/asil-2018-annual-meeting> accessed 19 September 2018.

[12] See Chapter 15 in this book by Gregory Messenger. See also James Crawford and Thomas Viles, 'International Law on a Given Day' in James Crawford (ed), *International Law as an Open System: Selected Essays* (C May 2002); David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press 2016).

[13] Werner Heisenberg, 'Über den anschaulichen Inhalt der quantentheoretischen Kinematik und Mechanik' (1927) 43 Zeitschrift für Physik 172.

This chapter elaborates several conceptual points concerning the phenomenon and temporalities of change in international law. The chapter first distinguishes the different dimensions of 'change' in relation to international law. Conceptualizing international law as a process of continuous change, the chapter subsequently espouses 'practice' as the key normative vehicle enabling international law's dynamism and introduces the concept of 'facticity' to describe the normative responsiveness of international law to social reality. The chapter then considers the relationship (regularly viewed as antithetical) between change and stability in international law, and concludes with a reflection on the alleged asynchrony between international law's formal sources and the ongoing processes of social acceleration.

2 DIMENSIONS OF CHANGE

Commentators have employed the term 'change' to refer to distinct (albeit related) dimensions of change in international law, and the conceptual heterogeneity has at times convoluted the consideration and the debate on this topic. Firstly, 'change' has regularly referred to alterations in the substantive content of international law and shifts in international legal concepts, i.e., change *within* international law. This strictly introspective perspective of 'change' typically focuses on issues of lawmaking, including mechanisms of law creation and law modification in international law.[14] However, this perspective may also explore transformations of international law narratives[15] or examine the ways in which specialized branches of international law influence each other or common (general) international law.[16]

[14] See eg Antonio Cassese and Joseph Weiler (eds), *Change and Stability in International Law-Making* (Walter De Gruyter Inc 1988); Christian Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice* (Oxford University Press 2013); Georg Nolte (ed), *Treaties and Subsequent Practice* (Oxford University Press 2013). For a nondoctrinal theories of endogenous change within international law see, Paul Diehl, & Charlotte Ku, *The Dynamics of International Law* (Cambridge University Press 2010) and Wayne Sandholtz and Kendall Stiles, *International Norms and Cycles of Change* (Oxford University Press 2008).

[15] Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press 2012).

[16] See eg Menno Kamminga and Martin Scheinin (eds), *The Impact of Human Rights Law on General International Law* (Oxford University Press 2009); Freya Baetens (ed), *Investment Law within International Law: Integrationist Perspectives* (Cambridge University Press 2013).

The term 'change' has, however, also denoted alterations in international law's underlying social and physical realities, such as shifts in political multipolarity, changes in the world's power structures, or environmental changes, *i.e.*, change *of* international law's *context*. Fields other than international law, including political science, geography, economics, and sociology, may primarily investigate these matters. Nonetheless, these processes of 'change' modify the landscape in which international law operates and which it seeks to regulate, and are therefore of immediate interest to international lawyers as well.

Finally, 'change' may concern the interplay between international law and its underlying social and physical reality. This interaction is bidirectional and consequently may involve both (i) an outward aspect – how international law alters its underlying social reality – *i.e.*, change *through* international law;[17] and (ii) an inward aspect – how international law copes with a change in its underlying social and physical reality, and how such change potentially becomes reflected in international law – *i.e.*, change *of* international law.[18] Unsurprisingly, questions such as how international law changes over time will be approached and answered very differently depending on the conceptualization used.

3 INTERNATIONAL LAW AS A PROCESS OF CONTINUOUS CHANGE

It is the third dimension of change that is analytically the most difficult, but also the most intriguing and pertinent, because it speaks to the mechanisms through which international law interacts with its environment. Fundamentally, as noted by Rosalyn Higgins, international law is inexorably intertwined with the international system in which it operates.[19] In the outward

[17] See eg Shima Baradaran and others, 'Does International Law Matter?' (2013) 97 Minnesota Law Review 743; Rachel George, 'The Impact of International Human Rights Law Ratification on Local Discourses on Rights: The Case of CEDAW in Al-Anba Reporting in Kuwait' (2020) 21 Human Rights Review 43.

[18] See eg Joel Trachtman, *The Future of International Law: Global Government* (Cambridge University Press 2013); Jost Delbrück, 'Prospects for a "World (Internal) Law"?: Legal Developments in a Changing International System' (2002) 9 Indiana Journal of Global Legal Studies 401; Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press 2015).

[19] Rosalyn Higgins, 'International Law in a Changing International System' in Pat Rogers (ed), *Themes and Theories* (Oxford University Press 2009), 903. *See* also Wilhelm Grewe, *The Epochs of International Law* (De Gruyter 2000); Jost Delbrück 'Prospects for a "World (Internal) Law"?: Legal Development in a Changing International System' (2002) 9 Indiana Journal of Global Legal Studies 401-31.

aspect, international law (and its categories) structure and shape interactions in the international domain by providing a normative framework and a common language for such interactions, such as by stipulating certain conduct permissible or prohibited. In the inward aspect, international law changes to reflect new social and physical circumstances.[20] The social processes underpinning this change *of* international law are complex; still, regardless of one's outlook on international law, these processes today evidently involve a multitude of social agents,[21] the relative power and strategies of which shape the momentum, format, dynamics, and impulses for change.

From a normative perspective, however, it is ultimately international law itself that determines the modalities of interaction with its environment. As explained by Niklas Luhmann's theory of autopoiesis, a legal system is characterized by simultaneous normative closure and cognitive openness: law is cognitively dependent on the facts occurring in the social system and normatively closed because only the legal system itself has the means to bestow legal validity to its elements. While law is open to its environment, law itself determines which parts of social reality (i.e. which 'facts') are legally relevant and should be attributed legal consequences.[22] International law itself thus determines which matters are legally cognizable and have legal effects in international law.[23] Accordingly, unless an international legal norm confers legal meaning on particular conduct, such conduct is nonexistent as a matter of international law, even if it exists in the social reality.[24]

[20] See eg Pauwelyn and ors (n 9) 744.

[21] In addition to states, these agents include international institutions and international judicial bodies, non-governmental organizations, civic groups, private businesses, municipal political constituencies, scholars, and others. See eg Bianchi (n 9) 137-39.

[22] Niklas Luhmann, 'The Autopoiesis of Social Systems' in Felix Greyer and Johannes van der Zouwen (eds), *Sociocybernetic Paradoxes* (Sage 1986), 172-92. For application to international law, see eg Vera Gowland-Debbas, *The Security Council and Issues of Responsibility under International Law* (Brill Nijhoff 2012) 204-05.

[23] As discussed by Eric Wyler and Arianna Whelan in Chapter 1 in this book, in this sense all 'facts' are necessarily legal.

[24] See Jenning's discussion of nonexistent (inexistent) acts from the perspective of nullity. Robert Jennings, 'Nullity and Effectiveness in International Law' in *Collected Writings of Sir Robert Jennings* (Kluwer Law International 1998), 694.

Any change of international law must consequently be processed through international law's lawmaking mechanisms and, in the end, must be validated in the formal sources of international law – in contemporary international law most prominently treaties, custom, and binding acts of international organizations, such as Security Council resolutions or regulations of the International Seabed Authority. It is only through these normative forms of international law that the change will be legally effectuated. As international law defines the parameters of the means of validation and thresholds of normativity, international law also ultimately regulates its own relationship with its social environment.[25] Importantly, the existing formal legal categories of normativity and validity are not immutable and may themselves change.

4 THE NORMATIVE CHARACTER OF PRACTICE

Many of the changes in international law mentioned in this chapter's opening section have taken place through the adoption of (multilateral and other) treaties. Large multilateral treaties form the bedrock of many areas of international law,[26] even if treatymaking has seen a decline in recent years.[27] Still, the vehicle most facilitating international law's dynamism and flexibility has been the normative (lawmaking) character ascribed to practice in international law.

Within the traditional formal sources of international law, practice is one of the key components of custom, through which a customary rule may come into existence, be modified, or be

[25] Gowlland-Debbas (n 21) 204-05.

[26] In addition to the UN Charter, one need only think of the codification treaties on treaty law, diplomatic and consular relations, humanitarian law, and the law of the sea, as well as of human rights treaties, environmental treaties, treaties protecting cultural heritage, weapons treaties, and treaties on cooperation in technical fields, such as civil aviation and telecommunications. See eg Vienna Convention on the Law of Treaties [1969] (VCLT); Vienna Convention on Diplomatic Relations [1961]; Vienna Convention on Consular Relations [1963]; The Geneva Conventions [1949]; United Nations Convention on the Law of the Sea [1982]; International Covenant on Civil and Political Rights [1966]; International Covenant on Economic, Social and Cultural Rights [1966]; Convention on Biological Diversity [1992]; Stockholm Convention on Persistent Organic Pollutants [2001]; Convention Concerning the Protection of the World Cultural and Natural Heritage [1972]; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction [1972]; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction [1992]; and Convention on International Civil Aviation [1944].

[27] Pauwelyn et al. (n 9) 734.

discontinued.[28] In treaty law, practice may modify treaty provisions without formal amendments through mechanisms of subsequent practice.[29] In this context, practice may alter any parameter of an international law norm: subject-matter, personal, spatial, and temporal. Practice can also alter or trump textual meaning, as it is the social consensus regarding the particular normative content that ultimately prevails.[30] However, the normative potential of practice reaches beyond individual rules to international law's fundamental concepts and doctrines; it also facilitates structural changes to international law as a legal order, including, potentially, adjustments to its accepted formal sources. For example, it was primarily through practice that international law grew to provide a comprehensive regulatory framework for international organizations, to assign binding force to particular unilateral acts of states, and to develop regimes of international responsibility.

The prominent role and the normative character of practice in international law arguably compensate for the absence of an effective institutional machinery for creation, alteration and termination of international legal norms: both the absence of a central legislature (which, together with judicial and delegated administrative decisions, could produce change of international law in a systematic manner) and the absence of obligatory judicial settlement of international disputes (which would allow international law to develop and adapt, within the limits of existing law, to the new conditions of international life through a process of equitable judicial interpretation and reasoning in individual cases).[31] As it is necessary, as a matter of principle, to endow law with means for its change to secure its efficacy,[32] the normative character attributed to practice provides agency to amend existing international law.

[28] *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)* Judgment [1969] ICJ Rep 1969 3; *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)* Judgment [1986] ICJ Rep 14; *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)* Judgment [2012] ICJ Rep 99; *Case Concerning the Continental Shelf (Libya Arab Jamahiriya v. Malta)* Judgment [1985] ICJ Rep 13, 29.

[29] VCLT art 31(3); Nolte G (ed), *Treaties and Subsequent Practice* (Oxford University Press 2013).

[30] See Bianchi (n 9) 136-37 and the examples provided therein.

[31] Lauterpacht (n 2) 256-67.

[32] ibid 354.

The process of normative change in international law takes place to a large extent dialectically through processes of normative claims and responses to such claims, both within existing normative structures and with the view of creating new ones. As no formal decisions are required for international law to evolve,[33] it may be said that international law grows interstitially from interaction to interaction, through acts of assertion, acceptance, protest, and acquiescence. In a way, practice is like a river of normative possibilities, consisting of an endless stream of interactions, some of which will ultimately prevail and become accepted as a legal norm. And it is arguably the normative character ascribed to practice that gives contemporary international law 'the sense of fluidity, opportunity and uncertainty.'[34]

An instructive example of the operation of practice in international law may be provided by the recent developments in the law on the use of force. Under Article 2(4) of the UN Charter, the use of force against another state is prohibited unless either authorized by the UN Security Council or carried out in self-defense. In an apparent violation of these rules, the United States carried out airstrikes against Syria in April 2017, justifying its use of force on a distinct ground: as a response to the Assad regime's use of chemical weapons in the Syrian conflict. The question of an appropriate response to the unequivocally illegal use of chemical weapons in Syria had been discussed within the UN Security Council for a number of months.[35] The Council had condemned the deployment of these weapons as unlawful;[36] however, it did not authorize any action due to political differences among its permanent members.[37] In reaction to the unilateral US action, the United Kingdom, Saudi Arabia, Turkey, Australia, Israel and other states supported the US strikes and their justification, while Russia, Iran and others

[33] Pauwelyn and ors (n 9) 745.

[34] James Crawford, 'International Law as an Open System' in James Crawford (ed), *International Law as an Open System: Selected Essays* (C May 2002), 17.

[35] Discussions have taken place at least since the Ghouta incident of 21 August 2013 to which the Security Council responded through SC Res. 2118 (2013).

[36] See eg SC Res. 2118 (2013), SC Res. 2209 (2015), SC Res. 2235 (2015); SC Res. 2319 (2016).

[37] The Security Council failed to condemn the reported chemical weapons attack on the Syrian town of Khan Shaykhun on 12 April 2017 due to a Russian veto. See UN Meetings Coverage, 'Security Council Fails to Adopt Resolution Condemning Chemical Weapons Use in Syria, Following Veto by Russian Federation' (*UN Meetings Coverage and Press Releases*, 12 April 2017) <https://www.un.org/press/en/2017/sc12791.doc.htm> accessed 16 July 2019.

protested against the US use of force as unlawful.[38] The interactions on the issue of permissibility of the use of force in response to the illegal use of chemical weapons continued thereafter, with France expressing its support for the idea of reprisals for the use of chemical weapons.[39] Similar interactions have also taken place with regards to other aspects of the law on the use of force, for example in connection with the use of force against armed groups operating within a territory of another state.[40]

5 FACTICITY OF INTERNATIONAL LAW

The normative character ascribed to practice in international law strengthens international law's particularly intimate relationship with the underlying social reality, as practice has been the key normative vehicle facilitating international law's organic interplay with that reality. International law has always been strongly affected by social reality ('facts'), and has responded and assigned normative value to socially significant phenomena. Indeed, law in general is a product of social reality and consequently cannot lag behind social reality for long.[41] Still, social reality has a stronger and more widespread effect on international law than on municipal law, both in terms of the operation of individual norms and in terms of the development of the law as such; continuous engagement with social reality and continuous change in response to that reality have been essential characteristics of international law. This

[38] BBC, 'Syria War: World Reaction to US Missile Attack' (*BBS*, 7 April 2017) <https://www.bbc.co.uk/news/world-us-canada-39526089> accessed 16 July 2019; Gregor Aisch, Yonette Joseph and Anjali Singhvi, 'Which Countries Support and Which Oppose the U.S. Missile Strikes in Syria' (*The New York Times*, 9 April 2017, updated) <https://www.nytimes.com/interactive/2017/04/07/world/middleeast/world-reactions-syria-strike.html? _r=0>; Aljazeera, 'Saudi Arabia, Iran, others react to US strike in Syria' (*Aljazeera*, 7 April 2017) <http://www.aljazeera.com/news/2017/04/saudi-arabia-iran-react-strike-syria-170407054521418.html> accessed 16 July 2019.

[39] Michel Rose and Leigh Thomas, 'Chemical weapons a red line in Syria, France's Macron says' (*Reuters*, 29 May 2017) <https://www.reuters.com/article/us-france-russia-syria-macron/chemical-weapons-a-red-line-in-syria-frances-macron-says-idUSKBN18P1OH> accessed 16 July 2019.

[40] See eg Michael Scharf, 'How the War Against ISIS Changed International Law' (2016) 48 Case Western Reserve Journal of International Law 1; Christian Tams, 'The Use of Force against Terrorists' (2009) 20 European Journal of International Law 359; Federica Paddeu, 'Use of Force against Non-State Actors and the Circumstance Precluding Wrongfulness of Self-Defence' (2017) 30 Leiden Journal of International Law 93; Noam Lubell, Extraterritorial Use of Force Against Non-State Actors (Oxford University Press 2010).

[41] See Hersch Lauterpacht, *Recognition in International Law* (reprint, Cambridge University Press 2012) 426-27.

facticity of international law – i.e., the normative responsiveness of international law to social reality (facts) – has defined the functioning and transformations of international law throughout its history.

The immediate link between international law and social facts has numerous familiar manifestations. Many norms of international law require a particular factual situation to materialize in order for legal consequences to arise,[42] such as norms relating to the existence of statehood, attributability of state responsibility, change of legal obligations due to a fundamental change of circumstances (*clausula rebus sic stantibus*), belligerent occupation, title of prescription, or exercise of diplomatic protection. The very construction of these norms facilitates the particular aspects of social and physical reality (and changes in these realities) to become immediately and organically reflected in the normative framework. Similarly, a claim may regularly exist only if it has a factual basis, and the factual element at times surpasses other considerations (such as legality or legitimacy) in the legal evaluation of a particular situation.[43] Social reality also finds its reflection in the content of international law through custom and its constitutive element of practice, as well as through concepts such as *desuetude* or subsequent practice with respect to treaties.

These instances of incorporation of social facts into the international legal framework have traditionally been described by the concept of (the principle of) effectiveness. In terms of effectiveness, social reality's impact both on general norms and on individual rights and obligations could be described as materializing in three distinct ways: (i) effectiveness as an element of specific substantive rules; (ii) effectiveness as an assignment of legal consequences to effective situations; and (iii) effectiveness as an element in general lawmaking as a component of custom and of treaty law (e.g., treaty interpretation, reservations to treaties, conditions of conclusion of a treaty). However, beyond the general understanding that (the

[42] Alfred Verdross and Bruno Simma, *Universelles Völkerrecht: Theorie und Praxis* (3rd edn, Duncker & Humblot 1984), 51; Salvatore Zappalà, 'Can Legality Trump Effectiveness in Today's International Law?' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012), 105.

[43] Katharina Doehring, 'Effectiveness' in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law* (North-Holland 1995), 44-46; Jean d'Aspremont, '"Effectivity" in International Law: Self-Empowerment Against Epistemological Claustrophobia' (2014) 108 Proceedings of the Annual Meeting (American Society of International Law) 165, 165; Zappalà (n 41) 105.

principle of) effectiveness relates to the relationship between social reality (facts) and international law, effectiveness has meant different things to different authors.[44] Effectiveness has additionally acquired a negative undertone due to its potential to grant legal effects to unlawful acts, as long as the unlawful but effective situation persists over a period of time. In this instance, effectiveness essentially remedies (or renders irrelevant) the original illegality of the act, thereby allowing might to trump legality. Effectiveness has been significantly limited by the general requirement of legality and by the norms of international law protecting fundamental values. Situations originating in an unlawful act cannot in principle produce results beneficial to the lawbreaker in contemporary international law (*ex injuria jus non oritur*). However, effectiveness has not been entirely replaced by legality or legitimacy. In circumstances in which international recognition accompanies factual situations, effectiveness continues to play a role, as evidenced, for example, by the establishment of the independent Kosovo.[45]

[44] see eg Charles de Visscher, *Les effectivités du droit international public* (A Pedone 1967); Robert Tucker, 'The Principle of Effectiveness in International Law' in George A Lipsky (ed), *Law and Politics in the World Community; Essays on Hans Kelsen's Pure Theory and Related Problems in International Law* (University of California Press 1953), esp 33; Monique Chemillier-Gendreau, 'A propos de l'effectivité en droit international' (1975) 11 Revue belge de droit international 38; Jean Touscoz, *Le principe d'effectivité dans l'ordre international* (Pichon et Durand-Auzias 1964); Hans Kelsen, *Pure Theory of Law* (University of California Press 1967) 193-95, 198-201, 208-14; Hans Kelsen, *General Theory of Law and State* (Harvard University Press 1945) 121. Recent scholarship has employed effectiveness to refer to other possible aspects of the relationship between international law and social reality, arguably further cluttering the term. Focusing on the *outward* aspect of the relationship (how international law impacts, or does not impact, social reality) rather than the *inward* aspect (how social reality is reflected in international law), scholars have used the term to refer to a diverse range of ideas, including (i) effectiveness as compliance – whether international law is actually complied with by its addressees; (ii) effectiveness as efficacy – whether a norm of international law results in the desired change in the social reality; (iii) effectiveness as enforcement – whether international law can induce its addressees to comply with its norms through such norms and institutional structures; and (iv) effectiveness as impact – whether international law makes difference in the conduct of its addressees or whether these would act the same way regardless. See eg Liam Murphy, 'Varieties of Effectiveness: What Matters?' (2014) 108 AJIL Unbound 99; Timothy Meyer, 'How Compliance Understates Effectiveness' (2014) 108 Proceedings of the ASIL Annual Meeting 168; d'Aspremont (n 42) 165-68.

[45] Zappalà (n 40) 112-14; Hersch Lauterpacht, *International Law: The Collected Papers of Hersch Lauterpacht* (Cambridge University Press 1970) 342; Doehring (n 42) 47. See also Florian Couveinhes Matsumoto, *L'effectivité en droit international public* (Bruylant 2014).

However, the facticity of international law surpasses (the principle of) effectiveness. Facticity describes the dynamic and continuous normative engagement of international law with (and the immediate link to) its underlying social reality and the consequent transformations of international law in response to social facts. This normative responsiveness of international law drives changes of international legal norms, concepts, categories and institutions, but also affects international law as a normative system. If expressed in terms of Luhmann's theory of autopoiesis, facticity involves constant redefining of the boundaries of the international legal system in response to changes within its social environment, which in turn alters the determination of which parts of that social environment will have legal relevance and will be attributed legal consequences. In this way, the concept of facticity elaborates on the mechanism behind the observation that international law is immediately shaped by its underlying social structures.[46]

In practical terms, facticity describes the following observation: once a particular phenomenon achieves a significant level of relevance in the international domain, the practice of international law as the relevant legal order does not ignore it.[47] Instead, legal practice alters and consequently adjusts international legal categories to the phenomenon. International law attaches legal value and legal consequences to the phenomenon and develops to regulate the conduct involved. The understanding shifts as to which issues and social relationships constitute matters of international concern, and are therefore proper objects for international legal regulation. In this way, international law grows to reflect the underlying changes in power structures, values, and concerns of the day, adapting existing law to new conditions.[48]

The responsiveness of international law to social reality (and changes in that social reality) most evidently manifests itself in the expansion (or reformulation) of international law's subject-matter scope. Matters previously unregulated by international law come within its

[46] See Bianchi (n 6) 393; Andrew Clapham, *Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations* (7th edn, Oxford University Press 2012) 41.

[47] See also Chris Jenks, 'Multinational Entities in the Law of Nations' in Wolfgang Friedmann, Louis Henkin and Oliver James Lissitzyn (eds), *Transnational Law in a Changing Society: Essays in Honor of Philip C. Jessup* (Columbia University Press 1972), 71-72.

[48] As noted by David Bedermann, states acknowledge (rather than anticipate or direct) the demands of international life. David Bederman, 'Acquiescence, Objection and the Death of Customary International Law' (2010) 21 Duke Journal of Comparative and International Law 31, 40.

purview as existing rules and categories continue to develop to reflect changed social and physical realities. Following the construction of the first airplanes, rules specifying the implications of sovereignty over airspace for aviation developed quickly, as did rules for international air services.[49] Similarly, the technological advances that made space exploration possible immediately led to the establishment of rules specifying the terms and legal implications of such exploration.[50] The observation of this subject-matter expansion of international law formed one of the core elements of Wolfgang Friedmann's classic work, 'The Changing Structure of International Law'.[51] This idea has more recently been further elaborated by Joel Trachtman, who argues that since international law evolves functionally as its constituents determine new uses, it is possible to anticipate international law's expansion into new areas.[52] Still, the facticity of international law is not limited to subject-matter expansion. Although most changes of international law do not affect its basic features, the normative responsiveness may produce truly fundamental shifts within international law when affecting international law's structural features and organizing principles.

The intrinsic pull to adapt international law to incorporate socially powerful phenomena reflects the essence of international law as the legal order for structuring interactions within the international domain.[53] International law, as the normative system of international legal ordering, responds and adjusts to social facts, ostensibly to maintain its efficacy – a perennial concern for international law as a legal order.[54] For example, judicial decisions and legal commentary regularly allude to the 'requirements' or 'necessities' of 'international life' in

[49] Brian Havel and Gabriel Sanchez, *The Principles and Practice of International Aviation Law* (Cambridge University Press 2013).

[50] Nandasiri Jasentuliyana (ed), *Space Law: Development and Scope* (Praeger 1992).

[51] Friedmann (n 4).

[52] Trachtman (n 17).

[53] Abbott and Snidal also argue that 'international actors choose to order their relations through international law and design treaties and other legal arrangements to solve specific substantive and political problems.' Kenneth Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 International Organization 421.

[54] See eg Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press 2007) 19; Jacob Katz Cogan, 'The Regulatory Turn in International Law' (2011) 52 Harvard International Law Journal 322, 361.

rationalizing developments in international law.[55] If international law is to maintain its efficacy, it must come to terms with reality (and changes to that reality) in some way. Owing to weaker governmental structures, the decentralized self-ordering organization of the international system, and the principal reliance on self-enforcement, international law has a lesser capacity to impose itself on the social reality it seeks to regulate. The practice of international law consequently organically incorporates important segments of social reality directly into its normative framework in order for international law to apply concretely[56] – that is, to be applied and complied with by its addressees – and thereby to deliver the desired regularity and predictability in international relations.[57]

For Kelsen, the inability to be generally applied and complied with would deprive a legal order of its very legal validity.[58] Even if one does not accept Kelsen's conception of validity, such inability undoubtedly puts into question the legal order's legitimacy and its very utility. By ensuring the continuous responsiveness of international law to its social environment, facticity safeguards international law's relevance as the normative system of international legal ordering. Facticity enables power and control to be brought within the international legal framework and allows significant social facts to acquire an international legal dimension. From international law's internal perspective, facticity thus essentially operates as a mechanism to prevent international law from becoming marginalized, as legal adjustment may be preferable to a legal vacuum.[59]

[55] See eg Reparation for Injuries Suffered in the Service of the United Nations Advisory Opinion [1949] ICJ Rep 174, 178; Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law* (Brill Nijhoff 1957) 39-40; Hersch Lauterpacht, *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration* (Longmans Green 1927) viii.

[56] See Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2006) 17; Nehal Bhuta, 'The Role International Actors Can Play in the New World Order' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012), 70; Heike Krieger, *Das Effektivitätsprinzip im Völkerrecht* (Duncker & Humblot 2000) 29; Doehring (n 42) 44; Hiroshi Taki, 'Effectiveness', *Max Planck Encyclopedia of Public International Law* (on-line version), <http://opil.ouplaw.com/home/EPIL> accessed 29 April 2016, para. 1.

[57] See eg Malcolm Shaw, *International Law* (7th edn, Cambridge University Press 2014) 5.

[58] Kelsen (n 43) 193-95, 198-201, 208-14.

[59] Bhuta (n 55) 70.

Certainly, international law's existing norms, concepts and institutions frame and structure any practice and, in this sense, impede the operation of facticity. However, the normativity of international law (i.e., its capacity to impose what ought to be) has its limits. If the discrepancy is too great between its norms and categories and social reality (particularly in terms of key social conflicts, coordination issues, and exercise of effective power), practice alters the elements of international law that are no longer adequate.[60] Facticity is thus in a perpetual (and unavoidable) tension with international law's normativity. In its day-to-day operations, international law permanently oscillates between normativity and facticity, as it seeks at the same time to be normative and concrete.[61]

Importantly, although the concept of facticity is principally about the impact of social reality on international law, it is certainly not the case that every social fact translates (or should translate) into international law.[62] International law's continuous normative engagement with social reality fundamentally does not take place through linear processes, and facticity may not be understood as a mere registration of fact. Portmann rightly observed that in contemporary international law, effective action does not imply a presumption of legal value or legal effects.[63] Facticity of international law thus does not suggest a straightforward lawmaking power of facts and in this sense differs from theories deriving legal validity directly from effective social behavior.[64] Facts do not have legal value per se, but they do produce stress on the practice of

[60] One is reminded of Fukuyama's remark in *The Origins of Political Order* that '[w]hen the surrounding environment changes and new challenges arise, there is often a disjunction between existing institutions and present needs.' Francis Fukuyama, *The Origins of Political Order: From Prehuman Times to the French Revolution* (Profile Books 2011) 7.

[61] The oscillation between normativity and facticity has been apparent even in some major official reports. See, eg, the statements in UN General Assembly, A More Secure World: Our Shared Responsibility. Report of the High-level Panel on Threats, Challenges and Change, 2 December 2004, UN Doc A/59/565, paras 12, 107–44.

[62] James Crawford, *The Creation of States in International Law* (Clarendon Press 2006) 4.

[63] Roland Portmann, *Legal Personality in International Law* (Cambridge University Press 2010) 265. See also Gowland-Debbas (n 21) 204. For consideration of the problem from the perspective of legal philosophy and the importance of 'institutions' in this respect, see John Searle, 'How to Derive "Ought" From "Is"' (1964) 73 The Philosophical Review 43; Neil MacCormick and Ota Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism* (Springer Science & Business Media 1986).

[64] See Robert Kolb, 'Politis and Sociological Jurisprudence of Inter-War International Law' (2012) 23 European Journal of International Law 233, 233.

international law to adjust in response to socially significant phenomena. In most circumstances, this stress will be processed through established lawmaking procedures, which will assign legal value to such phenomena. However, facticity may produce changes even to the parameters of the lawmaking procedures themselves if the social practice and consensus underlying the acceptance of these procedures were to alter.

6 TENSION BETWEEN CHANGE AND STABILITY

While the dynamic processes of change safeguard international law's viability and efficacy by ensuring its connection and responsiveness to the underlying social reality, these processes have regularly raised concerns about the stability of international law as a legal order.[65] With international law's stability being deemed as a necessary precondition for its capacity to facilitate a stable framework for social action in the international domain,[66] notions of change and stability have therefore been typically juxtaposed in international law.[67]

The routine association of change and stability in international law highlights the intrinsic tension between the two. The tension between the need for change and adaptation on one hand, and stability and normativity on the other, has in fact been a long-standing concern of

[65] See eg Lauterpacht (n 2) Part IV ('Stability and Change in International Law'); Cassese and Weiler (n 13); Jutta Brunnée and Stephen Toope, 'International Law and the Practice of Legality: Stability and Change' (2018) 49 Victoria University of Wellington Law Review 429; Alexander Grabert, *Dynamic Interpretation in International Criminal Law: Striking a Balance between Stability and Change* (Herbert Utz Verlag, 2015); Christina Binder, 'Stability and Change in Times of Fragmentation: The Limits of Pacta Sunt Servanda Revisited' (2012) 25 Leiden Journal of International Law 909; Alex Oude Elferink, *Stability and Change in the Law of the Sea: The Role of the LOS Convention* (Nijhoff, 2005). See also the ongoing project carried out at the Graduate Institute of International Development Studies in Geneva 'Paths of International Law: Stability and Change in the International Legal Order' (https://paths-of-international-law.org).

[66] See Hartmut Rosa and William Scheuerman, 'Introduction' in Hartmut Rosa and William Scheuerman (eds), *High-speed society: social acceleration, power, and modernity* (2009), 14. Basic structures of international law, such as the law of treaties and the law of international responsibility, as well as many specialized treaty regimes, forcefully promote stability. See eg Christina Binder, 'Stability and Change in Times of Fragmentation: The Limits of Pacta Sunt Servanda Revisited' (2012) 25 Leiden Journal of International Law 909.

[67] Binder id; Kathryn Gordon and Joachim Pohl, 'Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World' (2015) 2015/02 OECD Working Papers on International Investment.

philosophy of law as such.[68] However, change and stability are strictly speaking not each other's opposites. Tellingly, the linguistic opposite of stability is 'chaos', and the notion of stability as the antinomy of change involves precisely the anxiety that undue change may put international law's normativity and its internal stability in jeopardy. If changes of international law are not carefully managed, the disarray may result in the inability of international law to perform its basic normative functions.

Concerns about stability have typically been expressed in terms of predictability and legal certainty.[69] However, equating the notion of stability with predictability and legal certainty is arguably somewhat overstated. So long as law provides clear mechanisms for its modification, change can remain predictable and can support required legal certainty, at least in the procedural sense. The stability of a legal system in fact arguably depends precisely on its capacity to change.[70] Still, on a basic level, stability of law entails a quality of a certain constancy of norms.[71] If law strives to regulate human behavior, its norms cannot be in a state of constant flux, as this would make it impossible for the addressees of its prescriptions to know what is legally required before acting. A certain constancy of norms is therefore a precondition for legal normativity, and international law, as any law, contains built-in constraints, elements of rigidity that promote such constancy.[72]

Fundamentally, the concern about the internal stability of international law as a legal order involves the idea that if international law is to fulfill its normative functions, it must maintain a secure configuration. Surely, most processes of change do not affect international law's basic features and therefore the stability of international law so understood. However, when the change relates to *structural norms* of international law, the tension between change and internal

[68] See the discussion of this issue from the perspective of legal philosophy in Lauterpacht (n 2) 256ff.

[69] See eg Lauterpacht (n 2) 256.

[70] id; Jutta Brunnée, 'Challenging International Law: What's New?' (*Opinio Juris*, 13 November 2018) <http://opiniojuris.org/2018/11/13/challenging-international-law-whats-new/#_ednref> accessed 5 April 2019.

[71] The constancy of norms is indeed one of Fuller's conditions for a genuine system of law. Lon Fuller, *The Morality of Law* (Yale University Press 1969) 39.

[72] For example, as will be discussed below, the procedural requirements for norm-modification are rather high in international law, in particular in multilateral contexts, making most of its norms relatively resistant to change. See eg Bianchi (n 9) 134.

stability of international law may become real. Structural norms delimit international law from its non-law and define international law's central structural features and organizing principles, such as the doctrines of sources and subjects, the concepts of statehood and sovereignty, and the rules of jurisdiction and normative hierarchy. When a potential change in international law involves a structural norm (as opposed to a *simple norm*)[73], the very core of international law becomes contested, and its internal stability as a legal order may be put in question. From that perspective, any changes to structural norms may be viewed as systemically risky. The alteration of structural norms is consequently more delicate than modification of simple norms. In the case of simple norms, the existing institutions of international law (including the established canons of interpretation and legal reasoning) firmly anchor the operation of simple norms and support their alterations. However, such institutions may prove deficient for mediating a potentially profound transformation of international law when a revision of international law's structural norms is involved.

The notion of stability has not been limited only to stability as an attribute of international law, however. Stability has regularly also been understood as an objective of international law. Some scholars have gone so far as to argue that it is the role of international law to 'serve as the guarantor of international stability,'[74] focusing on the role of international law in creating stability within the international arena by neutralizing conflict, facilitating cooperation and peaceful conflict-resolution, promoting justice and shared values, and ensuring that certain critical realities are taken into account. This perspective strengthens the point that international law's structural norms are not immutable, as their change (which may produce a risk of momentary internal instability) might be required in order to generate stability in the underlying social reality and to maintain international law's efficacy as the normative system of international legal ordering.

The tension between change and stability thus does not play out singularly on the level of international law, but also involves the interplay with international law's underlying social

[73] Simple norms are substantive norms of international law, such as prohibition on the use of force, prohibition on torture, and rules of the world trading system.

[74] Higgins (n 18) 903.

reality.[75] Just as 'change' may refer to change within international law and change within the underlying social reality, so does stability. Consequently, there are, in fact, two dualities of change and stability in operation, which mutually interact in a multitude of ways. Most straightforwardly, the value of stability within law may produce strong elements of normative rigidity, while the drive to facilitate stability in the international domain by addressing pressing matters of international concern regularly compels international law to change. Other times, however, the conserving elements within international law, which promote its internal stability, may embed and solidify injustice, thereby producing a degree of instability in the underlying social reality. The process of international law thus in actuality takes place in the context of a constant interaction between the elements facilitating its change (such as the normative character of practice) and the elements promoting its stability (such as the high requirements for the formation of general rules), and this interplay produces a particular balance within the normative system.

7 CONCLUSION: ASYNCHRONY OF INTERNATIONAL LAW'S FORMAL SOURCES?

While international law has historically been a very flexible body of law, its adaptability may be under stress due to a problem of (potential) *asynchrony* of international law's formal sources.

Modernity has been characterized by a phenomenon of social acceleration – a profound change in the (increasing) pace of many aspects of modern social life. For Hartmut Rosa, social acceleration is in fact a defining feature of modernity,[76] which changes the temporal structure of a modern society through technological acceleration, evident in transportation, communication, and production; acceleration of social change, reflected in cultural knowledge, social institutions, and personal relationships; and acceleration in the pace of individual life.[77]

[75] See Chapters 15 and 16 in this book by Gregory Messenger and Jaye Ellis, respectively. Also Chapters 2, 5 and 6 by Juhana Salojarvi, Jan Lemnitzer, and Rob Grace, respectively also testify to this interplay.

[76] Hartmut Rosa, 'De-Synchronization, Dynamic Stabilization, Dispositional Squeeze: The Problem of Termporal Mismatch' in Judy Wajcman and Nigel Dodd (eds), *The Sociology of Speed: Digital, Organizational, and Social Temporalities* (Oxford University Press 2016), 31-32.

[77] Hartmut Rosa, *Social Acceleration: A New Theory of Modernity* (Jonathan Trejo-Mathys tr, Columbia University Press 2013). For other sociological examinations of social accelleration, see eg Anthony Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Stanford University Press 1991); Anthony

However, the two dominant formal sources of international law – treaty and custom – both entail a relatively high and, therefore, rigid threshold for norm-creation and norm-modification, particularly so with respect to universal norms. A large multilateral treaty necessitates the agreement of dozens of states; as a result, its conclusion as well as any future amendments require a considerable amount of time.[78] The formation of a customary norm, according to the orthodox view, requires a long-established practice,[79] and consequently again involves a significant passage of time.[80]

As discussed, international law responds to changes in its underlying social reality and formally validates any normative change through the accepted lawmaking mechanisms and within the parameters of its normative forms. A misalignment between the temporal parameters of international law's formal sources, on one hand, and the pace of contemporary social life and the conduct of international affairs, on the other – asynchrony between the two – may conveivably challenge the normative capacity of international law. Many commentators have in fact argued that international law's lawmaking tools are inadequate for the realities of

Giddens, *The Consequences of Modernity* (Stanford University Press 1991); Judy Wajcman and Nigel Dodd (eds), *The Sociology of Speed: Digital, Organizational, and Social Temporalities* (Oxford University Press 2016); Hartmut Rosa and William Scheuerman, *High-Speed Society: Social Acceleration, Power, and Modernity* (Pennsylvania State University Press 2009). Judy Wajcman, *Pressed for Time: The Acceleration of Life in Digital Capitalism* (University of Chicago Press 2015); Thomas Eriksen, *Tyranny of the Moment: Fast and Slow Time in the Information Age* (Pluto Press 2001). Acceleration has also come to pass in the acceleration of events that impact international affairs. See eg Vaclav Havel, Speech at the Parliamentary Assembly of the Council of Europe on 10 May 1990 (*Vaclav Havel Library*, 10 May 1990) <https://archive.vaclavhavel-library.org/Functions/download_binary.php?id=146268> accessed 16 July 2019.

[78] An exception to the generally high threshold for norm-modification would be some specialized treaty frameworks, such as the 'tacit acceptance' treaty amendment procedure in treaties under the auspices of the International Maritime Organization. Consider e.g. Convention on the International Regulations for Preventing Collisions at Sea [1972], International Convention for the Prevention of Pollution from Ships [1973] and International Convention for the Safety of Life at Sea (SOLAS) [1974].

[79] See eg Shaw (n 56) 54; James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 24-25; Hans Kelsen, *Principles of International Law* (The Lawbook Exchange, Ltd 1952) 374.

[80] See also the discussion of temporality in international legal processes in Chapter 7 in this book by Tomasso Soave (Section 3.2).

contemporary international relations.[81] Treatymaking has dramatically slowed down in the last 20 years, and states have increasingly begun to engage in other, informal ways to pursue international cooperation.[82] Much of the normative activity also takes place outside the remit of binding international law.[83] A perceived asynchrony between international law's formal sources and the speed of contemporary international relations arguably stands behind much of the doctrinal concern and changes in lawmaking practices.

Coming back to Lauterpacht's description of international law in the early 1930s, Lauterpacht considered international law to be comparatively more 'static' than municipal law because the relations that international law regulated were not in themselves affected, in a decisive manner, by economic and other changes.[84] This characterization clearly no longer applies as well; still, international law's formal lawmaking tools and its basic formal sources have remained largely the same ever since.

One response to the problem of asynchrony has been a desire to relax the temporal element of custom. For example, Michael Scharf has argued that the formation of custom has accelerated, at least at times of critical junctures.[85] In his view, if international law is to keep pace with developments, such as technological advances, the commission of new forms of crimes against humanity, and the development of new means of warfare or terrorism, an accelerated formation of customary rules is required. While the elements of state practice and a clear and widespread

[81] Boyle and Chinkin (n 53) 19; Higgins (n 18). See de Visscher's lamentation with respect to custom already in the 1950s in Charles de Visscher, 'Reflections on the Present Prospects of International Adjudication' (1956) 50 The American Journal of International Law 467, 472.

[82] Pauwelyn and ors (n 9) 734-44. See also Armin von Bogdandy, Philipp Dann and Matthias Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' (2008) 9 German Law Journal 1375; Matthias Goldmann, 'Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority' (2008) 9 German Law Journal 1867.

[83] Jean d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (revised edn, Oxford University Press 2013) 2-5; Wouter Werner, 'Regulating Speed: Social Acceleration and International Law' in Moshe Hirsch and Andrew Lang (eds), *Research Handbook on the Sociology of International Law* (Edward Elgar 2018).

[84] Lauterpacht (n 2) 256.

[85] Michael Scharf, 'Seizing the "Grotian Moment": Accelerated Formation of Customary International Law in Times of Fundamental Change' (2010) 43 Cornell International Law Journal 439.

expression of opinio juris still apply, the extent and duration of the state practice necessary for custom formation may be minimized in periods of extraordinary change.[86] For other authors, the problem of asynchrony has been yet another reason for promoting normative projects outside of formal international law.[87]

The inability to promptly produce norms to address pressing matters of international concern presents a potentially serious issue from the perspective of international law's normative functions (even if the sociological literature on social speed and acceleration emphasizes that the experience of acceleration is not universal across social groups and spaces worldwide,[88] and, thus providing a helpful reminder that the problem of asynchrony may appear urgent only in certain quarters). The delegation of powers to international organizations and the endowment of their organs with executive and even lawmaking powers has introduced some flexibility in international law's formal lawmaking. However, while these mechanisms have been relatively successful in technical areas, such as maritime, telecommunications, and air law, they have limited viability in politically more controversial areas. Nevertheless, complete deformalization of normativity in the international domain – the abandonment of binding and enforceable norms in international law – seems hardly the answer. The driving force behind the most notorious examples of 'failures' of formal international law has been states' unwillingness to firmly commit themselves, rather than an issue with formality as a means of creating such binding commitment.

It remains to be seen whether the problem of asynchrony will prove to be transient, or whether the facticity of international law will generate the necessary alignment by triggering normative shifts in international law to enable more efficient dealing with pressing matters of international concern. However, in a world in which all but the global elites seem to desire firm control of nation-states over public affairs, the rigidity of formal international law might actually be its great asset.

[86] ibid 467-68. Similar ideas were advanced by other scholars, most famously by Bin Cheng under the heading of instant customary law in connection with rules on non-sovereignty over space. Bin Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?' (1965) 5 Indian Journal of International Law 23.

[87] See eg Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2004) 4, 31, 49, 167.

[88] See eg Rosa and Scheuerman (n 67) 6.

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