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'Customary Internet-ional Law': Creating a Body of Customary Law for Cyberspace. Part 1: Developing Rules for Transitioning Custom into Law

Warren B. CHIK
Singapore Management University, warrenchik@smu.edu.sg

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'Customary internet-ional law': Creating a body of customary law for cyberspace. Part 1: Developing rules for transitioning custom into law☆

Warren B. Chik

Singapore Management University, Singapore

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ABSTRACT

The shift in socio-economic transactions from realspace to cyberspace through the emergence of electronic communications and digital formats has led to a disjuncture between the law and practices relating to electronic transactions. The speed at which information technology has developed require a faster, more reactive and automatic response from the law that is not currently met by the existing law-making framework. This paper suggests the development of special rules to enable Internet custom to form legal norms to fulfill this objective.

In Part 1, I will describe the socio-economic problems and stresses that electronic transactions place on existing policy and law-making mechanisms; examine the history of custom as a source of law in various contexts and identify potential sources of Internet Law in particular the suitability of customary international law rules as a template for formulating customary Internet law-making rules. In Part 2, I will construct the customary rules to Internet law-making that are applicable to electronic transactions by adapting customary international law rules; apply the suggested rules for determining customary Internet norms and identify some existing practices that may amount to established norms on the Internet, specifically practices relating to the Internet Infrastructure and Electronic Contracting.

''Laws are Sand, Customs are Rock.'' The Gorky Incident, Mark Twain (1835–1910)

1. Prelude

There are many similarities between the development and characteristics of International Law and the developing Law of Cyberspace not least of which is the fact that they are global in nature and effect. Just as international socio-political and economic relations engendered the need for rules of engagement between States and international organizations, advances in the development and use of information technology and the electronic media for easy and extensive worldwide interaction is creating many legal issues and disputes both in relation to existing relationships as well as new forms of affiliations that require redefinition and terms of interactions, respectively. The development of the Internet infrastructure through the means of efficient categorization and organization of information and the methods for accessing and navigating the World Wide Web (WWW) poses challenges that require laws and regulations in order to provide legitimacy to their existence and to create an orderly

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and effectively functioning transactional framework wherein all its participants are aware of their rights and responsibilities vis-à-vis one another. Hence, there is a growing interest in the identification of potential solutions to the uncertainties that arise from online relationships and networks,[1] and it is only natural that we start to seek inspiration from recognized sources of law from both domestic and the international legal systems to identify and give recognition to potentially new ones.

In cyberspace as in realspace, law often follows change. The development of rules to order and regulate intercourse in the digital world is slower than the pace and development of new forms of communications technology, electronic analogues and legal entities. In fact, due to the speed by which technology evolves and its impact on human behavior and transactions, the problem is magnified manifold in contrast to the pace of developments in the real world. The good news is that, by and large, both the policy and legal reactions thus far, mainly through the versatility and applicability of pre-existing laws and privately regulated practices, have led to some form of order in the development and use of technology and in its various forms of operation. Public and private, commercial or non-commercial, transactions and communications operate in a state of ordered chaos. However, this is not a sufficiently satisfactory state of affairs as uncertainties still remain as to the legitimacy of existing practices and on the legality of relationships, which can dampen the growth potential of information technology and the Internet and World Wide Web, with all that they have to offer to human socio-economic dealings.

The development of information, product and services technology and in communications sciences has not abated and may in fact be accelerating, and there are many unforeseeable achievements yet to be attained in these fields. Hence, it is imperative that we make haste to re-evaluate the sufficiency and suitability of the existing forms of rule-making, including that which applies to International Law, with a view to creating a multi-pronged and more comprehensive and reactionary regulatory solution to technological developments.[2] The natural way in which online conduct has evolved and crystallized into set and repetitive patterns of behavior is symbolic and almost prophetic of the important role and function that custom can play in the organic and evolutionary development of norms in cyberspace. In order to harness the promise of custom so as to achieve the objective of optimal norm creation, the identification of the various stakeholders in cyberspace, their interests, and the concomitant assessment and analysis of their behavior (adherence) and attitude (observance) towards customary roles of engagement will be integral to a democratic process of governance by the people for the people in cyberspace transactions. The development of custom as law that is bottom-up in approach that recognizes the most prolific body of participants on the Internet will provide it both evidentiary value and legitimacy. Meanwhile, consideration must also be given to the role of the entire network of stakeholders whose needs and interests may complement or conflict, and that is even more complicated in cyberspace; with mash-up of existing actors such as the emergence of the hybrid User-Creator, and new intermediaries from the service provider to the content creator and the many variations in between such as peer-to-peer platforms, search engines, news aggregators, content hosts, social networking sites amongst others.

Returning to the comparison of global and cyberspace transactions, the similarities between them stems from their very nature, which is that they frequently involve multi-national cross-border transactions for which only a universal solution will be effective. The real world and the cyber world are two dimensions that display the same global and geographically porous characteristics, which differentiate them from localized or domestic laws. The parallelism between the two dimensions gives rise to the potential for lessons to be drawn from the former for the benefit of the latter in terms of the development of custom as law for the governance and regulation of activities in their respective spheres in order to achieve what will be called the development of a more expansive and comprehensive, albeit never complete, body of 'Internet-ional Law' for cyberspace communications and transactions. In fact, the two realms are not mutually exclusive and the sources of law for cyberspace can straddle or overlap with Public International Law such as in the area of treaty law, which also implicates electronic transactions and that can and have be used to harmonize the regulation of such activities. However, there are sufficient differences between the two dimensions as well, such as in the personalities involved, the volume and types of behavior and the speed of transactions, which necessitates some modifications to the formulation and implementation of Customary International Law, in the process of transposing its use from the real to the digital context, to render it compatible to the digital realm.

That is the purpose and objective of this paper, which is to go beyond *analogizing* the two realms to offering clear *solutions* through concrete measures and detailed proposals for law-making that is specific to cyberspace drawn from redefining the Public International Law template for customary law-making to create a set of rules for 'Customary Internet-ional Law' as a tool for norm creation that is specially crafted to suit the cyberspace stakeholders, relationships, transactions and environment with its idiosyncrasies. The idea is for the recognition, development and maturation of 'Customary Internet-ional Law', which is the ideal default law-making device that will fill in the gaps in the law applicable to the Internet as well as to function as an interpretative device to existing laws and regulations; and in the process also encourage universal and consistent norms that will provide a stable regulatory and facilitative electronic environment for its actors.

[1] E.g., conflict of laws rules, jurisdiction and Internet governance has to be re-assessed as to their applicability and suitability to electronic transactions particularly in light of the fact that they tend to manifest as multi-national cross-border transactions involving many participants in different countries.

[2] "Reactionary" in the sense that it validates the legality of already existing practices, such as codified legislation, as opposed to "affirmative" which is to influence certain behavior or refrain from certain forms of actions through the instructive nature of progressive legislation.

In the process of determining custom, which involves observing the behavior, expectations and attitudes of relevant personalities based on their role and the context and type of transaction they are involved in, there is an integral law-making or 'influencing' role for private entities like intermediaries and individuals who actively participate in cyberspace as well as public entities such as governments and other organizations (the 'creators'). Their role must be clearly defined. Customs will have to be identified and interpreted following a set procedure, from which jurisprudence can be derived in such a way that it will provide a clear and legitimate set of norms. Custom as a source of law will work automatically, but jurists, including judges, academics and empiricists also have an important role that lies in actually identifying established and emerging norms and in recognizing them as such (the 'observers').

There are two main benefits to identifying the customary rules for Internet law. It will both give legal legitimacy to recognized, existing and established practices as well as speedily detect legal norms for newly emerging practices. 'Customary Internet-ional Law' is meant to *supplement* existing and applicable laws, both international and country-specific, for any form of transaction, transnational or otherwise, and in every area of law and activity, not just for commercial transactions or in the area of e-commerce and contract law. It will act as a gap-filler of rules for new practices and technologies and as an interpretative aid for written law. It is *complementary* and is not meant to supplant explicitly written rules of policy and law, unless and to the extent that it supersedes them in a manner and according to a procedure that is clear and acceptable based upon a hierarchy of norms in the event of a conflict of norms.[3]

In Section 2 of Part 1, I shall further substantiate the socio-economic problems caused by the rapid acceleration of Internet transactions and technological advances and the stresses that it places on existing policy and law-making mechanisms. Section 3 of Part 1 introduces sources of law rules under Public International Law, specifically Customary International Law as well as the role of custom in other contexts and in the history of law-making with a view to its suitability as a source of law mechanism for cyberspace transactions. Subsequently in Section 2 of Part 2, comparisons and differentiations will be made between the background and context relating to global transactions and virtual transactions,[4] with a view to determining the utility and consistency of customary rules to law-making that are applicable to electronic transactions. Concepts that can be 'borrowed' from Public International Law and the changes that have to be made to adapt it to Internet law will also be proposed with a suggested form of *norm-realization* that will emerge from this analysis. Finally, in Section 3 of Part 2, I will reinforce the real utility and effects of Internet custom by identifying some existing practices that amount to established norms on the Internet, specifically relating to the established features of the 'Internet Infrastructure' and to Electronic Contracting practices. The method of substantiating and clarifying what exactly are already developed customs in online access and navigational tools as well as in electronic commercial transactions will be examined.

2. The machines vs. the regulator: challenges posed to the Rule of Law by the cacophony of cyberspace behavior

2.1. *The rise of the machines: technological development and progress*

The rapid development of information technology is posing a problem towards rule-making for the regulation of electronic transactions and its participants, particularly those conducted through the Internet and on the World Wide Web (WWW).

Ever since the growth of the Internet and during the course of its rapid expansion and increased penetration geographically,[5] academics in almost every relevant field have discussed the nature of the impact that the WWW has had on the socio-economic environment. Specifically, in relation to law and regulation, arguments arose for a 'borderless' space which in turn led to calls for ''supranational Internet law(s)'',[6] given the fact that both commercial and non-commercial transactions in cyberspace tend to transcend national boundaries and when such activities accelerated and proliferated due to the ease of interaction which the medium itself advocates. Proponents argued for such laws based upon the need to instill confidence and ease of transaction, and in particular to promote an assurance of recognition and enforceability of electronic transactions that

[3] Hence, I am not proposing a form of exclusive ''private ordering'' that is verging on anarchy as some proponents of customary norm regimes seem to be advocating. See Margaret Jane Radin, R. Polk Wagner, *Symposium on the Internet and Legal Theory: The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 Chi.-Kent. L. Rev. 1998; 1295: 1296; where the author critiqued Johnson, Post and Hardy's theses: David R. Johnson & David G. Post, *And How Shall the Net Be Governed?: A Meditation on the Relative Virtues of Decentralized, Emergent Law, in Coordinating the Internet* 81–90 (Brian Kahin, James H. Keller (eds.), (1997); David G. Post , David R. Johnson. *Chaos Prevailing on Every Continent'': Towards A New Theory of Decentralized Decision-Making in Complex Systems*, 73 Chi.-Kent L. Rev. 1998; 1055: 1086–1088 and Trotter Hardy, *The Proper Legal Regime for ''Cyberspace''*, 55 U. Pitt. L. Rev. 1994; 993: 1051–1053. There should not be a reliance on any single source of law when the sum total of several sources can co-exist in relative harmony and can do a much more comprehensive job of regulating and enforcing order in the digital world.

[4] Depending on the situation and the issue, 'mixed transactions' such as the digital sale of physical goods and services or the physical sale of digital goods and services may be governed by cyberspace law or real world law but not both, even if the outcome may be the same.

[5] See the Internet World Stats website for the latest statistics and figures on Internet usage and penetration by region at: http://www.internetworldstats.com/.

[6] See Polanski, *Towards a Supranational Internet Law*, JICLT 2006; 1 (1), available at: www.jiclt.com/index.php/JICLT/article/viewPDFInterstitial/8/7.

truly reflect the principle of ''functional equivalency'' between real world and cyberspace instruments and transactions. Whatever form or extent the solution should take, it was at least clear that changes were necessary to meet the needs of cyberspace.

There have been experiments conducted to illustrate the extensive penetration of electronic communications media, digital products and online services in modern life, both for individual sustenance and social interaction. A subject can socialize in online forums and chatrooms, have instant communication using the telephone or Instant Messaging Systems (IM), correspond through electronic mail and work online via Intranet and other remote platforms. One can also physically sustain oneself by purchasing products and services online that manifests in both digital and physical forms. In the digital age and with modern day electronic connectivity, one can almost fully conduct oneself in the digital realm, short of actually living in that dimension as an avatar.[7] Multiplying those practices to the actual reach and scope of the Internet and the WWW globally to the quantity and types of interaction and transactions worldwide and their socio-economic impact, one can clearly see why so many legal issues and problems arise from digitization.[8]

2.2. *The role of the regulator: the function of the law and legal system*

What is the function of law? It is a system of rules and institutions that underpin civil society, that facilitate orderly interaction and that resolves disputes or conflicts that arise in spite of such rules.[9] It also allows people in a community, through a governing body, to determine the limits of what can and cannot be done in their collective interest. Law can be created in many different ways, it can be negotiated, imposed or evolved.[10] Law can regulate behavior and that was in fact the challenge posed to law-makers by the increasingly busy and high volume of electronic activity, particularly with the introduction of the Internet and the WWW to mainstream society.

2.3. *The testy relationship between technology and the law*

There is no doubt that advances in technology is testing the efficacy of the law in social ordering.[11] Rapid changes in the socio-economic landscape are rendering certain laws that were created before the advent of modern electronic technology, particularly the Internet, antiquated and inadequate in many ways that cannot be overstated.[12]

The cyber world is amorphous with multiple parties interacting from different geographical and jurisdictional points. Piecemeal and disparate, and oft-times inadequate and even non-existent, national laws are clearly not a satisfactory solution to such multi-party cross-border dealings.[13] For example, consider the transnational nature of Internet transactions and compare it to the disparate legal and regulatory approaches to digital signatures.[14] One can also look at how the failure to address the legal framework for the

[7] Some applications such as virtual worlds like Second Life and other gaming platforms already allow one to 'live' and perform in the digital world through a proxy or an alter ego personality. Second Life has been described as an Internet-based ''computer game'' but according to its developer, Linden Research Inc., it is more than that, providing a different dimension for people to literally live a 'second life' in a virtual world in a form that they define and transacting socially and commercially. Many institutions such as Universities and Business have set up a presence in the world of Second Life. See: http://secondlife.com.

[8] See Kristi L. Bergermann, *A Digital Free Trade Zone and Necessarily-Regulated Self-Governance for Electronic Commerce: The World Trade Organization, International Law, and Classical Liberalism in Cyberspace*, 20J. Marshall J. Computer & Info. L. 2002; 595, specifically on the challenges to the global trading system in meeting the needs and promoting the use of the electronic forum, and in attempting to ''define the parameters of an international agreement on trade in digital products'' with a view to ''fashioning an e-commerce trade framework'' such as by establishing a digital free trade zone and regulated-self-governance.

[9] When the interaction results in conflict, the legal institutions step in to resolve such disputes fairly in accordance with established rules of dispute resolution.

[10] See Lynn, N. Hughes, *Contracts, Custom and Courts in Cyberspace*, 96 Nw. U.L. Rev. 2002; 1599: 1601–1602. The legal system largely operates only in default. ''Custom was the foundation of the law for mercantile and maritime trade, and those practical arrangements should be the first recourse in questions about the Internet. Excessive particularization and premature formalization waste current opportunities and impede future improvement – technical and commercial. We all must resist seductive proposals by bureaucrats – whether academic, governmental, or corporate – to replace cooperation with compulsion in their pursuit of some vision. Just let the people wheel, deal, cooperate, design, innovate, cross-fertilize, negotiate, tinker, and improve. Let us, in the law, have broad horizons. We, in the law, ought to articulate the continuities, patterns, and verities. We ought to remind people that law is prospective, neutral, and general.'' *Ibid.* at 1605.

[11] See, e.g., Noel Cox, *The Relationship Between Law, Government, Business and Technology*, 8 Duq. Bus. L.J. 2006; 31: 42–54 and Walter B. Wriston, *The Twilight of Sovereignty: How the Information Revolution is Transforming Our World* (Scribner, 1992).

[12] There is no comprehensive treaty or international instrument governing parties' rights and obligations on the Internet. Modem legislators continue to regulate the Internet using a patchwork of domestic legislation and other regulatory instruments, which suffer from a nationalistic focus and domestic perspectives. In order to remedy this situation, the concept of international custom as a source of law could be used, to fill in some gaps resulting from a lack of globally binding Internet laws where it is feasible to do so and where common ground can be found and homogeneity established.

[13] Sean Salin, *Governing Cyberspace: The Need for an International Solution*, 32 Gonz. L. Rev. 1996/1997; 365.

[14] On the different electronic signature models currently utilized; see, e.g., Anda Lincoln, *Electronic Signature Laws and the Need For Uniformity in the Global Market*, 8J. Small & Emerging Bus. L. 2004; 67); *Contracting via Internet: a Comparison Between the Law of Singapore, Austria and the European Union*, ABLR 2 (2003) and Lance C. Ching, *Electronic Signatures: A Comparison of American and European Legislation*, 25 Hastings Int'l & Comp. L. Rev. 2002; 199.

'ownership' and allocation of domain names and in the control of unsolicited electronic messages and attribute them to the unsatisfactory state of these regimes as they operate today. Without a broad framework of laws of global application to tackle multilateralism or a comprehensive and complementary network of laws to engender consistency and cohesiveness, the regulation of electronic transactions is prescriptively disparate, difficult to adjudicate and consequentially hard to enforce. Without careful planning and regulation at the early stages of development, fundamental problems relating to the Internet infrastructure, communications technology and digital format will arise and are likely to be compounded.

For an analogy and with a view to drawing some ideas for reform, we can look at the development of International Law in relation to global transactions. As sovereign borders are becoming less significant as a barrier to social and commercial intercourse, International Law provided some of the solution for the regulation of such affairs, both in the public and private law fields, so as to render them harmonious and consistent to an acceptable, although not necessarily optimal, degree. Some universal consensus is achieved by the use of public and private international law instruments such as treaties and conventions, as well as non-legal instruments that encourage consistent law-making like model laws.

For example, in the area of commercial and contract law, the existing multilateral instruments often come in the form of general frameworks, such as the United Nations Commission on International Trade Law (UNCITRAL) Model Laws,[15] and the United Nations Convention on the Use of Electronic Communications in International Contracts (CUECIC), otherwise known as the Electronic Contracting Convention.[16] Likewise in Intellectual Property Law, the WIPO Conventions and domestic legislation struggle to play catch-up to technological developments in order to reconcile advances in information technology to traditional notions of property rights in creative works and to recalibrate the balance of rights between stakeholders based upon changes to the equation wrought by technological developments.[17] The unique issues relating to identity and monitoring on the Internet likewise also poses significant policy and law challenges to Privacy and Data Management of information on the WWW and have been addressed in international and regional instruments to some degree, although there have been no consistent treatment under national laws.[18]

Treaties and conventions tacitly, if not explicitly, evidence the need for a worldwide legal framework governing all issues relating to electronic transmissions and digital products and services. Although they do go some way towards facilitating and regulating such transactions, they still lack comprehensiveness and specificity, largely providing the 'lowest common denominator' of cyber laws in order to achieve greater acceptance and consensus.[19] Moreover, they may not in all cases be globally subscribed or adhered to, and even if transposed into domestic law, they may not be done consistently.

In his thesis, ''The Internet is Changing International Law'' at the Symposium on the Internet and Legal Theory over a decade ago in 1998, Perritt examined the issues from the perspective of mutual alteration and how the Internet changes International Law.[20] This paper is the mirror image of his approach and addresses how the Internet itself can benefit

[15] The United Nations Commission on International Trade Law (UNCITRAL) was established by the United Nations General Assembly in 1966 to harmonize perceived disparities in national laws governing trade in order to promote international trade. The UNCITRAL website is at: http://www.uncitral.org/uncitral/index.html.

[16] The United Nations Convention on the Use of Electronic Communications in International Contracts (CUECIC) was adopted by the United Nations General Assembly on 23 November 2005, which objective is to enhance legal certainty and commercial predictability where electronic communications are used in relation to international contracts. Amongst other provisions, it addresses the party's' location in an electronic environment; the time and place of dispatch and receipt of electronic communications; the use of automated message systems for contract formation and the criteria to be used for establishing functional equivalence between electronic communications and paper documents and between electronic authentication methods and traditional hand-written signatures. The text of the CUECIC is available at: http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce.html.

[17] E.g. Copyright legislation have seen one of the most rapid and frequent amendments in recent years to take into account digitization of both communication and transfer of information, products and services. The approach is a mix of acknowledgement, accommodation and exemption. See the World Intellectual Property Organization website at: http://www.wipo.int/portal/index.html.en.

[18] This has led to conflict in policy approach to the flow of information online between the European Union, with its stringent data management policy and laws, and other countries. It has also given rise to security and encryption issues. See Matthew R. Van Wasshnova, *Data Protection Conflicts Between the United States and the European Union in the War on Terror: Lessons Learned From the Existing System of Financial Information Exchange*, 39 Case W. Res. J. Int'l L. 827 (2007–2008); Domingo R. Tan, *Personal Privacy in the Information Age: Comparison of Internet Data Protection Regulations in the United States and the European Union*, 21 Loy. L.A. Int'l & Comp. L.J. 661 (1999); Briana N. Godbey, *International: Data Protection in the European Union: Current Status and Future Implications*, 2 ISJLP 803 (2006) and Jennifer M. Myers, *Creating Data Protection Legislation in the United States: An Examination of Current Legislation in the European Union, Spain, and the United States*, 29 Case W. Res. J. Int'l L. 109 (1997). It has also been the subject of a symposium. See Various, *Symposium: Data Protection Law and the European Union's Directive: The Challenge for the United States* 80 Iowa L. Rev (1995). Also, current conflict of laws rules is inadequate to resolve jurisdictional disputes when applied to online transactions. This in turn contributes to great uncertainty in such transactions and constrains the appeal and growth of the medium as the mode of choice for communication and transaction.

[19] This is the nature of internationally negotiated legal instruments, such as those agreed upon under the auspices of the World Trade Organization (WTO) and the World Intellectual Property Organization (WIPO). International treaties often reflect the ''lowest common denominator'' and come close to consensus in order to attract greater participation and accession.

[20] Henry H. Perritt, Jr. *Symposium on the Internet and Legal Theory: The Internet is Changing International Law*, 73 Chi-Kent L. Rev. 1998; 997.

from International Law rules. What these two approaches do show is the positive and mutually beneficial synergy that the two disciplines can derive from one another. One important observation Perritt made was how Public International Law was moving away from the state-centric tradition due to the de-segregating and decentralizing nature of the Internet,[21] which is a point that is also relevant to the argument for the development of a body of customary law to govern Internet transactions.

2.4. *How to achieve reconciliation between technology and the law*

A solution need not be novel in its inception or revolutionary in its approach in order to be effective. In the case of Internet law, it need not come in the form of self-regulation or require a total re-invention of the source and framework of law and regulation. In fact, the rise of the electronic medium has given rise to talk of more ''self or flexible regulation'' and ''decentralized rules''.[22] It is neither useful to continue the argument from the narrow perspectives of ''techno-optimists'' that are proponents of the development of ''cyber-law'', nor to accept the views of ''techno-realists'' who are of the opinion that ''real law'' suffices to regulate the Internet transactions.[23] In reality, we require a mixture of both, and a conglomeration of idealism and realism. The solution must be workable and the stakeholders and participants must embrace it as a legitimate and acceptable solution for the problems associated with the ordering of electronic transactions.

This article is not arguing for the Internet to be self-regulating or for it to be considered a separate world with entirely distinct solutions.[24] This cyber-libertarian view is too simplistic and extreme, and fails to recognize the crossover effects that electronic action and products have in realspace. There is still a strong overlap and mixture of transactions between both 'worlds'. Many transactions incorporate both electronic and physical components, whether as alternatives, such as physical goods or services that are available in digital format, or as complements, such as the process of electronic negotiations and contracting in relation to physical goods or services. Self-regulatory rules may also conflict with government regulations in 'mixed' transactions depending on the situation.[25]

There is a wide spectrum of requirements in different areas of law, some which merely require slight changes through amendments, while others require significant or radical reinvention and a few that necessitate an entirely new body of rules. At one end of the scale, for instance, lie jurisdictional principles pertinent to the laws on contract, crime and tort, which are still relevant and apply in the same manner to Internet transactions albeit perhaps requiring some evolution and adaptation in approach and definitions to suit such new scenarios. Further along the scale and somewhere along the middle are areas of law such as Intellectual Property Law, in particular copyright law, that require more novel policy and legal creations over and above regular amendments to the law, for example, to deal with the nature of the WWW through laws on intermediaries, Digital Rights Management (DRM) and exemptions for WWW functionality. At the other extreme, new laws are required such as those relating to the domain name regime and spam control laws, which never existed previously as domain names and spam did not exist before the digital era.[26]

Hence, it is important in dealing with this subject that we should not only be concerned with commercial certainty,

[21] *Ibid*. at 1049–1050. See also, Robert D. Cooter, *Law, Economics, & Norms: Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant,* 144 U. Pa. L. Rev. 1996; 1643, where the author stated incisively that ''[c]entralized law, like socialism, is not even plausible for a technologically advanced society….[and that] efficiency requires decentralization to become more important, not less, as economies become more complex. Specifically, efficiency requires that as economies develop, the enforcement of custom . . . becomes more important. '' *Ibid*. at 1646. ''Customs arise, while laws are made.'' *Ibid*. at 1655.

[22] I. Trotter Hardy, *The Proper Legal Regime for 'Cyberspace'*, 55 U. Pitt. L. Rev. 1994; 993: 995. Proponents of Internet self-governance, usually cyber-libertarians, argue for a 'free market' invisible hand approach to the Internet; that is, by basing norms on the existing practices within the cyber-community that can be considered 'quasi-legal norms' or soft law and that resembles custom. Conduct in this world is envisioned to be regulated, not by the public authorities, but by its participants in their respective communities. An example of this is the development of 'netiquettes' in various fora such as Internet networking platforms and information or discussion forums, often consisting of regular acceptable behavior that are compiled by moderators or administrators, or that have become tacitly accepted and followed by users. In such a model, regulation by state actors should be minimal and only where necessary, in the form of intervening measures such as where important socio-political issues are concerned. Although this paper does not espouse any drastic or extreme approach, aspects of the ideas of self-regulation and the organic nature of the creation of norms to produce order in such an environment do support and reflect the use of custom in a complementary manner.

[23] Kurbalija J. *Internet Governance and International Law*. In: Drake WJ (ed.), *Reforming Internet Governance: perspectives from WGIG* (United Nations ICT Task Force, 2005), 105–115 at 105–106, available at: http://www.ifap.ru/library/book271.pdf.

[24] See, e.g., David R. Johnson & David Post, *Law and Borders -The Rise of Law in Cyberspace*, 48 Stan. L. Rev. 1996; 1367: 1367. There have been other articles for and against this view. For a opposing view, see, Jack L. Goldsmith, *Against Cyberanarchy*, 65 Univ. Chi. L. Rev. 1998; 1199, and the counter-response in David G. Post, *Against ''Against Cyberanarchy''*, 17 Berkeley Tech. L.J. 2002; 1365: 1366. See also, Shamoil Shipchandler, *The Wild Wild Web: Non-Regulation as the Answer to the Regulatory Question*, 33 Cornell Int'l L. J. 2000; 435: 461–463; Robert Corn-Revere, *Caught in the Seamless Web: Does the Internet's Global Reach Justify Less Freedom of Speech?* 13, Briefing Paper of the Cato Institute (24 July 2002), available at http://www.cato.org/pubs/briefs/bp71.pdf and Henry H. Perritt, Jr. *The Internet is Changing the Public International Law System*, 88 Ky. L. J. 1999–2000; 885: 917.

[25] Note the many critiques that sprouted in response to a seminal statement that the laws of the physical world should not apply to cyberspace. See the 1996 article that sparked off the debate of Internet freedoms by John Perry Barlow, *A Declaration of the Independence of Cyberspace* (8 February, 1996), available at: http://homes.eff.org/barlow/Declaration-Final.html.

[26] Although they may bear some relation to, and may involve the principles developed for, existing laws like trademark law and anti-junk mail laws, respectively.

although a lot of academic theses focus largely on such transactions.[27] A stable digital environment and confidence in the protocols of behavior relating to the Internet and the WWW interface in general is an important foundation for its growth and well-being as the new medium for human communication and intercourse. This is all the more significant as it continues to make inroads into different forms of interaction between multiple categories of participants for a variety of objectives and purposes.[28]

What is ultimately important is to consider how legal rules and regulations, and their objectives, can complement and support the rapid development of the Internet society by creating order and certainty of transactions for a stable transacting environment. This requires the development of law to be efficient and reactive, which is not always the case particularly when it relates to a fast developing and connected world. In the next Part, I will explain why, because of their similarities and in spite their differences, the objectives and function of Public International Law, in particular Customary International Law, governing global transactions and relations can be used as a template for the construction of customary guidelines as a source of law for the cyber world, which I will term 'Public Internet-ional Law' and 'Customary Internet-ional Law', respectively. In particular, I will focus on customary law as a much needed and significant addition to the source of law suite for electronic transactions by examining the evolution of custom under Public International Law, in societal, national and regional legal traditions, and in commercial law.[29]

The benefits of Customary Internet-ional Law that takes into account the behavior, expectations and attitude of all the participants on the Internet, which constitute its stakeholders, include, but are not limited to the following:[30]

1. It will empower Internet users as a whole in law-making, and give them a stake in 'Internet-nation building', further giving such customary norms legitimacy.[31] Intermediaries that have a strong power to shape such norms will also have to be engaged, but to some extent they have to be controlled where necessary in the manner in which their development can influence behavior and even expectations and attitudes.[32] Last but not least, real world governments and organizations can still influence the growth of custom based on carefully considered policy grounds. In order to be effective and efficient, the study of such norms may require non-law assistance and cross-disciplinary research such as empirical studies, and may even involve automated processes developed by information systems experts in cooperation with lawyers and experts from other fields of research.
2. It will provide an additional source of law and the impetus for national and international legislators as well as organizations to develop written norms, further clarify and substantiate such norms, and reinforce their acceptance and application. These will be mutually reinforcing, and will accelerate and accentuate the building of electronic transactional norms. It will create a 'virtuous cycle' that will promote the creation and clarification of such norms.
3. In the meantime, it will also provide a source of norms or terms of reference upon which judges and other dispute resolution panels or personnel can be guided by and that they can use to settle disputes, in the absence of existing or clear written law, whether national, regional or multilateral. The role of the law and law-maker should not be an intrusive one but rather facilitative, with the main aim of creating a stable Internet environment for all forms of communication and transaction.[33]

When creating the rules for determining customary law, it should be kept in mind that electronic media such as the

[27] Most of the current writings on custom and the Internet relate to addressing commercial concerns specifically. See, e.g., Polanski PP, *Common Practices in the Electronic Commerce and Their Legal Significance*, 18th Bled eConference eIntegration in Action, Bled, Slovenia, 6–8 June 2005, where the presenter outlined the Internet Law Merchant and elaborated on established practices relating to online commercial transactions. Similarly, the majority of the multilateral instruments created thus far relate to the same, such as the UNCITRAL instruments available at: http://www.uncitral.org/uncitral/en/uncitral_texts.html, and the WIPO Conventions available at: http://www.wipo.int/portal/index.html.en. See also, Polanski PP. and Robert B. Johnson. *Potential of Custom in Overcoming Legal Uncertainty in Global Electronic Commerce*, Journal of Information Technology Theory and Application, 2002, endorsing the concept of ''international commercial custom'' or ''e-custom''.

[28] E.g., the increasing use of electronic governance by the public sector and the rapid expansion of its use in social networking such as Facebook, Friendster, Myspace, Blogspots and other such portals.

[29] To meet the transnational needs of cross-border merchants in the Middle Ages, which also includes related concepts like usage and practices, or what has become popularly known as the ''*lex mercatoria*''.

[30] These are not in any order of merit and are not exhaustive.

[31] Timothy S. Wu, *Cyberspace Sovereignty? – The Internet and the International System*, 10 Harv. J. Law & Tec. 1997; 647: 666. ''The onus…is on the developing institutions of cyberspace to develop norms and rules that make sense and will gain broad acceptance internationally.'' The writer examines the liberal theory of international relations in relation to the Internet. *Ibid.* at 661–665.

[32] The concept of customary Internet norms is an expansion of the idea of individual empowerment and freedoms; for example, in the context of contract law, the parties have the freedom to determine their agreement and the autonomy to choose the applicable law to the contract. But in reality, mass behavior and even attitudes can be shaped and influenced by what and how technology creators choose to create. Hence, the dilemma for governments to, on the one hand, encourage creativity in technology creation, and on the other hand, weigh it against conflicting interests such as the protection of intellectual property rights and the maintenance of fair competition.

[33] Lynn N. Hughes, *Contracts, Custom, and Courts in Cyberspace*, 96 Nw U.L. Rev. 2002; 1599. ''Just let the people wheel, deal, cooperate, design, innovate, cross-fertilize, negotiate, tinker, and improve…Let us, in the law, have broad horizons. We, in the law, ought to articulate the continuities, patterns, and verities. We ought to remind people that law is prospective, neutral, and general.'' *Ibid.* at 1605.

Internet is both a *means* of transaction (electronic channel) and a *form* of transaction (digitized information, products and services). The stakeholders are also more diverse and complicated as it also includes the hybrid user-creators and intermediaries that hold one or more roles such as access and service providers, content hosts and suppliers and technology creators of both hardware and software applications.

2.5. *The third legal order of cyberspace*

The first legal order is based on geographically-defined and confined legal rules and system.[34] The logic of territorially defined law is based on several considerations including national sovereignty, consisting of notions of ''legitimacy'' and ''power''; and relevance and efficacy, due to the place of ''nationality'', the ''effects doctrine'' and the reality of enforcement. As transnational physical trade and cross-border transactions developed, a second legal order developed consisting of rules for transactions that involved different parties and action over several territories. This falls under the umbrella of Private International Law that addresses private relationships and transactions, and the Public International Law framework that largely covers the relationship between nations and international organizations. Now, with the ever expanding nature of cyberspace and the growth of its participants and the increasing sophistication of its users, at least in transactions within that environment, the earlier legal orders and their considerations, although not subverted, have to be revisited as to their effectiveness; and their rule-making devices must to some extent be deconstructed and redefined to adapt it to this context.[35] The Internet and WWW leads the advent of the digital age and heralds the rise of the ''third industrial revolution''.[36]

''The law of any given place must take into account the special characteristics of the space it regulates and the types of persons, places, and things found there.''[37] The Internet is a democratic and equalizing device that is eroding power from the bourgeois and dispersing it to the proletariat masses. In Section 3.4, I will introduce the concept of a global consciousness, the cyber citizen and the international community that is not defined by physical borders but rather are according to subject matter or type of transaction. There is a case for the erosion of sovereignty based upon jurisdictional lines,[38] to be translated into the creation of a different 'sovereign' which scope is defined sensibly by subject area or transactional type rather than arbitrarily by physical borders in the context of cyberspace.[39] The idea of a 'commons', which have been widely debated and even implemented in some sectors, is an outgrowth of this concept and understanding.[40]

It should be noted that some actions in the real world have very different values and consequences in the Internet, and there may be a difference in value and effects when we compare real and cyber transactions and physical and digital goods and services.[41] These will have to be taken in account when adapting the legal regime to accommodate the needs of cyberspace.

3. Public internet-ional law: the potential bridging of the gap through the organic development of custom as law

The idea of an autonomous cyberspace legal system surfaced in the 1990s.[42] Comparisons were already made then between

[34] In contrast, cyberspace weakens, if not destroys, physical location depending on the transaction in question, the nature of the parties, the subject matter, the form of communication and exchange medium. See David G. Post, *Symposium: Governing Cyberspace*, 43 Wayne L. Rev. 1996; 155: 159.

[35] E.g. it has both been explicitly and tacitly acknowledged by many countries' policies that territorial control only serves to stifle the growth of electronic transactions, hence the relaxation of regulatory controls (e.g. Singapore's officially touted 'light touch' approach to Internet regulation), the unrestricted transborder data exchange (e.g. the EU's policy on the free flow of information) and the removal of obstructions to optimal electronic transactions (the US' tax moratorium on online commercial transactions).

[36] One that is based upon technological advances in software, hardware and telecommunications. See, Beadford L. Smith, *The Third Industrial Revolution: Policymaking for the Internet*, 3 Colum. Sci. & Tech. L. Rev. 2002; 1), where the writer identified four non-exclusive solutions: market-based, technology, public-private and international.

[37] David R. Johnson and David Post, *Symposium: Surveying Law and Borders: Law and Borders – The Rise of Law in Cyberspace*, 48 Stan. L. Rev. 1996; 1367: 1401. The authors argue that cyberspace requires a system of rules distinct from the laws that regulate physical, geographically-defined territories due to fundamental differences between both dimensions that render the considerations that developed territorial laws and legal systems not unsuitable to cyberspace. Some analogy is drawn to the rules that have been developed to regulate the more porous cross-border transactions such as the *lex mercatoria*. *Ibid.* at 1389–1390.

[38] See Henry H. Perritt, Jr. *Cyberspace and State Sovereignty*, 3J. Int'l Leg. Stud. 1997; 155: 156–171.

[39] See Henry H. Perritt, Jr. *Cyberspace Self-Government: Town Hall Democracy or Rediscovered Royalism?*, 12 Berkeley Tech. L. J. 1997; 413: 437–463.

[40] If we again seek to make a comparison to International law, we can perhaps loosely analogize the concept of a 'commons' for Internet transactions to the purpose and objective behind the Schengen Accord in Europe for the free movement of persons and to erase the barriers to that by physical borders.

[41] E.g. the value and experience of receiving a real card or gift is different from receiving their virtual equivalent although they may both cost money. In relation to intellectual property, the monetary value, aesthetic quality and utility of paintings, books, photos, movies and music all differ both vis-à-vis one another as well to their digital equivalent based partly on the mode of communication or transfer and on the nature of their format, which in turn also has an impact on the behavior and attitudes of its users.

[42] See David R. Johnson and David Post. *Law and Borders – The Rise of Law in Cyberspace, Stanford Law Review*, 1996; 48: 1367–1402 and Hardy IT. *The Proper Legal Regime for Cyberspace*, University of Pittsburgh Law Review, 1994; 55: 993–1054.

transnational electronic commercial transactions and the *law merchant*, and between Internet practices and custom.[43] For example, in relation to the latter, the word 'netiquette' became popularly used to describe informal customs or practices and usages emergent on the Internet although it is often used without legal connotation.[44] Analogies were made between the evolution of Internet protocols and practices to the development of customary law largely in the context of commercial transactions.

It is the position in this paper that lessons can be drawn from the development of Customary International Law (CIL) in order to build a robust and useful source of law not just for electronic commerce but for all areas of law, whether commercial or non-commercial and public or private, through a similar organic model of law creation through detecting customary usage. CIL itself developed customary laws for beyond the commercial context.

3.1. *Understanding public international law and custom*

In Section 3, I have explained how the rules of Customary International Law (CIL) as it exists under Public International Law (PIL) is a useful source of law tool to be adapted and transposed for use in the digital international realm. For the purpose of this paper, it will be called 'Customary Internet-ional Law' or Internet law custom. In order for it to work, we first have to understand the position of CIL under PIL, the source of law rule, how it operates, its relationship with other sources of law as well as other CIL concepts. For instance, what exactly determines that a customary practice amounts to a legal norm, are there different categories of customary law, what is the relationship between treaty law and customary law and what are the rules that apply to render CIL consistent with other sources of law such as treaty law, which is incidentally also relevant to lawmaking for the cyber world. It will also be shown how part of PIL, that is treaty law, is already used to create and standardize law relating to electronic transactions.

Customary law and rules in all its permutations will also be canvassed to show its pervasiveness and importance as a tool for social ordering. We will first revisit the history and foundation for CIL as law under PIL as well as the role of custom in other contexts, in particular that which facilitates transnational trade as well as in various social, national and regional traditions. Custom and its current relationship with the Internet will then be examined. Finally, useful comparisons will be made between what CIL is to global relations as Customary Internet-ional Law will be to cyber world relations; and between national and international Cyberlaw, legal systems and environment, which will be taken into consideration when formulating the most appropriate modified set of rules to determine the existence of customary legal norms.[45]

3.1.1. *International law*

''International Law'' has varying definitions in dictionaries, but generally it is described as a body of rules that applies globally rather than domestically and that involves the creation of rules on an international stage between sovereign states and legally recognized international organizations or actors, that may apply to states, organizations and individuals.[46] The term is used in two legal disciplines. It is conventionally divided into Public International Law and Private International Law.[47] They are relatively new and still developing areas of law and the former, which originally governed the conduct between nations, have expanded its jurisdictional scope to conducting the relationship between states and with organizations and even individuals.

1. ''Public International Law'' or the ''law of nations'' and ''agreements among nations''[48] includes the institutions and rules that emerge from the United Nations (UN), itself a creation of PIL. There are three recognized core sources of international law, which are law by treaty or convention, customary international law, and *jus cogens* (or universal law). The first two sources are by nature of their creation consensual in that a sovereign state can opt out of their applicability to it by simply refusing to sign it in the case of treaties,[49] or by objecting to it in the case of CIL.[50]

[43] See, *ibid*. See also, Henry H. Perritt, Jr., *Cyberspace Self-Government: Town Hall Democracy Or Rediscovered Royalism?*, Berkeley Technology Law Journal, 1997; 12: 413–482; Branscomb, AW. *Anonymity, Autonomy, And Accountability: Challenges To The First Amendment In Cyberspaces*, Yale Law Journal1995; 104: 1639–1679; Burnstein MR. *Conflicts on the Net: Choice of Law in Transnational Cyberspace*, Vanderbilt Journal of Transnational Law, 1996; 29: 75; Boele-Woelki K, Kessedijan C, Burnstein, MR. A Global Network in a Compartmentalised Legal Environment, Internet. Which Court Decides? Which Law Applies? (The Hague, London, Boston, 1998); Reidenberg JR. *Lex Informatica: The Formulation of Information Technology Rules Through Information Technology*, Texas Law Review; 1998–2000; 76: 3; Michaels R. *The Re-Statement of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism*, Duke Law School Working Paper Series (Paper 21) (2005) and Trakman LE. *From the Medieval Law Merchant to E-Merchant Law*, University of Toronto Law Review 2003; LIII: 3.

[44] A portmanteau of ''network'' and ''etiquette'', it generally relates to a set of social conventions or protocol that facilitates orderly interaction over electronic networks, particularly the Internet.

[45] This will be done in Part 2 of the paper.

[46] It is defined under the Encyclopaedia Britannica as: ''The body of legal rules, norms, and standards that apply between sovereign states and other entities that are legally recognized as international actors.'' It attributed the term as having been invented by English philosopher Jeremy Bentham (1748–1832). However, this definition more accurately describes only one of three legal disciplines that use the term. See the Encyclopaedia Britannica at: http://www.britannica.com/EBchecked/topic/291011/international-law.

[47] Henry H. Perritt, Jr. *Symposium on the Internet and Legal Theory: The Internet is Changing International Law*, 73 Chi-Kent L. Rev. 1998; 997: 999–1000.

[48] *Jus Gentium* (the common law of nations) and *Jus Inter Gentes* (the body of treaty law), respectively.

[49] But in many cases, politio-economic pressures would provide the impetus to do so, such as for countries required to subscribe to the suite of agreements in order to join the World Trade Organisation (WTO).

[50] Cf. Supranational law such as the European Union (EU) and its legal system and laws. See the European Union website at: http://europa.eu/.

2. ''Private International Law'' or ''conflict of laws'' deals with jurisdictional issues such as where a dispute should be adjudicated, whether in the courts of a country or in an alternative forum like arbitration. It also deals with what laws or rules apply to a case, and the recognition and enforcement of a verdict or decision in other countries. In its broader sense, it refers also to legal norms that have extra-territorial character and applicability and has a role in harmonizing laws through institutions and conventions.

3.1.2. *Public international law*

Article 38 of the Statute of the International Court of Justice (ICJS) enunciates the primary and secondary sources of PIL in the context of the court's jurisdiction. It states that:

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 5, 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 *en aequo et bono*, if the parties agree thereto.[51]

International conventions or treaties are agreements or understandings among sovereign states and are similar in structure and content to contracts. They set out the rights and responsibilities of its signatories and also the mechanisms for subsequent rule-making, dispute adjudication and enforcement. They can also set up institutions to implement their objectives. The United Nations Charter (UNC) is an example of a global treaty as well as an organization. Conventions also include regional legal instruments and institutions, such as the European Union (EU) and its suite of legal instruments, and understandings between two or more countries in the form of bilateral or multilateral agreements. Treaty law can be analogized to contract and statutory law which are expressed and subject to interpretation. Treaties are by their nature negotiated and acceded to only by states. Some treaties have to be acceded to *in toto* although for many it is possible to make a reservation or caveat to some of its provisions when accepting a treaty.[52] It also serves a useful function in relation to electronic transactions although, unlike customary law, it will be impracticable to expand the concept to allow for 'treaties' among individuals, not in the least due to insurmountable problems of organizing agreement and enforcement and to fulfill the reciprocity rule. However, standard term contracts or licenses that are gaining acceptance, usage and popularity can fulfill some of the same purposes and have similar effects for individuals as treaties do for states.

On the other hand, CIL is developed through the conduct and intention of states but are identified by decision-making bodies, such as the International Court of Justice (ICJ), and through other subsidiary means for determining norms such as ''the teachings of the most highly qualified publicists''. To the extent that it is 'judge-made' through the identification of customary norms and practices,[53] it can be compared to common law as both are amorphous and evolutionary in nature, and are not legislated or expressed in the form of a document. As noted earlier, similar to treaties, CIL is consensual and states can exempt themselves from a CIL norm by simply manifesting an intention not to be bound by it as a persistent objector. While CIL ordinarily addresses relations only between states, there are some judicial and academic arguments for the possibility that persons may enjoy rights created by CIL.

It is to be noted that there are still disagreements over the source and legitimacy of international law; that is, whether it is based only on the legislative acts of sovereign states or that it is more generally based on the consent of the world community as a whole or on natural law. The latter proposition is interesting when I present the concept of the global consciousness in law-making, and the proposal for the creation of Customary Internet-ional law by *all* stakeholders *including* individuals, giving them ownership of the cyber world.

3.1.3. *Customary international law*

As we have seen, CIL it is a primary source of PIL, together with positive law such as that set out in treaties and conventions and with general principles of law. Under Article 38(1)(b) of the ICJS, custom is highly ranked as a source of PIL. CIL consists of rules of law derived from consistent state conduct that follow from the belief that they are required to abide by them. In other words, it is the body of legal norms developed through customary exchanges between sovereign nations over time. It obtains legitimacy from reinforcement of both practices and acceptance.

CIL is created by two essential elements:[54] State Practice, which is the widespread persistency and repetition of the

[51] Article 38(1)(c) and (d) are authoritative evidence of the state of international law.

[52] See Article 2(1)(d) of the Vienna Convention on the Law of Treaties.

[53] E.g. custom is common under contract and tort law as both a measure and standard (e.g. to determine ''reasonableness'' and the ''officious bystander test'' or the ''reasonable man test''), and as a determinant or rule (e.g. to imply terms into a contract through custom, usage or prior dealings). Custom is used in tort law to help determine negligence. Following or disregarding a custom is not determinative of negligence, but instead is an indication of possible best practices or alternatives to a particular action.

[54] Custom consists of two elements; the objective and the subjective element. The objective element is one determined by the express manifestation of physical action and habitual practice, which can be supplemented by expressions of intent, statements, declarations and other expressions of objectives. This segues into the subjective element that is more nebulous but no less important, which is the attitude of the parties towards that behavior and whether there is any real acceptance of a practice as a norm which should be adhered to. This will exclude incidents where it can be proven that acts arose out of herd instinct or the lack of choice such as through coercion, duress and the like.

conduct in question by states over time representing almost universal consensus; and *Opinio Juris*, which refers to the fact that the conduct is done out of a sense of obligation. These legal obligations enable states to carry out their affairs consistently with one another in accordance with well-established and accepted conduct. CIL is fluid and is subject to change over time depending on the adoption or acceptance and rejection or abandonment by states of new and existing norms, respectively. Some principles of customary law can achieve the force of peremptory norms that obtain their strength from universal acceptance and that cannot be violated or altered except by a norm of comparable strength. Sometimes CIL gains further substantiation by subsequent codification by treaties or by popular acknowledgement in treatises.

There is an overlap between PIL and Internet Law as will be shown in a comparison below both in context as well as in the commonality of problems – and hence it stands to reason that the applicability and solutions of one can be transplanted to the other, albeit with some adaptive changes. In the process of adaptation, it should also be noted that other concepts relating to CIL can be useful to the digital realm, hence the focus on CIL rather than local or regional custom or the trade-limited *lex mercatoria* as a basis for adaptation. These include the principle of *pacta sunt servanda*,[55] hierarchy of norms, *jus cogens*,[56] *ejusdem generis*, and so on. Other features of CIL, such as the persistent objector doctrine may have to be removed or take on a different role as they may be unsuitable for customary Internet law-making unlike the case for PIL.[57] The benefits of clarity and harmonization strongly support a deviation from such a rule.

3.1.4. *Public internet-ional law*

The transnational or international nature of the digital world have already been canvassed, hence the need for a similar international framework of law-making. There are already institutional changes to deal with electronic transactions such as the Internet Corporation for Assigned Names and Numbers (ICANN)[58] and domestic institutions under the domain name regime.[59] PIL is already a source of inspiration for Internet transactions in this regard. For instance, elements of PIL have been identified as useful in the field of Internet governance.[60] There is no reason why there cannot be additional law-making mechanisms beyond treaty and model laws. As noted by one writer, ''there are structural similarities between the milieus of international law and of the Internet: neither is completely hierarchical and both must deal with ''commons'' problems.''[61] These differences and what they may mean for the nature of developing Customary Internet-ional Law will be analyzed later based on the state of Internet Law, the challenges it faces and what type of characteristics it should have.

Internet Law should not be made another component of International law such as Environmental Law, the Law of the Sea or Space Law,[62] which have all developed as technological reach and control progressed through the ages. Customary Internet-ional Law should also not, as some has suggested, be treated as that part of PIL applicable to the high seas, Antarctica, and outer space.[63] The only similarity one can draw between the sea, the South Pole and outer space to the digital realm is the lack of borders and means of control, challenges to regulation and their differences to the real world. On the other hand, there is a 'population' or community in cyberspace and many daily transactions of diverse types that have effects beyond that realm. Cyberspace is not an entirely independent international space or concern that is beyond national regulation.[64]

One main argument against such a treatment is that Internet Law is not the prerogative of States and does not only involve macro or state-to-state relations. It does not fall under the definition of PIL, which establishes the framework and criteria for identifying states as the principal actors in the international legal system. An important feature of PIL is also the foundation of control, jurisdiction, territoriality and the core recognition of state sovereignty. Ironically, information technology have eroded sovereignty at the state-to-citizen

[55] The principle is based on good faith and whether relating to private contracts or international agreements it refers to the correct behavior in commercial practices that are expected of parties to an obligation the non-fulfillment of which is breach of their pact. The basis for the *bona fide* requirement for agreements is that it is essential to the efficacy of the system. Under Internet law, for example, autonomy to contract, functional equivalency, technological neutrality, and similar concepts can perhaps be related back to this principle.

[56] *Jus Cogens* is described by the Vienna Convention on the Law of Treaties as a ''norm, accepted and recognized by the international community of States as a whole, from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'' See Article 53 of the 1969 Vienna Convention on the Law of Treaties.

[57] Customary practices need not be the product of full consensus, and there is some allowance for minor inconsistencies although the greater the volume of inconsistencies the weaker the case for recognition of a customary norm. Similarly customary acceptance should not be eliminated due to some objections. Although in PIL the persistent objector may be exempted from such practices, this rule may not be suitable for our purposes.

[58] See the Internet Corporation for Assigned Names and Numbers (ICANN) website at: http://www.icann.org/.

[59] Every country coded top level domain name (ccTLD) is administered by a national agency. For example, .uk, .au and .sg. See the Internet Assigned Numbers Authority (IANA) website for more details at: http://www.iana.org/domains/root/.

[60] Kurbalija, *Internet Governance and International Law, Reforming Internet Governance: perspectives from WGIG*, 110–115, available at: http://www.wgig.org/docs/book/JK.html and www.wgig.org/docs/book/Jovan_Kurbalija.pdf.

[61] Charles D. Siegal, *Rule Formation in Non-Hierarchical Systems*, 16 Temp. Envt'l. L. & Tech. J. 1998; 173: 177.

[62] Space Law, for one, is a classic example of an area of law that developed through modern technology as we know it. See Colin B. Picker, *A View from 40,000 Feet: International Law and the Invisible Hand of Technology*, 21 Cardozo L. Rev. 2001; 149: 175–178.

[63] See Darrel C. Menthe, *Jurisdiction in Cyberspace: A Theory of International Spaces*, 4 Mich. Telecomm. & Tech. L. Rev. 1998; 69: 71, in relation to prescriptive jurisdiction. *Contra*. Jack L. Goldsmith, *Against Cyberanarchy*, 65 Univ. Chi. L. Rev. 1998; 1199: 1250.

[64] And there are challenges that are peculiar to this realm such as in terms of control (jurisdiction) and investigation (identification).

level,[65] both intangibly, such as by undermining uniqueness or distinctions in culture as geographically defined, and tangibly, such as by the erosion of state control over effects felt within jurisdiction by actions committed elsewhere. The Internet and other electronic forms of communication and platforms for transactions breed homogeneity in human culture such as to create an 'Internet culture'.

As an aside, it is to be noted that technology has also shaped and presented challenges to PIL and provided an Indelible impact on the way that PIL develops or devolves.[66] Some of these challenges that technology poses are specific to PIL but some are common problems that will be faced in Internet law-making, and hence should likewise be taken into consideration when adopting and while adapting PIL source of law rules, specifically those relating to the creation and identification of customary law, for the Internet.

The following are some not insurmountable challenges the process and development of such a body of Customary Internet-ional Law will face:

1. Challenge of relevance, which requires as its solution a fast paced process of identification through inter-disciplinary and empirical research,[67] and technological neutrality. In the past and particularly in relation to CIL, it was the norm for customary law to be created over a long period of time;[68] this mindset that a long period of gestation is imperative is unsuitable for the realization of Internet custom.[69]
2. Challenge posed by powerful new technology industries and players, as parties that can strongly influence, modify and even manipulate behavior, and how to deal with them.
3. Challenge of uneven powers of influence due to uneven distribution of computers and penetration of electronic communications infrastructure globally.[70]
4. Challenge of unpredictability, in other words, the difficulty in foreseeing the direction and the development of new technology.

3.1.4.1. *Treaty as a source of Internet law*. There are currently two main methods to develop commonality in written laws across nations: The Model Law approach whereby countries incorporate and may modify the provisions before adopting it into national legislation and the Convention approach whereby countries may signify their intention to take on the international law obligations stated in a treaty by rendering it law within the country.[71]

The law of treaties and conventions has already been used to develop mostly framework laws for the Internet affirming what are largely uncontroversial and accepted practices and principles. Not surprisingly, the laws are mainly commercial or related thereto.[72] In relation to online contracting, the United Nations Commission on International Trade Law (UNCITRAL)[73] Model Laws on Electronic Commerce and Signatures,[74] and the United Nations Convention on the Use of Electronic Communications for International Contracting

[65] Also, at the state-to-state level and the state economic level. See John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations*, 36–42 (2nd ed., 1997).

[66] See Colin B. Picker, *A View from 40,000 Feet: International Law and the Invisible Hand of Technology*, 21 Cardozo L. Rev. 149 (2001), tracing the historical impact of technology on the development of PIL. "Technology changes international law in a number of ways, by forcing states to either: (1) agree to modify their behavior (usually through the device of a treaty); (2) abandon previously agreed behavior (abandonment of treaties); (3) abandon the effort to agree on new behavior (abandonment of treaty formation); (4) engage in new practices that eventually are accepted by the global community (creating customary international law); (5) abandon previously widely accepted customs (abandonment of customary international law); or (6) accept peremptory obligations (creating *jus cogens*). Simply put, technological innovation either results in the creation, modification, or destruction of international law, or the derailment of the creation of new international law." *Ibid*. at 156. See also, Jonathan I. Charney, *Technology and International Negotiations*, 76 Am. J. Int'l L. 1982; 78; Thomas Cottier, *The Impact of New Technologies on Multilateral Trade Regulation and Governance*, 72 Chi.-Kent L. Rev. 1996; 415; Joseph W. Dellapenna, *Law in a Shrinking World: The Interaction of Science and Technology with International Law*, 88 Ky. L.J. 1999–2000; 809; John K. Gamble, *International Law and the Information Age*, 17 Mich. J. Int'l L. 1996; 747; John King Gamble & Charlotte Ku, *International Law – New Actors and New Technologies: Center Stage for NGOS?*, 3 Law & Pol'y Int'l Bus. 2000; 221: 249–251; C. Wilfred Jenks, *The New Science and the Law of Nations*, 17 Int'l & Comp. L.Q. 1968; 327; Henry H. Perritt, Jr. *The Internet is Changing International Law*, 73 Chi.-Kent L. Rev. 1998; 997; Louis B. Sohn, *The Impact of Technological Changes on International Law*, 30 Wash. & Lee L. Rev. 1973; 1; Goldie LFE. *Science, Policy, and the Developing Frontiers of International Law*, 4 Akron L. Rev. 1971; 114 and *Symposium, The Impact of Science and Technology on International Law*, 55 Cal. L. Rev. 1967; 419.

[67] Difficulty of identification can have the same practical effect as a long gestation process for the formation of norms. Norms that are formed late has the same effect as if it were formed early but identified late, which poses a challenge for the inter-disciplinary research that institutions can play a part in.

[68] See Henkin, *International Law: Politics and Values* 1995; 8: 29 and David J. Bederman, *International Law Frameworks* 2001; 3:14–16. Customary international law is formed by the slow acceptance by states of obligations to behave in a specific manner. See Henkin, *supra*. at 29; and Bederman I, *supra*. at 14–16.

[69] E.g. technology-based international law is generally created over a shorter time period that that normally taken for other international law regimes.

[70] However, it is to be noted that this problem is not endemic to cyberspace.

[71] They can do so in several ways such as becoming a signatory state or through accession and ratification. Although there is not as much flexibility in modifications, reservations are often allowed as long as they do not go against the spirit and objective of the treaty. See the Vienna Convention on the Law of Treaties on the rules relating to treaty creation and application to states, available at: http://web.archive.org/web/20050208040137/http://www.un.org/law/ilc/texts/treatfra.htm.

[72] Another example of an area of law that has also seen great changes in this context is the field of Intellectual Property. In particular, copyright law has been greatly affected and there have been many amendments to the copyright treaties of the World Intellectual Property Organization (WIPO) to deal with advances in technology and their effects; so much so that copyright law issues are often dealt with separately, such as in the case of immunity provisions for intermediaries, provisions relating to Digital Rights Management (DRM) and Anti-Circumvention Measures (ACM) as well as exceptions to copyright protections for Internet operability.

[73] See the UNCITRAL website at: http://www.uncitral.org/.

[74] See the MLEC and MLES texts at: http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce.html.

(CUECIC)[75] have been developed by UNCITRAL to provide more stability to Internet commerce and contracting although they are clearly not enough to deal with all the issues relating to the electronic medium and format,[76] which are operationally different from traditional methods of communication and forms of products and services.

More relevant and unifying work has been done in the European Union (EU) including the EU Directive on Electronic Commerce,[77] but these are rules of regional practice and may not truly reflect international consensus. They are also not comprehensive enough to address existing ambiguities. Gaps need to be filled, where the technical features of existing business models have not already done so, for example, to resolve the uncertainties relating to offer and acceptance in relation to the various modern ways of communication and the incorporation of terms with respect to browse wrap and click wrap agreements.[78]

The needs and wants of the Internet generation are very different and the solely top-down only approach to law-making is not suited to it. Moreover, the greater emphasis in PIL towards more reliance on progressive norm formation rather than codification is not reflective of the nature of online channels and transactions. Conventions also commonly suffer the 'lowest common denominator effect' which is a natural consequence of the need for rules to reflect as close as possible international consensus so as to engender wider appeal for subscription and harmonization of laws. Furthermore, there is a lack of general awareness of PIL amongst the general international community that should not be replicated in the case of Internet transactional norms; and the primary and largest volume of users that consists mainly of individuals and other entities should be fully aware of, exposed to and educated on Internet norms. For all these reasons and in spite of them, treaty law is still an important component of Internet law-making, but is insufficient in itself to tackle all the existing and future uncertainties of digital transactions.[79]

3.1.4.2. *Custom as a source of Internet law*. The law of the digital age has been identified by some academics as the third legal order; the first and second of which are domestic and international law, respectively.[80] With this distinction also comes the obvious need for the development of a suitable legal regime to regulate activities in the new cyberspace dimension and through its medium, and this requires comprehensiveness in its sources of law. Although treaty law and even existing private laws such as contract law have already been developed under the first two legal orders to do so, they are far from sufficient. It is the proposal in this part that custom is a natural alternative to more deliberate forms of law-making and is an important supplement to treaty law and private self-help measures.

3.1.4.3. *Custom and usage generally*. Custom is indisputably a rich source of law or regulation throughout history within tribes, societies, countries and even regions.[81] Custom is a common source of law cutting across legal systems and cultures, which evidences it to be an acceptable source of law worldwide. It stems from established patterns of behavior that can be objectively verified within a particular cultural, social or economic setting as the case may be. It is given legal legitimacy through the development of a body of precedents over time and it generally exists where two ingredients are met: A well-established and identifiable practice or habit is observed and it has gained widespread acceptance and is observed and expected as a right or obligation by the parties in the relevant community that are affected by it. In this sense, custom is not so much the actual creation of norms as it is the realisation that certain norms are naturally occurring through *behavior* or practices and *attitudes* or acceptance.

Custom as established forms of behavior within the socio-cultural order that is observed with the deference of law has been traditionally applied to many different areas of life such as regulating family relations (for example, customary marriages), social standards (such as the standard of care and the reasonable man test under the tort of negligence) and economic transactions (see below). It can be as good as other forms of law or as a secondary source of law or even manifest as a standard or test in the application or interpretation of existing legal principles and rules. Under common law, custom is enforceable when it displays the following characteristics that are often ascribed to it: Legal, notorious, ancient, immemorial, continuous, reasonable, certain, universal and obligatory. It is ''a creature of its history''.[82] For

[75] See the CUECIC text at: http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html.

[76] E.g., the treatment of digital goods and services is still unresolved, either not addressed or not included, under the Vienna Sale Convention and many domestic legislation relating to the sale of goods, supply of services and consumer protection. See Sonja Golser, *Contracting Via Internet: A Comparison Between the Law of Singapore, Austria and the European Union*, No. 41, Asia Business Law Review 14, 16–18 (July 2003).

[77] Directive 2000/31/EC (Official Journal of the European Communities 2000), available at: http://ec.europa.eu/internal_market/e-commerce/directive_en.htm.

[78] E.g., note the inconsistent lines of U.S. decisions relating to the inclusion of terms in click and browse wrap contracts and the dearth of such law in other jurisdictions.

[79] In the meantime, more specific rights and obligations are still left for the parties to negotiate and define in their own contracts. It is thus lacking in the legal facilitative role of contract law.

[80] Lando has listed several ''elements'' rather than ''sources'' of the *lex mercatoria* as follows: Public international law, uniform laws, the general principles of law, the rules of international organizations, customs and usages, standard form contracts and the reporting of arbitral awards. See Ole Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 Int'l & Comp. L.Q. 1985; 747: 748–752. See also, Henry H. Perritt, Jr. *Cyberspace and State Sovereignty*, 3J. Int'l Legal Stud. 1997; 155: 180–181, on the ''New World Order''.

[81] See generally, P.P. Polanski, *Customary Law of the Internet: In the Search for a Supranational Cyberspace Law*, Information Technology & Law Series (T.M.C. Asser Press, 2007) at Part II ''Custom: Five: The Role of Custom'', where custom in all its form throughout history as a law-making or quasi-law-making instrument in different countries, societies and contexts are examined by the author in great detail.

[82] Joseph H. Levie, *Trade Usage and Custom Under the Common Law and the Uniform Commercial Code*, 40 N.Y.U. L. Rev. 1101, 1103 (1965).

example, in contract law, custom reinforces the terms of a contract as an instrument for implying terms, and the objective reasonableness test, officious bystander test and business efficacy test are all rooted in determining whether a certain act, behavior or practice is common and expected. These should feature prominently in the development of customary norms in any field, including for all forms of electronic transactions.

Finally, its pedigree provides the same level of legitimacy for Internet-ional law as it has gained for International Law and in the regional, national and tribal contexts. Moreover, custom can also be crystallized into tangible form such as written law through codification, as was the case of civil law that developed out of the customs (*coutumes*) of the Middle Ages,[83] and treatises that are a rich and recognised resource for law.

3.1.4.4. Custom and usage in trade. Custom is a rich and established source of legal rules in several legal fields, particularly in relation to economic and business practices. Custom-based mercantile law relating to commercial transactions is the most recognizable, widespread and global example of the use of custom to substantiate common practices.[84] During the middle ages, itinerant merchants traveled across Europe to trade at fairs, markets, and sea ports. In the process, they needed some common ground rules to create a stable trading environment and to overcome the cultural, social, legal and political differences between them. These rules were not artificially or instantly created but evolved from custom and usage or practices into a distinct body of law. This came to be known as the *lex mercatoria*.[85] It was independent of local sovereign rules and was applicable across jurisdictions. It also provided a common understanding of, and improved confidence and predictability in, such transactions and thus helped maintain commercial relationships. Most of these rules have since been recognized and acknowledged by law-makers, such as through legislation and in judicial decisions and more recently, arbitral decisions.[86]

We see many similarities when we compare the custom that developed into the law merchant to the idea of Internet custom.[87] They evolved out of necessity, practical functionality and for transactional efficacy, through practices that became commonly accepted or expected, at a period of time when the transactions in question was at its renaissance, if

[83] These were expressions of law that developed in particular communities, which were then identified, collated and written down by jurists. Such customs acquired the force of law when they became the undisputed rule upon which rights and obligations were regulated between members of the community in question. Customary law is generally a supplementary source of law that arose out of the lacuna in traditional sources of law such as codes in civil law countries and statutes, regulations and judge-made law in common law countries.

[84] On *lex mercatoria* generally, see Abul F.M. Maniruzzaman, *The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?*, 14 Am. U. Int'l L. Rev. 1999; 657: 657–692, where the author critically analyses the different prominent juristic views relating to and issues concerning the *lex mercatoria*. On the history and evolution of the *lex mercatoria*, see Leon E. Trakman, *The Law Merchant: The Evolution of Commercial Law* 1983; 11–12 and Bruce L. Benson, *The Spontaneous Evolution of Commercial Law*, 55 Southern Econ. J. 1989; 644: 646–647. See also, Harold J. Berman, Colin Kaufman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 19 Harv. Int'l L.J. 1978; 221: 274–277.

[85] See, Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 Tex. L. Rev. 1998; 553, where the writer coined the term "*lex informatica*" specifically in relation to the law and policy on electronic forms of information. Cyberspace transactions are more complex and multi-dimensional and it has become a platform for all manners of communication beyond the administrative and business context to the social. See also, Antonis Patrikios, *Resolution of Cross-Border E-Business Disputes by Arbitration Tribunals on the Basis of Transnational Substantive Rules of Law and E-Business Usages: The Emergence of the Lex Informatica*, 38 U. Tol. L. Rev. 2006; 271.

[86] Modern commercial transactions conform to well-established mercantile customs and it is now required of international traders in the relevant trade to be familiar with such customary principles as the International Commercial Terms (INCOTERMS) and the Uniform Customs and Practice for Documentary Credits, which have been codified and published by the International Chamber of Commerce (ICC). It is of interest to note that in relation to electronic contracting, the ICC has produced "eTerms 2004" to promote the use of new technologies for business practices. These terms could mutually reinforce customary principles of Internet-based commercial practices. As noted elsewhere in this paper, Internet customs can be regarded as a modern extension of *lex mercatoria* or as another incarnation of the law merchant in the context of commercial transactions. There are many core similarities between the various 'waves' of commerce: Early trade, international commerce and the electronic commerce.

[87] "Perhaps the most apt analogy to the rise of a separate law of Cyberspace is the origin of the Law Merchant – a distinct set of rules that developed with the new, rapid boundary-crossing trade of the Middle Ages. Merchants could not resolve their disputes by taking them to the local noble, whose established feudal law mainly concerned land claims. Nor could the local lord easily establish meaningful rules for a sphere of activity that he barely understood and that was executed in locations beyond his control. The result of this jurisdictional confusion was the development of a new legal system – Lex Mercatoria. The people who cared most about and best understood their new creation formed and championed this new law, which did not destroy or replace existing law regarding more territorially based transactions (e.g., transferring land ownership). Arguably, exactly the same type of phenomenon is developing in Cyberspace right now." David R. Johnson and David Post, *Symposium: Surveying Law and Borders: Law And Borders – The Rise of Law in Cyberspace*, 48 Stan. L. Rev. 1367, 1389–1390 (1996). "The parallels [between the development of the Law Merchant and] cyberspace are strong. Many people interact frequently over networks, but not always with the same people each time so that advance contractual relations are not always practical. Commercial transactions will more and more take place in cyberspace, and more and more those transactions will cross national boundaries and implicate different bodies of law. Speedy resolution of disputes will be as desirable as it was in the Middle Ages! The means of an informal court system are in place in the form of on-line discussion groups and electronic mail. A "Law Cyberspace" co-existing with existing laws would be an eminently practical and efficient way of handling commerce in the networked world." I. Trotter Hardy, *The Proper Legal Regime for "Cyberspace"*, 55 U. Pitt. L. Rev. 993, 1021 (1994), where the author argues that the electronic community should apply the *lex mercatoria* system.

not its infancy, and they also have transnational cross-boundary and participatory diversity that require the creation of a common understanding in order for a 'meeting of minds' between parties to any form of transaction or intercourse despite their geographical and socio-cultural differences.[88]

In fact, there is a more compelling case for a 'new law merchant' for the Internet than the 'old law merchant' for physical trade. This is due to the fact that there are even more differences and uncertainties that have to be surmounted in order for electronic transactions and digital goods and services to work efficiently. Specifically, there are entirely new and more complex forms of proceedings, platforms and participants that makes the case even more compelling for new forms of regulation in relation to virtual transactions and digital goods and services.[89]

In the context of trade on which the *lex mercatoria* was specifically based, an analogy have been drawn between transnational trading practices and behaviour to the rapidly expanding electronic market to the extent that some have coined the term *lex informatica* to represent its equivalent in the electronic context.[90] However, custom has a usefulness that goes beyond the commercial and the trend should be to expand the use of custom beyond the business context while not isolating or entirely removing cyberspace laws and dispute resolution away from the existing real world law-making and dispute resolution regimes.

Economic analysis provides that decentralized market processes are comparatively more efficient than centralized processes. In this respect, customary law, which is created voluntarily and spontaneously, is a highly efficient process for creating rules for international electronic transactions. Historically, traditions of international economic law can be traced back to the law merchant and sets of principles used to resolve conflicts involving jurisdictions.[91] Presently, the international community is challenged by similar problems and ambiguities beyond the commercial that must be resolved.[92] Because customary international law permits states to cooperate in the absence of formal written agreements, it also has the advantage of minimizing transactional costs associated with negotiating treaties.

3.1.5. *Other possible sources of Internet law*

There are other possible sources of Internet law. Although they do not feature along the main theme of this paper, they are briefly canvassed here for the sake of comprehensiveness. It should be noted that these can also be complementary rather than competing sources of Internet law.

3.1.5.1. Contract law and licensing standardization. Some writers considered the possible use of a 'network of contracts' to regulate the Internet. For example, Fisher proposed a regime of contractual self-ordering by content creators to govern digital content on the Internet, for instance in the case of copyright law, replacing the statutory copyright regime with contract-based entitlements.[93] In fact this is already happening but to a limited extent and within the confines of existing laws; for instance, this flexibility of contracts is in fact perpetuated by licenses such as those promulgated by the Creative Commons movement. However, this approach can

[88] It may be useful to examine specific examples of how custom and usage developed such as in the context of shipping law, and also how standard terms and common understandings can facilitate such transactions, for example, the INCOTERMS. See the ICC website at: http://www.iccwbo.org/incoterms/id3045/index.html.

[89] Stephen E. Sachs, *From St. Ives to Cyberspace: The Modern Distortion of the Medieval 'Law Merchant'*, 21 Am. U. Int'l L. Rev. 685 (2006). ''What similarities existed in the regulation of commerce may be better explained as the convergent evolution of local practices, rather than the conscious expansion across Europe of a distinct body of law. The memory of medieval commerce has been distorted considerably in the seven centuries since Gerard lost his wine; the evidence from St. Ives fails to support the view that the merchants of the Middle Ages ''were subject to no legal order but their own.''' *Ibid.* at 695.

[90] Antonis Patrikios, *Resolution of Cross-Border E-Business Disputes by Arbitration Tribunals on the Basis of Transnational Substantive Rules of Law and E-Business Usages: The Emergence of the Lex* Informatica, 38 U. Tol. L. Rev. 271, 274 & 277 (2006). In this article, the term ''*lex informatica*'' encapsulates an expansive concept that has a mixed substantive and methodological content. It covers all sector-specific variations and encompasses both the body of transnational substantive rules of e-business law and usages, as well as the method of their application for the resolution of e-disputes by arbitration. ''[It] is the body of transnational rules of law and trade usages applicable to cross-border e-business transactions. These rules and usages are created by and for the participants in cross-border e-business and applied by online arbitrators to settle disputes on the basis of the parties' intentions and functional comparative law analysis. In addition, arbitrators take into account the current state of play in e-business. Lex informatica is defined by its sources. It is the product of private decentralized law-making emerging mainly from the discourses of actors in cross-border e-business transactions and information technology networks. However, it is ''not from the political centers of nation-states and international institutions.'' Lex informatica is an expansive concept encompassing several specific variations depending on the e-business sector it is derived from and to which it applies.

[91] Joel R. Paul, *Interdisciplinary Approaches to International Economic Law: The New Movements in International Economic Law,* 10 Am. U.J. Int'l L. & Pol'y 607, 609–610 (1995).

[92] E.g., customary international law is also an efficient means for responding to cybercrime. See also, Jason A. Cody, *Derailing the Digitally Depraved: An International Law & Economics Approach to Combating Cybercrime & Cyberterrorism*, 11 MSU-DCL J. Int'l L. 231, 246–248 (2002). The symmetrical cybercrime interests leading to the optimal and most efficient level of cybercrime custom in international law would require perfect incentive alignment and the author describes three methods of doing so: Role reversability, reciprocity constraints, and articulation. *Ibid.* at 249–258. However, this article is confined to the state-centric approach of PIL.

[93] William W. Fisher III, *Property and Contract on the Internet*, 73 Chi.-Kent L. Rev. 1998; 1203 and James Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* 144 (1996). See also, Niva Elkin-Koren, *Copyrights in Cyberspace – Rights Without Laws?*, 73 Chi.-Kent L. Rev. 1998; 1155 and Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of ''Rights Management''*, 97 Mich. L. Rev. 1998; 462: 480–515.

give rise to the problem of license proliferation. Licensing standardization can go some way towards solving the problem of license proliferation. In any case, the use of contracts and licenses is already a reality of commercial transactions, so this is nothing new. Also, it should be noted that this approach is only relevant to commercial transactions and agreements.

3.1.5.2. *Private international law*. As noted previously, Private International Law is the body of principles concerning the relationship among multiple sources of law originating in different sovereign states. Its rules specify the criteria for establishing applicable jurisdiction and law in cases or disputes containing foreign elements such as legal relationships involving two or more parties from different countries. These rules are stipulated in national legislation and not in international treaties.[94] Despite its efforts, the Hague Conference on International Private Law has still not produced an internationally harmonized instrument in this regard.[95] However, it remains that there are many similar criteria that are being used to establish applicable jurisdiction and law in different countries.[96]

Private International Law rule-making is specifically useful for jurisdiction and conflict of laws relating to transnational transactions, which is a greater dilemma in cyberspace given the virtually borderless digital environment.[97] Given the global nature of the Internet, legal disputes involving individuals and other entities from different national jurisdictions are common, but only rarely has Private International Law been used for settling Internet-based issues. This is not surprising given that the processes and procedures are usually complex, slow, and expensive; whereas the majority of Internet transactions are inexpensive and simple ones that are complicated by identification problems and geographical distance. This is a dilemma that has to be resolved. Hence, Private International Law also requires modernization so as to meet the needs of the Internet-based world. Some of the changes can include simplified and streamlined procedures for identifying appropriate jurisdictions and laws for online transactions, more options for alternative dispute resolution such as through developing automated processes and mechanisms for simple dispute resolution as well as a greater use of mediation, negotiation and arbitration.

3.2. *Custom and the Internet*

One writer describes Cyber norms as ''informal social standards of obligatory user behavior in cyberspace…practices that have developed through mutual user assent and in deference to the preferences of other users, rather than mere tendencies of user behavior.''[98] One must be careful when making that distinction because what may appear as mere tendencies can amount to customary practices with legal consequences. This includes the mere visiting of webpages while surfing the Internet particularly regular visits that are subject to terms of use, and the use of chatrooms where certain protocols of behavior are expected to be observed. Visiting a website with certain terms attached to the use of its services or to transact in goods could in some instances be deemed as their acceptance and so should invoke cyber norm concepts. However, mere conformity to behavior and chat room etiquette may not imbue it with the status of a cyber norm.[99] How to distinguish practices that have force of law and those that should not is an important consideration when formulating the determinants of customary Internet law, which will be done in Section 2 of Part 2.

As I have explained, customary law will be useful as a primary source of law under the Internet legal system. Custom has the potential of providing the biggest cache of globally homogenous but unwritten but discoverable norms on the Internet. Also, norms that are organically developed by the Internet community as a whole have greater legitimacy and adherence as an autonomous legal system. Internet custom and common usage will form a regime of rules that constitute the new Internet customary law and can be progressively developed and codified at a suitable point in time.

However, before it can be utilized, it must be adapted and conducive to the special needs and wants of the cyber world. There is still a role for both practice and acceptance, but modified for electronic transactions. For example, a problem relates to what is real and what is automatic or manipulated behavior and how to deal with that

[94] The main principles were developed at a time when cross-border interaction was less frequent or common and there were proportionally fewer cases involving individuals and entities from different jurisdictions.

[95] On the Hague Conference, see the Hague Conference website at: http://www.hcch.net/index_en.php. There are numerous articles written on the proceedings of the conference and the difficulties of reconciling jurisdictional differences hindering its success. The EU have however, been successful in producing a regional consensus in the form of the Rome and Brussels instruments (and their Lugano equivalent). See the Europa website at: http://europa.eu/scadplus/leg/en/s22003.htm.

[96] E.g., the link between an individual and national jurisdiction such as nationality and domicile, or the link between a particular transaction and national jurisdiction such as where the contract was concluded and where the exchange took place.

[97] The Internet poses additional and sometimes unique difficulties for the doctrine of Private International Law, because electronic transactions and their effects invariably transcend national borders.

[98] April Mara Major, *Norm Origin and Development in Cyberspace: Models of Cybernorm Evolution*, 18 Wash. U.L.Q. 2000; 59: 70–71, where the writer identified some practices that she considered cybernorms such as the behavior relating to electronic mail usage and the evolution of HyperText Markup Language (HTML). *Ibid*. at 77–74. The relationship between social norms and cybernorms was also examined. *Ibid*. at 75–92. So was the application of norm origin theory to cybernorms. *Ibid*. at 92–103.

[99] These informal rules for Internet user behavior are referred to as ''netiquette'' and many of them constitute cybernorms due to user adherence. Whether or not they constitute legally enforceable norms will depend on the definition we adopt here of customary Internet-ional Law, particularly how the element of acceptance is formulated.

distinction. For another example, consider the role of the automaton in transactions and of intermediaries that determine the technical models of communication or the electronic format of products and services. They pose problems relating to how influence and artificiality should be dealt with in relation to both the elements of practice and acceptance. Practice can be surmountable by attributing the actions of automatons to their principal actors. The requirement of acceptance, on the other hand, requires more of a radical change in the cyberspace customary law context, as it is rarely expressed and not easily detectable or sometimes even considered.[100] Hence, customary Internet law arises if it can be shown that a given customary practice is widely followed through *practice* by a dominant majority of *relevant* Internet users and that its observance is a result of an *acceptance* of such behavior whether through an attitude of expectation, deference or obeisance or even as a result of concession, accedence or submission to the practice in question. The latter is a more controversial but nevertheless necessary extension of the understanding of *opinio juris* in PIL.

Another problem, which will have to be addressed, is the fact that the idea of a supranational Internet law requires the examination of the relationship of custom to other sources of norms, particularly to international treaties and conventions. On the positive side, custom can *supplement* and support existing international or domestic legislation when it is specifically referred to (*consuetudo secundum legem*), and play a *complementary* and incremental rule in filling in gaps where there is a lacuna in the law or no actual provision in the existing body of law (*consuetudo praeter legem*).[101] However, custom can also conflict with an existing body of law (*consuetudo contra legem*), in which case some form of hierarchy of norms and rules to resolve such conflict have to be promulgated to resolve their differences as and when they arise.[102]

Yet another compelling question when considering the relationship between custom and the Internet is whether customary Internet-ional law can develop without a special institution to nurture it, and if not whether a new institution has to be created or whether it is better served by piggy-backing on existing institutions. International institutions promote compliance by clarifying norms that in turn accelerates its use and positive recognition. When considering this practical issue, it should also be kept in mind the usefulness of creating one or more research institutes to empirically substantiate and give material shape to customary law through inter-disciplinary research and development. Meanwhile, treaty law can remain the responsibility of existing PIL institutions that are already doing such work, such as the UNCITRAL and WIPO, in their respective fields of law.

Internet custom can be categorized in many different ways for further study. For example, it can be compartmentalized based on whether they exist in the offline world (universal legal customs) or not (Internet specific customs). It can also fall along a sliding-scale of full offline to fully online transactions with a majority of transactions falling anywhere along that scale and thus involve a mix of the real and the virtual.[103] What is necessary for its development is continuous research into the common practices of Internet users.[104]

Custom understood as a process of creating norms works not just through the detection of behavior and attitudes of its participants but also affirms and validate norms originating from other sources such as arbitral awards,[105] model laws and frequently used standard form contracts or clauses. Conversely these other sources can identify and express customary norms that have already crystallized. Decision and law-makers can also discovery and identify custom thereby giving it recognition and reducing it to more tangible and material form. Thus, they have a mutually symbiotic relationship that will work to achieve the common aim of the development and realization of Internet laws. Doctrines of persuasive and binding norms, such as *stare decisis* under common law cases, also perpetuate the development of Internet practices and influence attitudes, which can further strengthen customary norms.

The benefit of custom in terms of harmonization and consistency is more valuable when it contributes to general as opposed to mere local custom. With the rendering of geographic isolation and party localization almost obsolete, especially in relation to socio-economic transactions, which is the reality of Internet interactions, the case for the development of more supranational customary Internet norms on these fundamental bases is more compelling.

3.3. *Useful comparisons*

Having just taken in consideration the important matters to be kept in mind when adapting and transposing the CIL

[100] Particularly in the light of additional challenges such as the sheer number of participants involved and the massive volume of transactions that must be taken into consideration as well as the lack of clear statements of intent or obligation and even the mere consideration of legality, which make the requirements in its PIL manifestation unsuitable for use in the cyberspace context.

[101] In terms of their relationship with one another, all sources of the Internet law can be mutually reinforcing. For example, soft law promotes practices leading to customary law, customary law can be codified into treaty, and progressive treaties can promote customary law.

[102] See Polanski PP. *Towards a Supranational Internet Law*, JICLT vol. 1, (1) (2006) p. 3–5, available at: www.jiclt.com/index.php/JICLT/article/viewPDFInterstitial/8/7.

[103] See e.g., Polanski PP. *Common Practices in the Electronic Commerce and Their Legal Significance*, 18th Bled eConference eIntegration in Action, Bled, Slovenia (6–8 June, 2005) at 3–4.

[104] *Ibid.* at 8–9.

[105] Consider the compatibility of alternative dispute resolution (ADR) and the use and emergence of customary law. In arbitration proceedings, the parties and arbitrators have the freedom to determine the application of transnational rules and trade usages instead of national law, which is reflected in international arbitration instruments using the term ''rules of law'' as opposed to ''the law''.

Table 1 – Comparison between Custom as it Applies to the Real World and to the Cyber World.

Subject matter for comparison	Customary international law	Proposed customary Internet-ional law
Stage/Level	Global	Global
Power	Sovereign regulatory regimes	Single cyberspace, decentralization of power
Written Source	Article 38(1)(b) of the Statute of the International Court of Justice	N.A.[a]
Stakeholders/Personalities	Principle actors are State Governments,[b] expanded to organizations and even, to a limited extent, individuals and private legal entities (Top-down) - Government actions	Principle actors are individuals, intermediaries, and governments (Bottom-up)- Interpreting public and private actions[c]
Method of Norm Creation/ Differences in Timeframe	Reactionary, slow, but less complicated as it is the state opinion juris and state practice only	Reactionary, faster,[d] but more complicated and difficult to assess (due to the diverse personalities) – more multi-disciplinary study required
'Community'	Global[e]	Global (consciousness)
Institutional Relation	International Court of Justice	N.A.[f]
Scope of Application	State-centric, inter-state	Multi-tiered[g]

a Currently there is no customary source of law for electronic transactions, but when it is implemented as proposed in this paper, the rules for recognizing Internet custom as law will be best if it is clearly spelt out in written form such as in a multi-national treaty-based agreement, perhaps under the auspices of a PIL institution like the United Nations (UN). The source of law rules should cover all components of rule-making, not just customary law.

b Generally, International Law regulates relations between and among states. In contrast, national or domestic law regulates relations between persons, legal entities and organizations. The UN Charter reinforces this dualist notion under its Article 2(7), which renounces the authority to intervene in the domestic jurisdiction of states by expressly preserving domestic jurisdiction. Thus, only states have legal standing, rights and obligations, under International Law.

c The main stakeholders of Internet governance have been identified under Article 49 of the World Summit on the Information Society (WSIS) Declaration as: States – ''policy authority for Internet-related public policy issues'' (including international aspects); the private sector – ''development of the Internet, both in the technical and economic fields''; civil society –''important role on Internet matters, especially at community level''; intergovernmental organizations – ''the coordination of Internet-related public policy issues''; international organizations – ''development of Internet-related technical standards and relevant policies''. See World Summit on the Information Society, ''Declaration of Principles'', WSIS-03/GENEVA/DOC/4-E (12 December, 2003), available at: http://www.itu.int/wsis/documents/doc_multi.asp?lang=en&id=1161%7C1160.

d The concept of *diritto spontaneo* or ''instant customary international law'' was proposed by Roberto Ago. See R. Ago, *Science juridique et droit international*, RdC (1956-II), 849–955, at 932 et seq. It is technically not really 'instant' but rather 'fast developing'. This concept emphasizes *opinio juris* and gives lower significance to general practice. This view has been criticized since it underestimates the importance of practice, which is the core element of custom and customary law. In current international law, only one possible reference exists in the International Court, that of the *North Sea Continental Shelf* (International Court of Justice Report, 1969) that opened up the possibility of developing customary law in a relatively short passage of time. ''[A]n indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and uniform.'' *Ibid*. at 43. This may not be as difficult in the Internet context given the speedy nature of transactions online and formation of trends. The problem is a more practical one, which is the detection and identification of such norms and that requires intense empirical, probably cross- and multi-disciplinary study. An institutional or organizational approach may be the best solution.

e But see, Katherine C. Sheehan, *Predicting the Future: Personal Jurisdiction for the Twenty-First Century*, 66 U. Cin. L. Rev. 1998; 385: 436–438, arguing that the Internet may fairly be characterized as anti-community due to the selective manner by which people interact and to the disenfranchisement of those who lack such connectivity whether due to computing or technological infrastructure or access and content regulation. On the other hand, it is not fair to state that there is no community simply on these grounds alone. Communities can exist on different platforms, for and in relation to subject matter. Moreover, communications technology has, within a short span of time, penetrated even the poorest and most technologically backward countries and will only continue to grow. There is also no reason to reject custom based on the state of technological penetration as custom can also change as the volume and diversity of usage increases and as more entities have a share or stake in electronic transactions.

f Query whether it should be in relation to the establishment of a dispute resolution institution like it is under the Statute of the International Court of Justice (ICJS). However, it is to be noted that although it is explicitly recognized as such under the ICJS, it was in fact already a recognized source of law even before its codification under the ICJS and is also of general application and not just the scope of jurisdiction of the ICJ.

g From law of states to law for people, see Rigaux's ''Transnational Civil Society'' at International Law: Achievements and Prospects (Mohammed Bedjaoui ed., 1991) at 12.

principles to Customary Internet-ional law, it will be useful at this point to make some comparisons that will also be useful in guiding the process of building the fundamental rules and sub-rules for the latter. The comparisons will be between the real world and virtual world and between national and international using certain relevant subject matters as the bases for distinction and similarities.

Table 2 – Comparison of National to International Cyberlaw, Legal Systems and Environment.

Subject matter for comparison	National laws	(Customary) Internet-Ional law
Source	National - Primarily domestic application	International - Global application and harmonization
Stakeholders/Personalities	National governments and its citizens and legal residents	Governments, legal entities and individuals
Norm Creation	National	Global
'Community'	Nationalist, divisive and unharmonious	Global (consciousness) reflective of reality in convergence 'Jus communis internationalis'?[a]
Scope of Application	Multi-tiered	Multi-tiered
Nature of Creation	Top-down, structural	Bottom-up,[b] natural

a Henry H. Perritt, Jr. *Symposium on the Internet and Legal Theory: The Internet is Changing International Law*, 73 Chi-Kent L. Rev. 997, at 998: ''[C]ultural diffusion and interpenetration of formal legal decisions and norms erode geographically based boundaries.'' See also, *ibid.* at 1035–1036 for more on cultural diffusion.

b Includes such methods as unilateral self-help, contracts, private associations and customs. The 'top-down' approach, on the other hand, is guided by policy such as legislation and judicial decisions. On the sometimes difficult task of determining what is really a 'top-down' or 'bottom-up' approach depending on perspectives, see Margaret Jane Radin, Polk Wagner R. *Symposium on the Internet and Legal Theory: The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 Chi.-Kent. L. Rev. 1998; 1295: 1297–1298, suggesting that the distinction is artificial and obfuscates the reality of cyberspace and its very practical requirements for a new and improved model for law and governance.

3.3.1. *Real world and virtual world*

Comparison between Real World and Cyber World is described in Table 1.

3.3.2. *National and international*

Comparison of National to International Cyberlaw, Legal Systems and Environment is described in Table 2.

3.4. *A new global consciousness and the cyber citizen*

The nature of custom reflects and is particularly suited to the seismic social changes and cross-cultural impact of the Internet and the development of what can be called a ''global social consciousness'' or in certain quarters, at least, what can be loosely called an ''international community'' where there are sufficient commonality in attitudes and behavior.[106] The new global consciousness is likely to be even more apparent in 'Generation Z', the generation that grows up with the Internet and that networks and socializes on the WWW, and is most familiar with the digital format of all types of works.

Custom as law is largely a 'bottom-up' approach in that it recognizes as law what the masses do. The people and technology developers and users, including commercial and non-commercial entities, influence the norms in cyberspace while policy and law-makers can only try to influence behavior and attitudes. The involvement of intermediaries and the public sector, however, also ensures some role for the 'mid-level' and 'top down' approaches as well. Hence, all stakeholders have a real share of influence in the development of Internet law through decentralization and sharing of law-making powers. In this way, it also strengthens the legitimacy and 'ownership' of laws.[107]

4. Conclusion

In this part of the article, I have described the socio-economic problems and stresses that electronic transactions place on existing policy and law-making mechanisms. I have also examined the history of custom as a source of law in various contexts and identify potential sources of Internet Law in particular the suitability of customary international law rules as a template for formulating customary Internet law-making rules. In the concluding part of the article that will appear in the next edition of the Computer Law and Security Review, I

[106] This ties in with the idea of a global consciousness and the cyberspace commons.

[107] See Polanski PP. and Robert B. Johnson. *Potential of Custom in Overcoming Legal Uncertainty in Global Electronic Commerce*, Journal of Information Technology Theory and Application (2002) at 7. It was argued that ''custom is an important component of the international legal systems because the essential features of those regimes are lack of central governance and, relative to modem legislatures, underdevelopment. Similarly, the Internet with its bottom-up governance and, at this stage, lack of any globally binding laws seems to be a very similar environment, which could utilize the idea of custom as a global source transnational e-commerce law.'' In relation to custom in International Trade Law, ''[t]here are three striking elements in this definition of custom. First, as in the previous definition, custom does not need to have a long tradition in order to be binding. Second, commercial practice needs to be widely used. Third, formulation of custom by various international trade associations seems to be the necessary condition of a successful formulation of custom. The first two elements of the definition are widely accepted in international public law theory. However, the third element is Schmitthoffs own proposal relating to international trade law specifically.'' *Ibid.* at 9.

will construct the customary rules to Internet law-making that are applicable to electronic transactions by adapting customary international law rules to formulate a set of determinants for customary Internet Law. I will also apply the suggested rules for determining customary Internet norms and identify some existing practices that may amount to established norms on the Internet, specifically those practices relating to the Internet Infrastructure and Electronic Contracting.

Warren B. Chik *(warren.chik@smu.edu.sg) Asst Prof of Law, Singapore Management University.*