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Citation: 27 Mich. J. Int'l L. 115 2005-2006



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# SAVING CUSTOMARY INTERNATIONAL LAW

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## I. INTRODUCTION

Customary International Law (CIL) is in trouble. It is in trouble notwithstanding the fact that it is central to our understanding of international law, is one of the two main sources of international law, and is the primary source of universal law.<sup>1</sup> In some sense, international law would not be possible without at least some norms of CIL, most conspicuously the requirement that treaties are to be obeyed.<sup>2</sup>

Despite its privileged position, CIL is under attack from all sides.<sup>3</sup> Some scholars complain that it is incoherent,<sup>4</sup> others assert that it is ir-

1. See, e.g., Brigitte Stern, *Custom at the Heart of International Law*, 11 DUKE J. COMP. & INT'L L. 89, 89 (2001) (“[C]ustom enjoys privileged status in the international order: ‘custom is even more central than the treaty’ . . .” (quoting and translating PAUL REUTER, INTRODUCTION AU DROIT DES TRAITÉS 38 (1972))). Though treaties have come to govern large areas of international law, there remain important areas of international law governed wholly or partially by CIL either because no treaties are in place or because treaties are not universal or do not cover all relevant issues. These areas include, for example, the law of state responsibility, foreign direct investment, the jurisdiction to apply law, diplomatic immunity, human rights, and state immunity.

2. See Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331, 339 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”); MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES 107 (1999) (“Treaty rules . . . are based on the general customary rule of *pacta sunt servanda*, which requires that treaty obligations be upheld in good faith.”); ANTHONY A. D’AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 130 (1971). Though the bindingness of treaties is itself provided for in a treaty, some more fundamental rule about the enforceability of treaties is needed to make it effective.

3. See David P. Fidler, *Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law*, 39 GERMAN Y.B. INT’L L. 198 (1996).

4. “The questions of how custom comes into being and how it can be changed or modified are wrapped in mystery and illogic.” D’AMATO, *supra* note 2, at 4; Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT’L L. 1, 1 (1977) (“[I]nternational lawyers . . . invoke rules of customary international law every day, but they have great difficulty in agreeing on a definition . . .”); Mark A. Chinen, *Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner*, 23 MICH. J. INT’L L. 143, 178 (2001) (“[M]ost commentators acknowledge that *opinio juris* is a concept for which it is difficult to account with any consistency, even though most acknowledge the need for some concept that will distinguish behaviors that have legal consequences from those that do not.”); Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33

relevant or a fiction,<sup>5</sup> and virtually everyone agrees that the theory and doctrine of CIL is a mess.<sup>6</sup> These concerns, though not new, have taken on a more aggressive tone in recent years.

The problem is aggravated by the fact that CIL is singularly ill-equipped to respond. CIL has no coherent or agreed upon theory to justify its role or explain its doctrine.<sup>7</sup> The old notions of natural law and consent, which were once used to explain CIL, are either no longer accepted or under-theorized (or both), and nothing has arisen to take their place.<sup>8</sup> As a result, CIL stands virtually defenseless and unable to counter critiques with much more than unsupported claims about its importance. Until a foundational theory of CIL is developed, a coherent response to critics will remain out of reach and existing defenses will be unpersuasive.<sup>9</sup>

This Article offers just such a theory of CIL—one that provides a firm and modern theoretical foundation for the analysis of custom. Though this is not the first article to propose a view of CIL through a

UCLA L. REV. 665, 709 (1986) (“[T]here are basic theoretical problems inherent in the idea of customary international law . . .”).

5. See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 43 (2005) (“[CIL] is not an exogenous influence on state behavior.”); Francis A. Boyle, *The Irrelevance of International Law: the Schism Between International Law and International Politics*, 10 CAL. W. INT’L L.J. 193, 198 (1980) (“International law is therefore irrelevant to those matters which count the most, or more forcefully, to those matters that count for anything in international relations.”); Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 CHI. L. REV. 1113 (1999); Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT’L L. 639, 640 (2000) (“The faulty premise is that CIL . . . influences national behavior.”).

6. See, e.g., Akehurst, *supra* note 4, at 1 (observing that scholars are not able to agree on a definition of CIL); J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT’L L. 449, 450 (2000) (“[T]here is neither a common understanding of how customary international legal norms are formed, nor agreement on the content of those norms.”); Edward T. Swaine, *Rational Custom*, 52 DUKE L.J. 559, 563 (2002) (“Even custom’s most ardent supporters, however, have difficulty explaining how it arises, and more particularly, why customary practices should be considered binding on states.”).

7. See, e.g., Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757, 757 (2001) (“The renaissance of custom requires the articulation of a coherent theory . . .”).

8. See ALFRED VERDROSS & HERIBERT KOECK, *Natural Law: The Tradition of Universal Reason and Authority*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW* 17 (Ronald Macdonald & Douglas Johnston eds., 1983) (natural law); See also *infra* note 113 (consent).

9. See Kelly, *supra* note 6, at 500 (“Controversy is inevitable because the elements of CIL legal theory are empty vessels in which to pour one’s own normative theory of international law. . . . Rather than undergoing a revitalization, CIL is disintegrating into a useless, incoherent source of law that is of little guidance in determining norms.”).

rational choice lens,<sup>10</sup> it is the first to map out a general theory of CIL based on such a model.<sup>11</sup>

In some respects, the effort to develop a proper theory with which to analyze CIL could be seen as an attack on classical notions of custom. This Article suggests that our understanding of CIL must change and points out ways in which current views of the subject are untenable. Despite this reformist feature, however, the Article is fundamentally constructive. It seeks to rescue CIL from its critics and to advance a comprehensive and sound version of CIL. This admittedly requires some changes to current notions of CIL, but it retains the basic contours—an understanding of how behavioral norms among states can come to have the force of international law. Without the proposed changes, it is hard to see how CIL as we now know it can retain any vitality and relevance to the way in which we think about international law.

It should be noted at the outset that many of the criticisms of CIL are powerful because they are correct. Certainly, existing views of CIL lack consistency and coherence, commentators on the subject commonly make assumptions about state behavior that seem implausible,<sup>12</sup> and advocates make claims about CIL that are difficult to square with the observed behavior of states.<sup>13</sup> None of these criticisms, however, rule out

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10. See Mark A. Chinen, *Afterward*, 23 MICH. J. INT'L L. 201 (2001); Chinen, *supra* note 4; Goldsmith & Posner, *A Theory of Customary International Law*, *supra* note 5, at 1113; Goldsmith & Posner, *Understanding the Resemblances Between Modern and Traditional Customary International Law*, *supra* note 5, at 639; Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002); Swaine, *supra* note 6; Pierre-Hugues Verdier, *Cooperative States: International Relations, State Responsibility and the Problem of Custom*, 42 VA. L. REV. 839 (2002); Vincy Fon & Francesco Parisi, *Customary Law and Articulation Theories: An Economic Analysis* (George Mason Law and Economics Research Paper No. 02-24), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=335220](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=335220); Vincy Fon & Francesco Parisi, *Stability and Change in International Customary Law* (George Mason Law and Economics Research Paper No. 03-21), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=399960](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=399960); Francesco Parisi, *The Formation of Customary Law* (George Mason Law and Economics Research Paper No. 01-06), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=262032](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=262032).

11. See Verdier (2002), *supra* note 10, at 841 (“[I]nstitutionalist scholars have focused on formal regimes established by multilateral treaties, they have neglected the customary norms and regimes that form the backbone of many fundamental areas of international law.”) (footnote omitted). There are, of course, exceptions, but none of them offers a new theoretical justification and explanation of CIL that resembles the one presented in this Article. *Cf. supra* note 10.

12. See Roberts, *supra* note 7, at 769 (“The greatest criticism of modern custom is that it is descriptively inaccurate because it reflects ideal, rather than actual, standards of conduct.”).

13. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980) (arguing that torture is a violation of customary human rights); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 702 cmt. g. & rep. n.5 (1987). *But see* Joan Fitzpatrick, *The Relevance of Customary International Norms to the Death Penalty in the U.S.*, 25 GA. J. INT'L

the possibility that there are international legal norms that, by virtue of that status, affect state behavior.

In more pragmatic terms, one might ask whether the impact of CIL, whatever it may have been in the past, has faded to the point of irrelevance. After all, modern international relations have made the treaty a more important tool, relative to CIL, than it has been in the past, and there are myriad ways for states to cooperate through soft law instruments that fall short of treaties.<sup>14</sup>

Despite these trends, however, an understanding of custom is critical to an understanding of international law. First, there remain important areas of international relations governed primarily by customary rules.<sup>15</sup> To pick one example, the law of state responsibility remains largely the domain of custom.<sup>16</sup>

Second, even in areas where one or more treaties exist, CIL often plays an important role. For example, in the human rights area there are a number of important treaties, but there remains the question of which human rights rules have the status of CIL and therefore apply to all states, including non-signatories.<sup>17</sup>

& COMP. L. 165, 173 (1995) (questioning the proposition that the prohibition on torture is customary international law by noting that torture is a widespread practice); Arthur M. Weisburd, *The Effect of Treaties and Other Formal International Acts on the Customary Law of Human Rights*, 25 GA. J. INT'L & COMP. L. 99, 120–22 (1996). For the proposition that states have an international obligation to prevent injury to the environment of another state, see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 601 (1987); Mary Ellen O'Connell, *Enforcing the New International Law of the Environment*, 35 GERMAN. Y.B. INT'L L. 293, 303 (1992). *But see* Karl Zemenak, *State Responsibility & Liability*, in ENVIRONMENTAL PROTECTION & INTERNATIONAL LAW 187, 188 (Winfried Lang et al. eds., 1991) (noting the lack of general and consistent state practice).

14. See Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581 (2005).

15. Critics of CIL may respond that areas said to be within the domain of custom are subject to no rules at all. If this is true, it is because CIL does not apply to the relevant issues, or perhaps it is entirely irrelevant to state behavior. In either case, one can only arrive at a conclusion regarding the role of CIL in these areas after one has developed an understanding of CIL.

16. In an effort to enumerate these rules, the International Law Commission adopted in 2001 the Draft Articles on Responsibility of States for Internationally Wrongful Acts. See Int'l L. Comm'n, *Responsibility of States for Internationally Wrongful Acts*, ch. IV. E.1, U.N. GAOR 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (Nov. 2001).

17. The same is true in the investment area, where bilateral investment treaties (BITs) dominate the legal landscape, but many investments are not covered by a BIT. There is debate about whether the legal rules included in BITs have become rules of CIL. See Bernard Kishoyian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14 NW. J. INT'L L. & BUS. 327, 329 (1994) (“[E]ach BIT is nothing but *lex specialis* between parties.”); Asoka de Z. Gunawardana, *The Inception and Growth of Bilateral Investment Promotion and Protection Treaties*, 86 PROC. AM. SOC'Y INT'L L. 544, 550 (1992) (stating that BITs affect the CIL rules governing investments).

CIL can also serve to influence treaty regimes. Treaties, for instance, sometimes refer to rules of customary international law, making such rules relevant to the interpretation of the treaty.<sup>18</sup> Additionally, CIL provides rules of treaty interpretation that are important to treaties, especially in the context of dispute resolution.<sup>19</sup>

Third, CIL is sometimes relevant to or a part of domestic law. In the United States, for example, the Alien Tort Statute (ATS)<sup>20</sup> grants federal courts jurisdiction over cases in which an alien sues for a tort committed in violation of CIL. In the famous *Filartiga* case,<sup>21</sup> the Second Circuit concluded that CIL was enforceable in the United States through the ATS.<sup>22</sup> The Restatement (Third) of Foreign Relations Law subsequently incorporated this perspective, stating that “customary international law is considered to be like common law in the United States, but it is federal law.”<sup>23</sup> In the 2004 *Sosa v. Alvarez-Machain* case,<sup>24</sup> the Supreme Court held that no rule of CIL supported Alvarez’s claim of arbitrary detention,<sup>25</sup> but it acknowledged that CIL was a legitimate basis for a claim under the ATS.<sup>26</sup> As the *Sosa* case demonstrates, once CIL can be considered part of or relevant to domestic law, it must be interpreted by domestic courts. Such an interpretation is only possible if we first have an understanding of what CIL is and how it works.<sup>27</sup>

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18. See, e.g., United States Model Bilateral Investment Treaty art. II, (Apr. 1994), reprinted in U.N. Conference on Trade and Development, INTERNATIONAL INVESTMENT INSTRUMENTS: A COMPENDIUM, 198, U.N. Doc. UNCTAD/DTC/30(Vol. III) (1996) (stating the signatories will in no case provide investment from their treaty partner “treatment less favorable than that required by [customary] international law”).

19. See, e.g., WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, art. 3.2, 33 I.L.M. 114, 115 (1994) (“Members . . . recognize that [the Dispute Settlement Understanding] serves to . . . clarify the existing [WTO] provisions . . . in accordance with customary rules of interpretation of public international law.”); Appellate Body Report, *United States—Standards for Conventional and Reformulated Gasoline*, art. 31, WT/DS2/AB/R (Apr. 29, 1996) (“That general rule of interpretation [contained in art. 31 of the Vienna Convention] has attained the status of a rule of customary or general international law. As such, it forms part of the ‘customary rules of interpretation of public international law’ which the Appellate Body has been directed . . . to apply.”).

20. Judiciary Act, ch. 20, § 9, 28 U.S.C. § 1350 (2000).

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

22. *Id.* at 880.

23. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 n.4 (1987).

24. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

25. *Id.* at 757.

26. *Id.* at 751–53.

27. On the Alien Tort Statute in general and the *Sosa* case in particular, see Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT’L L. 461 (1989); Harold H. Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991); Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Ap-*

Fourth, custom remains an integral part of the rhetoric used in the international legal landscape. Countries routinely reference CIL to support their actions and those of their allies, or to condemn behavior by other states. Two examples suffice to illustrate this reality. The United States has often claimed that there exists a rule of CIL prohibiting the expropriation of foreign investment without prompt, adequate, and effective compensation,<sup>28</sup> and the European Union has appealed to CIL for the claim that the “precautionary principle” affects state obligations.<sup>29</sup> To understand the relevance and role of that rhetoric, we must first understand CIL itself.

Fifth, CIL is one of the recognized sources of international law.<sup>30</sup> One could hardly claim to understand international law without an understanding of CIL, how it works, and its relevance. Even if one seeks to dismiss the relevance of CIL as a source of law, it is necessary to have some understanding of what CIL is.

Finally, as previously mentioned, whatever other purposes CIL serves, it is the basis for the requirement that states honor treaties.<sup>31</sup> Understanding custom, then, helps us to understand treaties.

This Article takes on the challenge of building a workable and defensible theory of CIL. To do so, it makes standard rational choice assumptions about state behavior. In particular, it assumes that states are able to identify their own interests and act to further those interests. States have no innate preference for complying with international law and so will only comply when doing so makes them better off. They are

*proach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153; Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492 (2004); J. Harvie Wilkinson III, *Our Structural Constitution*, 104 COLUM. L. REV. 1687 (2004).

28. See *Amoco Int'l Fin. Corp. v. Government of the Islamic Rep. of Islam*, 15 Iran-U.S. Cl. Trib. Rep. 189, 223, 234 (1987); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 712 cmt. d (1987).

29. See WTO Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products*, ¶¶ 120–25, WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R, 48 (Jan. 16, 1998).

30. See Statute of the International Court of Justice, art. 38.

31. See *supra* note 2; see also MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 66 (3d ed. 1993) (“Probably no rule better fits the definition of a norm of *jus cogens* than *pacta sunt servanda*, for it is essential to the theory of both conventional and customary international law that contracts between states be legally binding.”). It is true that the obligation to honor treaties also finds expression in the Vienna Convention. See Vienna Convention on the Law of Treaties, art. 26, U.N. Doc. A/CONF.39/27 (May 23, 1969), reprinted in *Official Documents: Vienna Convention on the Law of Treaties*, 63 AM. J. INT’L L. 875 (1969). Not all states are party to the treaty and yet it remains the case that even non-parties (including the United States) are thought to have an obligation to comply with treaties. Furthermore, the Vienna Convention is itself a treaty, so there remains the question of why states are required to comply with it. CIL provides part of the answer.

unaffected by the “legitimacy” of a rule of law,<sup>32</sup> past consent to a rule is insufficient to ensure compliance,<sup>33</sup> and there is no assumption that decisionmakers have internalized a norm of compliance with international law.<sup>34</sup>

The Article models cooperation among states using a repeated prisoner’s dilemma. Recognizing that states interact repeatedly with one another over time leads to the conclusion that rules of CIL can affect payoffs and, therefore, provide an incentive toward compliance. This, then, is what the Article takes as its definition of CIL—a norm that, by virtue of its status as a legal rule, affects the payoffs of states.<sup>35</sup>

Whenever groups (including groups of states) interact, behavioral norms emerge. Some of the norms that have emerged among states are known as legal rules—rules of customary law. In the absence of a supranational authority capable of identifying legal rules, it is left to the states themselves to determine which norms achieve this status. This corresponds roughly with what, in existing discussions of CIL, is known as *opinio juris* or the “subjective” element of CIL.<sup>36</sup>

Under traditional conceptions of CIL, the other requirement is a demonstration of consistent state practice, referred to as the “objective” element.<sup>37</sup> A rational choice approach, however, looks to compliance and incentives affecting state behavior. This, it turns out, leaves no room for a practice requirement. Because the consequences of violating a legal rule depend only on the attitudes of other states, state practice plays no direct role. Practice may affect the attitudes of states, of course, but it does not directly contribute to the existence of a rule of CIL. Practice may also be relevant as evidence of *opinio juris*, but this is a different role than the one traditionally assigned to it and has different implications, as explained in Part IV.

The Article is organized as follows: Part II discusses the pressure placed on existing notions of CIL by both traditional and modern critics. Part III develops a theory of CIL under the assumption that states are

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32. See generally THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995); Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT’L L. 705 (1988).

33. See Louis Henkin, *International Law: Politics, Values and Functions*, 216 RECUEIL DES COURS D’ACADEMIE DE DROIT INT’L 19, 27 (1989) (“[A] state is not subject to any external authority unless it has voluntarily consented to such authority.”).

34. See Harold H. Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 182–83 (1996); Harold H. Koh, *Why do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997).

35. See *infra* Part III.

36. See *infra* Part IV.A.

37. *Id.*

rational actors that only comply with international law when they have sufficient incentives to do so. Part IV presents a positive analysis of CIL, explaining how CIL can exist and how conventional accounts of CIL must change to accommodate this revised understanding. That same Part also considers the implications of the theory for our understanding of instant custom and special custom. Part V turns to a more normative analysis of certain doctrinal rules of CIL, considering the impact of the rules concerning persistent objectors, subsequent objectors, and new states and describing the preferred approach to each. Part VI concludes.

## II. THE ATTACK ON CIL

### A. CIL<sup>38</sup>

The most commonly cited and authoritative definition of CIL is found in article 38 of the Statute of the International Court of Justice, which provides that “international custom, as evidence of a general practice accepted as law” is one of the sources of international law.<sup>39</sup> A similar definition is offered by the Restatement (Third) of Foreign Relations Law of the United States, which defines CIL as “result[ing] from a general and consistent practice of States followed by them from a sense of legal obligation.”<sup>40</sup>

CIL, then, is normally said to have two elements. First, there is an objective element consisting of sufficient state practice (“general practice” under the ICJ definition and “consistent practice” under the restatement). Second, there is a subjective element, known as *opinio juris*, which requires that the practice be accepted as law or followed from a sense of legal obligation.<sup>41</sup>

This definition of custom is the most traditional and the one that is taught to law students. As discussed below, however, it has a host of problems.

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38. Among CIL's many problems is the fact that there are few aspects of it upon which all commentators agree. This is a function of the notorious theoretical weakness in the area. The diversity of views presents something of a challenge for this Article because as a new theoretical foundation for CIL is developed, it is necessary to discuss the existing state of legal doctrine. Rather than providing an exhaustive catalogue of views, this Article attempts to present the mainstream or majority view whenever possible, while also providing important alternative views.

39. Statute of the International Court of Justice, art. 38 sec. 1 cl. b; IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 3 (4th ed. 1990).

40. *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES*, § 102(2) (1987).

41. *Id.* at cmt. c.

### B. Traditional Critiques

A central theme in many traditional critiques is the imprecise character of CIL. Karol Wolfke, for example, argues that the problem with custom "lies in the intangibility of custom, in the numerous factors which come into play, in the great number of various views, spread over centuries, and in the resulting ambiguity of the terms involved."<sup>42</sup> Vagueness about legal rules, however, need not be fatal. After all, common law adjudication is in significant part about the clarification or establishment of rules that are applied to disputes *ex post*. That said, the lack of precision in CIL rules does indeed undermine the force of the rules and generate skepticism about their importance.

Beyond vagueness, there is a laundry list of problems with CIL that have long been understood. Anthony D'Amato made perhaps the best presentation of those concerns in his well-known book, *The Concept of Custom in International Law*.<sup>43</sup> One of the most vexing problems discussed by D'Amato is the inherent circularity of CIL.<sup>44</sup> It is said that CIL is only law if the *opinio juris* requirement is met. That is, it is only law if states believe it is law.<sup>45</sup> But why would a state believe something to be law if it does not already have the requisite *opinio juris*? So it appears that *opinio juris* is necessary for there to be a rule of law, and a rule of law is necessary for there to be *opinio juris*.

Other problems with the conventional definition of CIL are easy to find. Like the *opinio juris* requirement, the state practice norm is said to be unworkable. There is no agreement on the amount or consistency of practice that is required.<sup>46</sup> It is clear that universal state practice is not

42. KAROL WOLFKE, *CUSTOM IN PRESENT INTERNATIONAL LAW*, xiii (2d ed. 1993).

43. See D'AMATO, *supra* note 2; Trimble, *supra* note 4.

44. BYERS, *supra* note 2, at 136–37; Trimble, *supra* note 4, at 710 ("The definition [of CIL] obviously has a circular tendency.").

45. "But if custom creates law, how can a component of custom require that the creative acts be in accordance with some prior right or obligation in international law? . . . How can custom create law if its psychological component requires action in conscious accordance with law preexisting the action?" D'AMATO, *supra* note 2, at 53, 66; see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102 *rep. n.2* (1987).

46. See D'AMATO, *supra* note 2, at 58 ("[T]he literature contains no standards or criteria for determining how much time is necessary to create a usage that can qualify as customary international law . . ."). For example, in *The Paquete Habana*, 175 U.S. 677, 686 (1900), the Supreme Court traced the fishing vessel exemption rule from the year 1403 until the year of the case, 1900, noting the occasional setbacks in the rule, but concluding that it was "established in our own country and generally throughout the civilized world." On the other hand, in *Military and Paramilitary Activities*, while noting that state practice is essential in finding a customary rule of law, the ICJ emphasized and focused on the importance of *opinio juris*. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 108–10 (June 27).

necessary, but beyond that the opinions of commentators diverge.<sup>47</sup> For example, it is unclear whether a single inconsistent act is sufficient to conclude that there has not been “continuous” state practice. Furthermore, if a single inconsistent act is not enough to undermine the consistency of the practice, how much inconsistency is required?<sup>48</sup>

Even if agreement could be reached on the consistency element, it is difficult to determine how widespread the practice must be. One might hope that the ICJ would provide guidance here, but when the court has addressed the issue it has failed to offer clarity. Judge Lachs, in his dissent in the *North Sea Continental Shelf* cases, for example, did little more than restate the problem when he commented that a “general practice of States,” which is something less than “universal acceptance,” is sufficient evidence that a practice is accepted as law.<sup>49</sup>

Ultimately, the question is one of the overall importance of practice, and there is no consensus on that issue. In the *Anglo-Norwegian Fisheries* case, the ICJ stated that “the Court considers that too much importance need not be attached to the few uncertainties or contradictions, real or apparent, which the United Kingdom Government claims to have discovered in Norwegian practice.”<sup>50</sup> Though this quote seems to indicate that practice is of modest consequence, the court then emphasized the importance of “constant and sufficiently long practice.”<sup>51</sup>

Furthermore, there is no agreement on the forms of evidence that may be used to demonstrate state practice. A liberal view of acceptable evidence of practice includes not only the actual actions of states, but also diplomatic correspondence, treaties, public statements by heads of state, domestic laws, and so on.<sup>52</sup> Though there is support for this view, one can also find prominent commentators arguing for a much shorter list.<sup>53</sup>

47. See J. L. BRIERLY, *THE LAW OF NATIONS* 61 (1936); Trimble, *supra* note 4, at 679. For instance, both the United States Supreme Court in *Paquete Habana* and the I.C.J. in *S.S. Wimbledon*, 1923 P.C.I.J. (ser. A.) No. 1 (Jan. 16), found rules of customary law from the practice of fewer than a dozen states.

48. See Guzman, *supra* note 10, at 1874. In *Military and Paramilitary Activities*, the ICJ stated that state practice did not have to be in “absolutely rigorous conformity with the rule,” and “that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.” 1986 I.C.J. ¶ 186, at 98.

49. *North Sea Continental Shelf* (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 229, 231 (Feb. 20); see also John A. Perkins, *The Changing Foundations of International Law: From State Consent to State Responsibility*, 15 B.U. INTL L. J. 433, 462–63 (1997).

50. *Fisheries* (U.K. v. Nor.), 1951 I.C.J. 116, 138 (Dec. 18, 1951).

51. *Id.* at 139.

52. See Akehurst, *supra* note 4, at 1.

53. See Trimble, *supra* note 4, at 679–81 (pointing out that some commentators believe UN General Assembly Resolutions qualify as practice, while others do not).

D'Amato, for example, asserts that only physical acts count and statements by diplomats or UN officials cannot be considered state practice.<sup>54</sup> The U.S. Department of State put forward a slightly more expansive position in the 1970s, stating that government acts, such as treaties, executive agreements, federal regulations, federal court decisions, and internal memoranda, count as state practice but resolutions of international bodies do not.<sup>55</sup> In contrast, many CIL theorists, including Simma, Alston,<sup>56</sup> Meron, and Sohn,<sup>57</sup> allow drafts of the International Law Commission, resolutions of the UN General Assembly, and recitals in international instruments to count as evidence of state practice.<sup>58</sup> The International Law Commission itself considers the cumulative practices of international organizations as evidence of state practice.<sup>59</sup>

Even if one could resolve the above problems about what counts as practice and the degree of consistency required, there remains the practical problem that observing all relevant evidence from all relevant states will normally be impossible. At the most mundane level, few nations document their actions and statements in a way that allows for an investigation of their practices.<sup>60</sup>

Furthermore, it is fantastical to think that lawyers in a case, much less adjudicators deciding a case or policymakers selecting a course of action, can canvass the virtually infinite universe of potential evidence, let alone come to some understanding of the extent to which a practice has been followed.<sup>61</sup> The challenge is even greater when one realizes that a proper investigation of state practice would consider instances in which states refrain from taking an action because it would be in violation of international law. This latter category of evidence would be the most relevant to an investigation of CIL. The fact that it is unobservable, how-

54. D'AMATO, *supra* note 2, at 88.

55. See 1973 DIGEST OF THE UNITED STATES PRACTICE IN INTERNATIONAL LAW v (Arthur W. Rovine ed., 1974).

56. Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT'L L. 82, 89-90 (1992) ("[R]ules or principles proclaimed, for instance, by the General Assembly . . . are taken not only as starting points for the possible development of customary law in the event that State practice happens to lock on to these proclamations, but as a law-making process which is more or less complete in itself, even in the face of contrasting 'external' facts.").

57. See THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 79-106 (1989); see generally Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1 (1982).

58. BROWNIE, *supra* note 39, at 5.

59. See Int'l L. Comm'n, *Report of the International Law Commission to the General Assembly*, U.N. GAOR Supp. (No. 12), U.N. Doc. A/1316 (1950), reprinted in [1950] 2 Y.B. INT'L L. COMM'N 364, U.N. Doc. A/CN.4/Ser.A/1950/Add.1.

60. See Byers, *supra* note 2, at 144 n.119.

61. Fidler, *supra* note 3, at 202.

ever, makes it virtually impossible to include in the evaluation of CIL.<sup>62</sup> Even if one can identify instances in which states claim to be refraining from certain actions based on CIL, it is difficult to know if they are doing so out of a sincere concern for CIL or if expressions of concern are simply a convenient rhetorical justification for their decision.

The interpretation of observable evidence of state action is also problematic. The most visible evidence consists of statements made by countries, including votes in international fora such as the UN General Assembly. Unfortunately, this evidence is also the least reliable, as states may have incentives to misrepresent their beliefs about CIL. In practice, such statements are at times used as evidence by international courts, including the ICJ.<sup>63</sup>

Finally, in addition to these problems of evidence, attempts to determine state practice inevitably face time and resource constraints, preventing a serious canvassing of all relevant information. The result is that judgments are based on cursory reviews of a few states, biased toward the practices of states with readily available statements about their behavior written in a language understood by the relevant judges,<sup>64</sup> heavily influenced by the particular background of the judge, and often inconsistent with the behavior of many states.<sup>65</sup>

These problems, along with others that are omitted from this brief discussion, make it difficult to take traditional theories of CIL seriously if one approaches the subject with even mild skepticism.<sup>66</sup> One illustration of this problem appears in an article by Kelly, who concludes that

62. Some such instances may be observable either based on the circumstances of the case or as a result of credible claims by states, but in many cases it will be very difficult to identify such behavior. Because the task is to get a picture of the overall practice of states it is important to have some sense of what states do in general and not only in individual cases.

63. See *Military and Paramilitary Activities*, 1986 I.C.J. 14, 99 ¶ 188; Part IV.

64. One likely result is a bias toward large, powerful, western states. See Kelly, *supra* note 6, at 472. This bias is evident in *Texaco v. Libya*, 17 I.L.M. 1, 29 ¶ 86 (1978), where the arbiter explicitly stated that the “legal value of the resolutions” depended on who voted for the resolution – if “developed countries with market economies which carry on the largest part of international trade” did not support a resolution, then the resolution was not legally binding. *But see* In the Matter of the Republic of the Philippines, *Entscheidungen des Bundesverfassungsgericht, [BVerfG]* (federal constitutional court) 46, 342 (F.R.G.) (1977), *translated in* DECISIONS OF THE BUNDESVERFASSUNGSGERICHT, INTERNATIONAL LAW AND LAW OF THE EUROPEAN COMMUNITIES, 1952–1989, 358 (1992) (analyzing the relevant provisions, judicial decisions, and administrative practices of 108 foreign states before deciding whether an international customary law prohibited the disputed conduct in the case).

65. This problem is partially alleviated in circumstances where the relevant number of states is small and planners or adjudicators need only canvass the behavior of that limited group. Even in these circumstances, however, there remains the problem of determining what behavior should be considered as evidence of practice.

66. See Kelly, *supra* note 6, at 500.

CIL is “a useless, incoherent source of law that is of little guidance in determining norms.” Even on its own terms, CIL is a problematic area. The basic definitions of CIL are at best difficult to understand and apply and certain to lead to inconsistent judgments about the content of the law; at worst they are incoherent and internally inconsistent.<sup>67</sup>

### C. Modern Skeptics

More recently a different critique has gained prominence. This line of argument, most forcefully developed by Goldsmith and Posner, uses conventional rational choice assumptions to claim that CIL does not affect state behavior<sup>68</sup> or, at least, has very little impact.<sup>69</sup> The heart of their theoretical claim is that international law lacks an enforcement mechanism and, as a result, cannot have any relevance in a one-shot prisoner’s dilemma.<sup>70</sup> This is clearly correct as a matter of theory, but it requires the strong assumption that states interact in one-shot games.

If this assumption is relaxed, the case against CIL, or any other form of international law, becomes much more tenuous. Critics of CIL must retreat to weaker and more conditional arguments. In their book, *The Limits of International Law*, Goldsmith and Posner<sup>71</sup> state that a behavioral regularity can, in theory, emerge from a prisoner’s dilemma and that this “approaches the traditional conception of customary international law.”<sup>72</sup> They then write:

Although most international law scholars acknowledge that States are more likely to violate customary international law as the costs of compliance increase, they insist that the sense of legal obligation puts some drag on such deviations. Our theory, by contrast, insists that the payoffs from cooperation or deviation are the sole determinants of whether States engage in the cooperative behaviors that are labeled as customary international law.

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67. For a more complete version of the traditional criticism, see D’AMATO, *supra* note 2; see also Goldsmith & Posner, *A Theory of Customary International Law*, *supra* note 5, at 1114, 1116 (“[CIL] lacks a centralized lawmaker, a centralized executive enforcer, and a centralized authoritative decision maker . . . . The origins of CIL are not understood.”).

68. See *supra* note 5.

69. See Goldsmith & Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, *supra* note 5, at 641 (“The faulty premise is that CIL . . . influences national behavior.”); Goldsmith & Posner, *A Theory of Customary International Law*, *supra* note 5, at 1177 (“. . . CIL has real content but is much less robust than traditional scholars think, and it operates in a different fashion.”).

70. Goldsmith & Posner, *A Theory of Customary International Law*, *supra* note 5, at 1120–31.

71. GOLDSMITH & POSNER, *supra* note 5, at 43.

72. *Id.*

This is why we deny the claim that customary international law is an exogenous influence on States' behavior.<sup>73</sup>

The authors' recognition of the fact that behavioral regularities can emerge in a prisoner's dilemma and that these regularities can affect the payoffs of states requires the further conclusion that these norms can affect state behavior. Accordingly, cooperation can emerge in a repeated prisoner's dilemma as a result of these norms. If this is true, the statement that CIL has no exogenous influence on behavior must mean that although some norms come to be called CIL, that label has no impact on behavior. The only difference between "mere" norms and "legal" norms in this theory is the name. According to Goldsmith and Posner, there is no meaningful sense in which a norm has greater force because it is considered a legal norm.<sup>74</sup>

As will be discussed throughout much of this Article, however, there is no valid theoretical reason to conclude that state payoffs are unaffected when a norm comes to be regarded as a legal requirement.

Commentators advance two other important arguments to challenge the existence of CIL. The first is the claim that a state's reputation for compliance with international law cannot have much effect on its behavior.<sup>75</sup> This claim deserves a detailed discussion, which I provide in Part III.<sup>76</sup> The final critical claim is that the number of states is too large to support significant cooperation. This claim is likely overstated and is certainly not demonstrated in any existing writings.<sup>77</sup> The simplest reason for believing cooperation is possible is that although the number of states in the world is relatively large—in the neighborhood of 200—for

73. *Id.* at 39.

74. It is helpful to be clear about the semantics involved here. Goldsmith and Posner conclude that CIL has no influence on state behavior. One might describe this as a conclusion that CIL "does not exist," though they refrain from using that terminology. To the extent they state that CIL "exists," they are simply referring to the fact that certain norms are labeled as CIL. In their view, however, norms described in this way do not impact behavior any differently than other norms. My own use of the terminology is somewhat different. As stated in the Introduction and repeated in Part III, I define a rule of CIL as a rule that has some impact on the payoffs of states. So, using the Goldsmith and Posner terminology, my claim is that CIL can have an exogenous impact on behavior. Though either terminology can be used, I have chosen my own because it avoids confusion between the question of whether a rule of CIL "exists" and whether it affects payoffs.

75. Goldsmith & Posner, *A Theory of Customary International Law*, *supra* note 5, at 1135.

76. *See infra* note 106 and accompanying text. For a more complete discussion of how reputational concerns can generate compliance in international law, see Guzman, *supra* note 10.

77. *See* George Norman & Joel Trachtman, *The Customary International Law Game*, 99 AM. J. INT'L L. 541 (2005) (providing a careful and useful explanation of why cooperation can arise in the international context despite the relatively large number of states).

practical purposes the relevant number is normally much smaller, and at times may be as small as two.<sup>78</sup>

Under the approach advanced in this Article, a state is subject to a rule of CIL if other states believe such a rule exists. Each state can come to its own conclusion about whether a rule applies, and no coordination among them is required. Though there may be widespread agreement among states in some instances, this is not necessary for there to be a relevant rule. If even a single state believes that a rule applies, that state's interaction with an offending state may be affected by the violation. A violation of a rule of CIL, then, may generate costs within a group as small as two states.<sup>79</sup> As a semantic matter, existing discussions of CIL label a norm "special custom" when the number of states involved is too small for it to qualify as general custom. Whatever the label, however, these expectations generate incentives for states and, therefore, a form of CIL.

Even when a general rule of CIL is present, there is no need for multilateral cooperation in the sanctioning of violations. When a state violates international law, there is generally no expectation that all states will band together to punish the violator.<sup>80</sup> Rather, states affected by the violation may choose to take some sort of retaliatory action. Direct sanctions, then, are applied bilaterally rather than multilaterally, making them possible even when there are many states involved and no explicit coordination.

Furthermore, under the model of CIL advanced in this Article, reputational sanctions can affect violators without formal action by other states. This reputational effect generates a reaction from all states without requiring any form of costly action on their part.<sup>81</sup> There is, therefore, a form of multilateral consequence without the need for multilateral coordination.

Once the assumption of a one-shot game is abandoned in favor of the more realistic assumption of a repeated game, conclusions about the importance of custom are speculative. As a matter of theory, then, CIL may be effective. To dismiss this source of law, therefore, requires empirical evidence showing that it is irrelevant. To the best of my

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78. See Oscar Schacter, *New Custom: Power, Opinio Juris, and Contrary Practice*, in *THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOR OF KRZYSZTOF SKUBISZEWSKI* 531, 536 (Jerzy Makarczyk ed., 1996) ("[T]he great body of CIL was made by remarkably few states.").

79. See Verdier, *supra* note 10, at 863.

80. See Int'l L. Comm'n, *supra* note 16, at 43 (laying out rules with respect to countermeasures and making clear that such countermeasures can be taken bilaterally).

81. For a further discussion of this reputational effect, see *infra* Part III.

knowledge, there is no empirical evidence on the importance of CIL, and neither side in the debate should claim otherwise. Both sides marshal anecdotal evidence in their favor, but there is as yet no persuasive study of the impact of CIL on state behavior. With neither a theoretical argument nor empirical evidence to the effect that CIL does not matter, the dismissal of CIL is simply an unsupported assertion.<sup>82</sup>

### III. CIL WITH RATIONAL STATES

If traditional notions of CIL are deeply flawed and the modern skeptics' claims are unpersuasive, we are left with a challenge. Legal scholars must reconsider CIL to determine what a proper theory of CIL should look like and whether there is a role for this source of law.<sup>83</sup> To date, there have been a modest number of articles attempting to provide a rationalist model of CIL.<sup>84</sup> These articles establish beyond any serious doubt that CIL can be present when states interact repeatedly over time.<sup>85</sup> This Article is the first, however, to offer a systematic reconstruction and evaluation of CIL that is consistent with the assumption of a rational state.

The theoretical approach used in this Article is unabashedly institutionalist, and like many other rational choice approaches, it uses game theoretic models to describe state behavior.<sup>86</sup> It makes standard assumptions: states are capable of pursuing their interests, unwilling to take

82. See Andrew T. Guzman, *The Promise of International Law*, forthcoming VA. L. REV. (2006) (reviewing JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005)).

83. There is also an empirical challenge, beyond the scope of this paper, to evaluate the effectiveness of CIL in affecting state behavior. This empirical challenge has only recently been taken up with respect to treaty commitments, and hopefully CIL will follow. See Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002); Beth A. Simmons, *Money and the Law: Why Comply with the Public International Law of Money?*, 25 YALE J. INT'L L. 323 (2000).

84. See Chinen, *supra* note 4, at 143; Guzman, *supra* note 10, at 1874–78; Norman & Trachtman, *supra* note 77; Swaine, *supra* note 6; Verdier, *supra* note 10, at 839; Fon & Parisi, *Customary Law and Articulation Theories*, *supra* note 10; Fon & Parisi, *Stability and Change in International Customary Law*, *supra* note 10; Parisi, *supra* note 10.

85. I demonstrated this in my paper, Guzman, *supra* note 10, at 1844–51, 1874–78 (“CIL may influence state behavior through both reputational and direct sanctions.”). A more thorough treatment can be found in Norman & Trachtman, *supra* note 77, at 568 (“[I]t is impossible to say with certainty that CIL affects behavior, how often, or how much. But it is equally impossible to say that it does not affect behavior, that it seldom does so, or even that it only has marginal effects.”).

86. The tools of game theory are relatively new in international law, but they have quickly become mainstream. For comprehensive presentations of game theory, see DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* (1994); DREW FUDENBERG & JEAN TIROLE, *GAME THEORY* (1991); ERIC RASMUSSEN, *GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY* (1989).

actions for any reason other than their own interests, and capable of understanding the consequences of their actions.<sup>87</sup> As in nearly all scholarship aimed at describing international law and how it affects state behavior, I treat the state as a single actor.<sup>88</sup> The most important theoretical approaches put to one side by these assumptions are a public choice approach and its close cousin, the liberal approach, both of which disaggregate the state and study the interplay of various interest groups within it.<sup>89</sup> The problem with these approaches is familiar—the complex interaction of domestic interest groups makes it virtually impossible to develop a predictive model of state behavior.<sup>90</sup> A more detailed explanation and justification of the rational choice approach would be possible but not productive. The merits and demerits of these and other approaches have been catalogued exhaustively in many places, and I have provided my own views on the matter elsewhere.<sup>91</sup>

Within a rational choice framework, one can imagine a variety of ways to model the interaction of states, and recent writers have provided a laundry list of games with which to study CIL.<sup>92</sup> In each of these

87. Other approaches are possible, of course, though the institutionalist or rational actor methodology used here is dominant in current writing on the theory of international law. For a review of other approaches see Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335 (1989); Guzman, *supra* note 10, at 1830–40; Hathaway, *supra* note 83.

88. The theory advanced herein can be reconciled with a variety of public choice approaches. All that is assumed here is that states can identify their objectives and pursue them at the international level. The theory and results are not affected by an assumption that those objectives are the product of a struggle among interest groups. For a discussion of how public choice issues can be handled in international legal scholarship, see Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 900–04 (2002).

89. See Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907 (1992); Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513 (1997); see also Rachel Brewster, *Rule-Based Dispute Resolution in International Law*, VA. L. REV. (forthcoming 2006); Kal Raustiala, *Domestic Politics and International Regulatory Cooperation*, 49 WORLD POL. 482 (1997); *supra* notes 32–34.

90. See Abbott, *supra* note 87.

91. See Guzman, *supra* note 10, at 1830–40.

92. These include, for example, coordination games, hawk/dove games, and coercion. See Swaine, *supra* note 6. In coordination games the players are indifferent between two or more outcomes, but must coordinate their actions to avoid other, less desirable results. For example, the navies of two states may wish to undertake training exercises in international waters. Several possible areas of the ocean are available, and the countries are indifferent about where their navies will train. Both countries, however, want to avoid a situation in which both navies train in the same waters at the same time. The states' interests are consistent with one another, but coordination is important to ensure the highest possible payoff. See Barbara Koremenos, Charles Lipson, & Duncan Snidal, *The Rational Design of International Institutions*, 55 INT'L ORG. 761, 774 (2001) (discussing coordination games in the context of international relations); Duncan Snidal, *Coordination versus Prisoner's Dilemma: Implications for International Cooperation and Regime*, 79 AM. POL. SCI. REV. 923 (1985) (same). In

games, CIL has the potential to alter payoffs and, therefore, to make a difference in the interactions of states. The dominant model, however, has been the prisoner's dilemma, and this Article focuses on that game. Concentrating on the prisoner's dilemma is useful for an account, such as the one presented here, that is fundamentally supportive of CIL. In the prisoner's dilemma the interests of states are at odds, making a cooperative outcome particularly difficult to achieve. In this sense, the prisoner's dilemma is the hardest case for CIL. If cooperation is possible in this context, it is likely possible in a wide range of games and strategic interactions. Furthermore, the way in which rules of CIL might influence payoffs is the same in any game, so the analysis presented here can easily be applied to other games.

It is important at this point to restate what I mean when I talk about rules of CIL. A rule of CIL, for present purposes, is a legal rule that, by virtue of its status, affects the payoffs of states. Traditional writing on CIL defines the relevant rules doctrinally—a rule that satisfies the *opinio juris* and practice requirements is a rule of CIL. This definition, however, tells us nothing about state behavior. In a world of rational states, CIL is relevant only when it has some impact on payoffs. Given that the rules in question arise without explicit agreement, it seems sensible to limit the definition to legal rules that have some effect.<sup>93</sup>

### A. Prerequisites for Cooperation

The strongest claims about the irrelevance of CIL are typically based on a simple one-shot prisoner's dilemma. In these models, the claim that CIL does not matter follows from the basic structure of the game—in a one-shot prisoner's dilemma, the parties have no reason to cooperate. In

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a hawk/dove game each player prefers to play one strategy, often called "hawk," but only if the other player plays a different strategy, "dove." For example, returning to the above example, in a hawk/dove game, both parties would prefer to train in one area, but would rather train by themselves rather than share that area. We can again reach an equilibrium through coordination—once one state commits to train in the preferred area, the other state will choose a different area. There is more tension between the states' objectives here than in a coordination game, but once again we can achieve a stable equilibrium through communication and coordination and without international law. For a development of the hawk/dove game in the international law context, see Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229 (2004).

93. I recognize that "law" is not generally defined as being limited to rules that affects costs and benefits. With respect to CIL, however, we are without the conventional markers for what is and what is not law (the passage of legislation, the signing of a treaty, the adoption of administrative rules, etc.). Where one turns instead is an open question. I do not wish to make any general point about the meaning of "law." Defining CIL to be those customary legal rules that affect behavior is simply the most practical definition for the development of this Article.

the domestic setting, this sort of problem can be resolved through contract; two parties can enter into a binding commitment, and if one of them breaches the contract, the other is entitled to damages ordered and enforced by courts. The threat of liability encourages compliance and, therefore, cooperation. The ability to use binding contracts changes the game from a one-shot game to a two period game, in which those who breach in the first period must pay damages in the second period.

The international system, however, does not provide for binding contracts or a set of courts ready to resolve interstate disputes.<sup>94</sup> Since violations of CIL do not lead to court-imposed sanctions, law can only affect behavior if there is some other sanction associated with noncompliance.

The two sanctions of greatest interest can be labeled direct sanctions and reputational sanctions.<sup>95</sup> Direct sanctions are specific punishments meted out by other states in response to a violation. For example, if a state violates a CIL obligation, an affected state might respond by refusing to perform some obligation it owes to the offending state.<sup>96</sup> These direct sanctions can deter wrongdoing, but their use is hampered by a number of considerations. First, direct sanctions are often costly to the sanctioning state. For example, the boycott of trade with South Africa during the apartheid years was certainly burdensome to South Africa, but it was also costly to the implementing countries whose exporters lost a market and whose consumers were unable to purchase South African goods.<sup>97</sup> This cost makes it less likely that states will punish a violation and, therefore, reduces the incentive generated by the threat of a sanction.

Second, direct sanctions for violations of CIL are normally imposed unilaterally and without formal dispute resolution procedures. As a result, there is no guarantee that sanctions will be imposed against actual violators rather than states that are in compliance. If violators are not always sanctioned and non-violators sometimes face sanctions, the incentive effect of sanctions is once again reduced because of the

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94. There is, of course, the ICJ, which is at times used to resolve disputes, but that institution hears very few cases and lacks enforcement powers.

95. For a detailed discussion of compliance in international law, including the role of reputational sanctions, see Guzman, *supra* note 10.

96. See, e.g., Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 16, art. 49 ("Countermeasures are limited to the non-performance . . . of international obligations of the State taking the measures towards the responsible State.")

97. See G.A. Res. 1761, U.N. Doc. A/RES/1761 (XVII) (Nov. 7, 1962) (calling for member states to break all diplomatic ties with South Africa, forbid their ships from entering her ports, boycott all South African goods and cease exporting to her, and refuse landing rights to South African aircraft).

diminished difference in treatment between those that comply and those that do not.

The use of direct sanctions is sufficiently hampered in practice that even the strongest believers in international law must concede that they normally provide no more than a modest incentive toward compliance with CIL.<sup>98</sup> Because states interact repeatedly, however, another form of costs—reputational sanctions—is able to increase the “compliance pull” of international law.

Reputational sanctions give states a separate reason to comply with the rules of international law in general and CIL in particular. A refusal to comply with international obligations today signals to other countries a willingness to violate the law. Other states then use this information to decide how to interact with the violating state in the future. For example, if state A repeatedly refuses to comply with a rule of CIL, it damages its reputation as a state that respects international legal rules. This in turn will hurt the state’s future international interactions. Other states may be reluctant to comply with CIL in their dealings with this state, and they may take actions to protect against future violations. If the reputational harm affects expectations about compliance with international agreements, it will also be more difficult for the violating state to enter into such agreements in the future.

To see how reputation can affect behavior, think of states deciding whether or not to comply with an existing rule of CIL. Suppose, for example, that states face a situation that, putting aside the relevant CIL rule, is a prisoner’s dilemma in which we label the cooperative outcome “comply” and the non-cooperative outcome “violate,” as shown in Figure I.<sup>99</sup> Suppose, for example, that states must decide whether or not to provide diplomatic immunity to foreign dignitaries.

FIGURE I

		Country 2	
		Comply	Violate
Country 1	Comply	5, 5	2, 6
	Violate	6, 2	3, 3

98. See Guzman, *supra* note 10, at 1845. *But see* Lori Fisler Damrosch, *Enforcing International Law Through Non-Forcible Measures*, 269 RECUEIL DES COURS 9, 19–22 (1997) (describing a range of enforcement mechanisms in international law).

99. This example is taken from Guzman, *supra* note 10, at 1842–51.

Because this is a repeated game, it is necessary to specify the outcome of future rounds. Absent a relevant rule of CIL, it is assumed that the identical game is repeated indefinitely and the parties treat every interaction as a separate one-shot game. The result is that the parties both play “violate” in every period. Assuming a discount rate of  $r$ , the states each earn a payoff of:  $3 + 3/(1+r) + 3/(1+r)^2 + \dots = 3(1+r)/r$ .<sup>100</sup> To simplify, let  $R = (1+r)/r$ . Then each country receives a payoff of  $3R$ .

Now consider how CIL might alter this result. Suppose that it is possible for a state to have a “good” reputation for following CIL, which simply means that other states believe that the state complies with CIL.<sup>101</sup> In concrete terms, assume that as long as a state complies with a particular rule of CIL, other states expect it to continue to do so. Once the state violates the rule, however, all other states consider it to have a “bad” reputation and will anticipate violations in the future.<sup>102</sup> If two states with good reputations interact, each will earn a payoff of 5 in every period as long as both comply. If a state violates in the first period, it earns a payoff of 6 in that period, but for every subsequent period it earns a payoff of 3 because it has lost its good reputation and other states anticipate a violation. So each country faces the following payoffs:

If it complies:  $5 + 5/(1+r) + 5/(1+r)^2 + \dots = 5(1+r)/r = 5R$

If it violates:  $6 + 3/(1+r) + 3/(1+r)^2 + \dots = 3 + 3(1+r)/r = 3 + 3R$

These payoffs can be represented as follows:

FIGURE II

		Country 2	
		Comply	Violate
Country 1	Comply	5R, 5R	3R-1, 3+3R
	Violate	3+3R, 3R-1	3R, 3R

The key point is that Figure II may no longer be a prisoner’s dilemma. For sufficiently large values of  $R$  (meaning a sufficiently low discount rate,  $r$ ) both states have an incentive to comply. For example, if

100. The calculation of these payoffs is straightforward once it is recognized that:  $x + x/(1+r) + x/(1+r)^2 + \dots = x(1+r)/r$ .

101. I put aside for the moment the possibility that the content of CIL may be uncertain or subject to dispute.

102. The simple identification of countries as having a “good” or “bad” reputation is done for the sake of clarity. It is not necessary for the analysis. All that is required is that reputation varies along a spectrum and that violations of CIL harm a country’s reputation.

the discount rate is assumed to be .25 (meaning that a state is indifferent between a payoff of 1 today and 1.25 next period), then  $R = 5$  and the dominant strategy for both parties is to comply with the rule of CIL.<sup>103</sup>

In this illustration, the CIL rule has altered behavior. Because violation of the rule affects a state's reputation for compliance, it is costly. There remains a current payoff to violation, but there are also future costs brought on by the CIL rule. The presence of a rule of CIL, then, generates an incentive for compliance because a reputation for compliance with CIL (or any international law, for that matter) offers benefits to a state. To establish or preserve such a reputation and enjoy gains in the future, a state may be willing to forego a short term benefit.

Notice that the nature of the reputational sanction presented above is not dependent on the explicit and intentional application of direct sanctions. When a state violates CIL, the resulting reputational sanction is not a costly punishment imposed by other states.<sup>104</sup> Rather, it is an updating of the beliefs about the violating state. Thus, for example, if the United States fails to respect the diplomatic immunity of a foreign diplomat, other states (including but not limited to the state of the diplomat) will take note of this action and alter their expectations about the immunity that will be granted in the future. This may change the way in which other states conduct their diplomatic relations with the United States, the way they treat American diplomats, and their willingness to rely on U.S. legal behavior. Though these changes impose costs on the United States, they are not costly to the other states. Rather, the sanction is the product of every other state altering its beliefs about the United States and then maximizing its payoffs under those new beliefs. So a state may decide, for example, to close or reduce the size of its diplomatic mission. This action would not be taken to punish the United States (though it would have that effect) but rather would reflect new fears for the safety of diplomats.

### B. *The Value of Reputation*

A theory of compliance based on reputation can only work if states care about their reputation,<sup>105</sup> and commentators seem to agree that reputation is in fact an important consideration for states. Even those most

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103. The payoff from compliance is 25 and the payoff from violation, even if the other party does not violate in the first period, is 18.

104. See Andrew T. Guzman, *The Design of International Agreements*, 16 Eur. J. Int'l L. 579 (2005).

105. For a more detailed discussion of reputation, see George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEG. STUD. 95 (2002); Guzman, *supra* note 10.

skeptical of CIL grudgingly admit that states put some weight on reputational concerns. Goldsmith and Posner, for example, state that "all things equal, nations will strive to have a reputation for compliance with international law, but a reputation for compliance will not always be of paramount concern because all things are not equal."<sup>106</sup> Of course, any sensible theory of law must acknowledge that other interests and concerns may override the incentives created by law. States are less likely to abide by international law when their security is at stake, for example. More generally, the most basic assumption of any rational choice model is that states will comply with international law when the total benefits of doing so outweigh the costs. It follows that reputational concerns are not always paramount.

A reputational theory of CIL, however, does not require that reputation dominate all other concerns. It requires only that states care about their reputation. If this is so, international law (customary or otherwise) offers some "compliance pull," encouraging states to obey the law. A state will not violate a norm of CIL if that violation would generate gains smaller than its costs. The reputational cost must be added to whatever other costs are relevant—putting a thumb on the scale in favor of compliance.

Furthermore, the notion that states wish to preserve a reputation for compliance with international law does not imply that this is the only reputational issue of concern to them. States may, for example, value a reputation for toughness in international relations, and this may at times conflict with the desire for a reputation for compliance with international law.<sup>107</sup> In this and other contexts, a state may be prepared to sacrifice its reputation for compliance in order to achieve other goals. The only claim of the reputational theory of compliance is that such a sacrifice is costly to the state.

It should also be noted that a state's reputation in one area may be different from its reputation in another. For example, a state may be reliable with respect to economic cooperation but not with respect to human rights issues. The extent to which states have a general reputation for compliance with international law as opposed to separate reputations for each issue area is significant, but goes beyond the scope of this Article and so will be left for another day.<sup>108</sup>

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106. See, e.g., Goldsmith & Posner, *A Theory of Customary International Law*, *supra* note 5, at 1136.

107. See, e.g., Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT'L L.J. 487, 496–99 (1997).

108. See Downs & Jones, *supra* note 105.

The point here is that a reputation for compliance is valuable to states; however, this observation should not be mistaken for a claim that it trumps all other considerations or all other forms of reputation. Attempts to dismiss a reputational theory on the grounds that other forces are at work in a state's decisions misunderstand what it means for reputation to matter. If the desire for a reputation for compliance causes states, at the margin, to comply with international law more than they otherwise would, a reputational theory is relevant.

### C. *International Norms and the Definition of CIL*

At this point it is helpful to clarify what it means for a particular behavioral regularity to be a rule of CIL rather than merely a norm of behavior. This distinction is a problematic one throughout the literature on CIL. A central problem for this Article is that the most plausible mechanism through which norms operate is quite similar to the way in which CIL operates. In both cases, certain behaviors are considered to be "cooperative," and a failure to act accordingly will generate a negative signal. It is inevitable, then, that the line between norms and CIL will often be difficult to identify.

Recognizing the similarity between CIL and norms suggests two possible definitions for CIL. First, one could define CIL to simply be those behavioral norms that have a particularly strong impact on state behavior. That is, we could assign the label of CIL to a set of particularly powerful norms. This definition, however, would not distinguish cases in which a norm gained greater force *because* it came to be seen as a rule of CIL. The term CIL would simply describe a certain set of norms.

An alternative definition of CIL—and the one chosen for this Article—refers to those norms that states see as legal rules. A norm may come to be seen as a legal obligation, for example, if it is considered especially important and of a higher order than "mere" norms. Or a norm may attain the status of CIL because it has been in place for a long time and has come to be viewed as more fundamental to the system than other norms. Once the norm becomes a legal rule, states have a heightened expectation of compliance. With this heightened expectation of compliance comes an increase in reputational sanctions in the event of a violation. It is one thing to violate a "mere" norm, but it is more serious to violate a rule of CIL. All else equal, the latter represents a more serious failure to cooperate and, accordingly, will have a more significant impact on a state's reputation. This higher cost, in turn, increases the "compliance pull" of the rule. This definition of CIL is functional and contrasts with the doctrinal view in the existing literature.

Notice that the definition turns on the beliefs of states and not their public statements. That is, a rule of CIL exists only if states have an honest belief that a particular norm is a legal rule. The reputational consequence of violation comes about because states that observe a violation then update their beliefs. To illustrate, it is not enough for the United States to declare that there is a legal obligation to refrain from expropriating the property of foreign investors. The United States must believe it to be so and must view a failure to behave accordingly as a signal about the willingness of another state to comply with international obligations.

It should also be noted that states are not free to choose their own beliefs. Beliefs are not policy variables that a state is able to manipulate strategically. This is true both with respect to the status of legal rules (a state cannot “choose” to believe that a legal rule does or does not exist) and with respect to the beliefs of a state about the reputation of other states (a state cannot “choose” to believe that a state is likely or unlikely to comply with a rule of CIL). Because states are not “choosing” their beliefs, the theory of CIL advanced here does not imply that states can create a rule of CIL simply by wishing that it exists.

#### IV. A POSITIVE THEORY OF CIL

Considering CIL through a reputational lens allows us to develop an understanding of how CIL can exist in a model of rational states. This Part focuses on a positive explanation of how CIL can exist and the implications for existing views of CIL. Specifically, it considers how a reputational theory can explain the presence of CIL and the implications of that theory for *opinio juris* and state practice, the traditional touchstones of CIL. It also examines what a reputational theory implies for the possible existence and importance of “instant custom” and “special custom.” In Part V, the Article turns to a more normative discussion of some other areas of CIL doctrine. The distinction between normative and positive analysis is inevitably imperfect in the sense that some normative discussion has unavoidably entered this Part and some positive discussion is present in the normative section. In general, however, this Part is focused on what the theory means for existing understandings of CIL, while the normative section is interested in the desirability of certain doctrinal rules of CIL.

## A. *Opinio Juris*

### 1. The Existing Doctrine of *Opinio Juris*

At present, *opinio juris*, also known as the “subjective element” of CIL, is one of the two requirements for the existence of a rule of CIL. The standard formulation of *opinio juris* is that a practice must be “accepted as law.”<sup>109</sup> The precise contours of *opinio juris* are somewhat uncertain,<sup>110</sup> but most agree that some version of it is required.<sup>111</sup>

To understand this requirement, it is helpful to go back to basic notions of the relationship between international law and consent.<sup>112</sup> It is commonly observed that international law cannot bind states without their consent, and notions of consent are often said to be the basis for CIL.<sup>113</sup> If this is true, it obviously follows that CIL binds a state only if that particular state accepts that the rule of CIL is a binding obligation.<sup>114</sup> If one holds to the touchstone of consent, then, *opinio juris*

109. Statute of the International Court of Justice, art. 38, para. 1(b).

110. See, e.g., Int’l L. Ass’n, Comm. on Formation of Customary (Gen.) Int’l L., *Statement of Principles Applicable to the Formation of General Customary International Law* 29–30 (2000), available at <http://www.ila-hq.org/pdf/customarylaw.pdf> [hereinafter *ILA Report*] (“The question of the subjective element in customary law is highly controversial. . . . ‘The precise definition of . . . the psychological element in the formation of custom, the philosopher’s stone which transmutes the inert mass of accumulated usage into the gold of binding legal rules, has probably caused more academic controversy than all the actual contested claims made by States on the basis of alleged custom.’”) (quoting H.W.A. THIRLWAY, *INTERNATIONAL CUSTOMARY LAW AND CODIFICATION* 47 (1972)).

111. See *Continental Shelf (Libya v. Malta)*, 1985 I.C.J. 13, 29 (June 3) (“[T]he material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States . . . .”); *North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.)*, 1969 I.C.J. 3, 44 (Feb. 20) (“The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.”); Roberts, *supra* note 7, at 757; see also BYERS, *supra* note 2, at 18 (“Although most international lawyers agree that *opinio juris* plays a role in transforming State practice into rules of customary international law, they have not been able to agree on its character . . . .”).

112. In previous writing I have criticized the consent-based approach to international law. See Guzman, *supra* note 10, at 1833–34.

113. See, e.g., *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 9, at 18 (Sept. 7) (“The rules of law binding upon States therefore emanate from their own free will . . . .”); Louis Henkin, *International Law: Politics, Values and Functions*, 216 *RECUEIL DES COURS D’ACADEMIES DE DROIT INT’L* 9, 27 (1989) (“[A] state is not subject to any external authority unless it has voluntarily consented to such authority.”).

114. In the debates about *opinio juris* there are some who favor a requirement that states believe that a rule exists while others favor a rule requiring that states consent to the rule of CIL. See Maurice H. Mendelson, *The Formation of Customary International Law*, 272 *RECUEIL DES COURS* 155, 246 (1998) (“Some . . . find the explanation in consent . . . . Others find the basis of custom’s binding force in States’ belief in the legal necessity or permissibility of the practice in question—which I shall call for short the ‘belief’ [approach].”). This distinction can matter in some discussions, but for present purposes it is sufficient to focus on whether a

requires that there be both a general acceptance in the international community that a rule of CIL exists and an acceptance by the affected state.

This conclusion, however, is not the mainstream view.<sup>115</sup> Though many commentaries fail to clearly distinguish the *opinio juris* required of states as a group from that required of an individual state, most discussions require only the former.<sup>116</sup> The ICJ, for its part, does not clearly identify which states must possess the psychological element that is *opinio juris*, but it seems to have in mind states as a group. For example, in the *North Sea Continental Shelf* cases, the ICJ stated that “[t]he States concerned must therefore feel that they are conforming to what amounts to a legal obligation.”<sup>117</sup> Though not entirely clear, the reference to “the States concerned” suggests a group of affected states rather than simply the violating state.<sup>118</sup>

The persistent objector doctrine also suggests that the sense of legal obligation must be held by states in general and not just the defendant state in particular.<sup>119</sup> According to that doctrine, a state that does not share the community’s sense that a particular norm is a rule of CIL cannot, based on that fact alone, claim to be exempt from the rule. Rather, the state must make its objections widely known, must do so

state has accepted the existence of a rule of CIL—a terminology that (at least partially) reconciles the two above alternatives. See *id.* at 283; *ILA Report, supra* note 110, at 30, cmt. 3.

115. See, e.g., Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT’L L. 1, 16 (1985) (“Most writers forbear from claiming that consent is the basis for obligation under international law . . .”)

116. See, e.g., Mendelson, *supra* note 114, at 248 (“[E]ven if we were to accept . . . that the consent of the generality of States is needed before a customary rule comes into being, it by no means follows that, for a particular State to be bound by that rule, one must show that that particular State consented to it.”); see also *infra* notes 137–149.

117. *North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.)*, 1969 I.C.J. 3, 44 (Feb. 20).

118. Subsequent discussion in the *North Sea Continental Shelf* cases is consistent with this conclusion. The ICJ spoke of the parties to the case and states in general without any particular focus on the defendant state:

[S]ome States have at first probably accepted the rules in question, as States usually do, because they found them convenient and useful, the best possible solution for the problems involved. Others may also have been convinced that the instrument elaborated . . . was to become and would in due course become general law . . . . Many States have followed suit under the conviction that it was law . . . . [T]he general practice of States should be recognized as prima facie evidence that it is accepted as law.

*Id.* ¶ 78.

119. See *infra* note 125 for a discussion of the persistent objector doctrine.

before the practice solidifies into a rule of CIL,<sup>120</sup> and must make the objection on a consistent basis.<sup>121</sup> If CIL required that an individual state feel a legal obligation to comply with a rule, there would be no need for the persistent objector doctrine as it currently stands. For example, it would not be necessary for a state to show that it had objected to a norm prior to that norm becoming law. Instead, it would be sufficient to show that a state had not consented to or accepted the rule. The state would then simply not be bound.<sup>122</sup>

For many international law scholars, the notion of consent is so deeply engrained that the idea of being bound by CIL without consent is troubling. One way around this problem has been to reference “inferred consent.”<sup>123</sup> If a state fails to object to a developing rule, then this failure to object is taken as support for the rule.

The notion of inferred consent attempts to retain the consensual basis of international law despite the absence of explicit consent. Notwithstanding its focus on consent, however, it requires that states object even (and perhaps especially) if they are behaving consistently with the norm but do not do so out of a sense of legal obligation. As Byers points out, a lack of objection is quite different from consent.<sup>124</sup> A state may fail to object for any number of reasons having nothing to do with consent. It may prefer to avoid objecting for political reasons, it may not feel that the norm is changing into custom—making objection unnecessary—or it may simply not be sufficiently affected by the rule to make objection a priority. The inferred consent argument, then,

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120. See T.L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. J. INT'L L. 457, 458 (1985).

121. Jonathan Charney claims that the persistent objector rule implies that the consent theory is correct, but what his argument actually shows is that states can avoid the application of the law, not that they must explicitly consent in order to be bound. That is, he is correct to note that the persistent objector rule allows states to opt-out of CIL, but this is not the same as a consent theory under which a state must opt-in in order to be bound. See Charney, *supra* note 115, at 16 (“It is difficult to see how the acceptance of [the persistent objector] rule does not reflect an acceptance of the consent theory of international law. If a mere objection to an evolving rule of law can prevent application of that rule to the State, then each State has the unilateral power to decide whether or not to be bound by the rule.”)

122. There would surely remain evidentiary issues about whether the state agreed that it had a legal obligation, but this evidentiary issue may at times be met without widespread knowledge of the objection by other states. Furthermore, because most CIL violations are not subject to any sort of dispute resolution, the issue seems minor. At any rate, given that the underlying *opinio juris* requirement does not demand that the sense of legal obligation be “widely known,” it is hard to see why it would make sense to demand this of an objector if the goal was to identify consent.

123. See BYERS, *supra* note 2, at 142–46; MARK VILLIGER, *CUSTOMARY INTERNATIONAL LAW AND TREATIES* 18–22 (1985).

124. See BYERS, *supra* note 2, at 143.

should be recognized as an argument that a state does not have to share a sense of legal obligation to be obligated. It is enough that it has failed to object to a rule of CIL supported by a general sense of legal obligation among states.<sup>125</sup>

Other scholars have attempted to rescue the consent element by arguing that states have consented to “secondary” rules of CIL.<sup>126</sup> The notion here is that states have consented to the way in which rules of CIL change over time, including a rule under which CIL can arise or change without affirmative consent. In the words of D’Amato, “perhaps the most important secondary rule in international law is the secondary rule of custom.”<sup>127</sup> D’Amato describes what he terms an “international consensus” with respect to this secondary rule.<sup>128</sup> For present purposes, what matters is that this notion of secondary rules concedes that states can be bound by a particular rule without consenting to it. To say that some other, secondary consent requirement is nonetheless satisfied calls on a different notion of consent.<sup>129</sup>

Ultimately, it is clear that the actual consent of an affected state is not itself required for that state to be bound by a particular rule of CIL.<sup>130</sup> Whether one simply accepts that consent is not necessary for a rule of CIL to bind a state or one imagines that states have agreed to a secondary rule under which there is a presumption of consent (rebuttable through the persistent objector doctrine) makes little difference. The key point is that states can be bound by CIL (or changes in CIL) even if they themselves have not consented to the rule.

This conclusion is consistent with at least a substantial part of the CIL literature—the *opinio juris* requirement is satisfied if states in gen-

125. The inferred consent approach has other flaws, including that it cannot explain why new states are generally thought to be bound by rules of CIL despite the fact that we cannot infer consent in their case. Similarly, it cannot easily be reconciled with the conventional rule that objections brought after a rule is established are insufficient to avoid the binding force of CIL. See Charney, *supra* note 115.

126. See Vaughan Lowe, *Do General Rules of International Law Exist?*, 9 REV. OF INT’L STUDIES 207, 208–10 (1983).

127. D’AMATO, *supra* note 2, at 44.

128. *Id.* at 42.

129. Though the argument in this Article does not require that this notion of secondary consent be discarded, it is worth noting that it represents a curious idea of consent. The secondary consent approach does not allege that any state ever actually gave explicit consent to a set of secondary rules governing custom formation, let alone that all nations have done so. Nor is there scope for a state to withdraw its consent to the secondary rules or even to withhold consent when it first becomes a state. The claim, then, is that consenting to these secondary rules is a necessary and unavoidable part of being a state. Labeling this “consent” is akin to suggesting that humans have consented to breathing in oxygen and exhaling carbon dioxide.

130. See BYERS, *supra* note 2, at 142–46; Akehurst, *supra* note 4, at 23 (“A State can be bound by a rule of customary international law even if it has never consented to that rule.”).

eral believe that a rule has the status of CIL. The distinction between the views of the individual state whose actions are alleged to have violated CIL and the views of states in general is important because once the narrower notion of consent is abandoned, CIL becomes a more coherent source of law. A rule of CIL is able to bind individual states that have not consented to it and that do not feel a sense of legal obligation if there is nonetheless a general sense of legal obligation among other states.

One can find prominent commentators who take the view that *opinio juris* is not necessary for the formation of CIL.<sup>131</sup> There is also a more modest position that has found support in several ICJ cases and that takes the presence of consistent state practice as sufficient to demonstrate the existence of *opinio juris*.<sup>132</sup> While this view offers lip service to *opinio juris*, it largely eliminates it as a meaningful element in the establishment of CIL.

These perspectives, however, do not appear to be majority views,<sup>133</sup> and it is not difficult to find ICJ cases that take *opinio juris* seriously, including the case concerning *Military and Paramilitary Activities in and Against Nicaragua*,<sup>134</sup> the *North Sea Continental Shelf* cases,<sup>135</sup> and the *Lotus* case.<sup>136</sup>

131. See, e.g., H. LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 380 (1958); Akehurst, *supra* note 4, at 32 (“The most radical approach is a denial of any requirement of *opinio juris*.”); Mendelson, *supra* note 114, at 250, 289 (“[I]t is not in fact necessary to demonstrate the presence of the subjective element in all, or perhaps even most, instances . . . [W]here there is a well established practice, the Court and other international tribunals, not to mention the States themselves, tend to conclude that there is a customary rule without looking for proof of *opinio juris*.”).

132. See, e.g., *Rights of Nationals of the United States of America in Morocco* (Fr. v. U.S.), 1952 I.C.J. 176, 200 (Aug. 27) (reviewing diplomatic correspondence to determine that a right to exercise consular jurisdiction “founded upon custom or usage” had not been established); *Asylum* (Colom. v. Peru), 1950 I.C.J. 266, 276 (Nov. 20) (suggesting that a customary rule must be based on a “constant and uniform usage”).

133. See, e.g., Wolfke, *supra* note 42, at 40–41 (“Without practice (*consuetudo*), customary international law would obviously be a misnomer, since practice constitutes precisely the main *differentia specifica* of that kind of international law. On the other hand, without the subjective element of acceptance of the practice as law the difference between international custom and simple regularity of conduct (*usus*) or other non-legal rules of conduct would disappear.”).

134. “[T]his *opinio juris* may be deduced from, *inter alia*, the attitude of the Parties and of States towards certain General Assembly resolutions . . .” *Military and Paramilitary Activities* (Nicar. v. U.S.), 1986 I.C.J. 14 ¶ 188 (June 27).

135. In which the ICJ found that the claims of Denmark and the Netherlands regarding CIL failed because neither the *opinio juris* nor the practice requirements were met. *North Sea Continental Shelf*, (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 229, 231 ¶¶ 74–78 (Feb. 20).

136. In this case, the PCIJ found that there was insufficient evidence of *opinio juris*. *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9, at 15–19 (Sept. 7) (finding that the *opinio juris* requirement was not met).

If one accepts that *opinio juris* must be established, there remains the question of how to do so. The central problem, of course, is that it is difficult to know what a state believes. We observe only actions and statements, not beliefs. State actions are more likely than statements to reflect beliefs, but they are also less frequently on point. This raises the question of whether statements can ever count as evidence of beliefs, or if only actions count. Though there are myriad problems with using statements as evidence of a state's beliefs,<sup>137</sup> the majority view is that they may be used in this way.<sup>138</sup>

## 2. A Rational Choice Analysis of *Opinio Juris*

A sensible and coherent theory of CIL must consider the behavior of states and the relationship between a legal rule and state actions. If a rule of CIL affects state behavior, it must be that it affects the payoffs states receive. As already discussed, these payoffs can be affected through either direct or reputational sanctions.<sup>139</sup> A theory of CIL, then, should take this into account.

Imagine that a state is choosing between two actions. The first possible action, which we call "comply," is consistent with a relevant rule of law. The second possible action, which we call "violate," is inconsistent with the rule. If the state chooses "violate," it faces a reputational or direct cost. Because these costs or sanctions depend on the actions and beliefs of other states, they are only triggered if other states believe that there has been a violation of a rule of international law. In other words, it is not the beliefs of the acting state that matter. Rather, if the states it interacts with believe there has been a violation of CIL, they will perceive the acting state to be less willing to abide by the law, and this belief will negatively affect future interactions.<sup>140</sup> These other states may also decide to impose some form of direct sanction. Whatever its form, the sanction imposes a cost on the violating state, and the threat of such direct and reputational sanctions can provide an incentive toward compliance.

Understanding the behavior of states with respect to CIL sheds light on a theoretically sound way to define *opinio juris*.

***Opinio juris refers to the beliefs of states that interact with a potential violator. To the extent that these states believe there exists a legal obligation, the potential violator faces a rule of CIL.***

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137. See *supra* Part II.

138. See *supra* note 134 (quoting an ICJ passage that treats votes on UN resolutions as evidence of *opinio juris*).

139. See *supra* Part III.

140. *Id.*

Strictly speaking, even the notion that there must be a general sense of legal obligation among states is incorrect. Each state has its own beliefs about the status of CIL and it is not necessary for all these views to be the same. When a state takes action that an observing state believes to be a violation of a legal rule, the latter adjusts its estimate of the acting state's willingness to comply with international legal rules. Notice that the sanction is bilateral in the sense that there is no need for a third party state in the sanctioning process. On the other hand, the violative act may affect some state other than the observing state. There is, after all, no reason for a state to update its beliefs based only on its firsthand experiences. If it observes a legal violation it will update its beliefs, even if the violation did not cause it injury.

The claim that each state has its own beliefs about the status of CIL must be tempered with recognition of the fact that a general sense of legal obligation may well influence the perception of states. That is, a state is more likely to believe that another state has a legal obligation if other states have the same view. Thus, a strong sense of legal obligation is more likely to come about if it is shared by a group of states. Furthermore, sanctions, whether direct or reputational, are more costly when they are applied by many states. Putting aside the persistent objector exception (discussed below),<sup>141</sup> the role of consent is all but gone from this description of CIL. Such an approach is sensible from the perspective of state incentives because, as mentioned, changes in the beliefs of other states generate reputational sanctions. Looking to states as a group is also consistent with the language in Article 38 of the Statute of the ICJ,<sup>142</sup> language used by the ICJ in its decisions,<sup>143</sup> and language in the Restatement (Third) of Foreign Relations Law.<sup>144</sup>

***Consent of the affected state is not required for the opinio juris requirement to be satisfied.***

The role of consent is dismissed because consent does not generate an incentive to comply with a rule of CIL. The beliefs of other states, in

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141. See *infra* Part V.

142. "[I]nternational custom, as evidence of a general practice accepted as law." Statute of the International Court of Justice, art. 38(1)(b).

143. See, e.g., *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 9, at 18 (Sept. 7) (stating that the will of states can be expressed through "usages generally accepted as expressing principles of law.") (emphasis added).

144. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102 cmt. c (1987) ("For a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation . . . . A practice initially followed by states as a matter of courtesy or habit may become law when states generally come to believe that they are under a legal obligation." (emphasis added)).

contrast, do generate such an incentive. A system that generates a legal obligation only when there is explicit consent would, to be sure, be more protective of state sovereignty and may (or may not) be a better normative system.<sup>145</sup> The point here, then, is not that consent should or should not be a requirement, but rather that in a model of rational states, there is no role for consent in the formation of CIL.

The focus on reputation and perception also explains the existence of aggressive attempts to frame the way in which CIL is perceived. Human rights activists, for example, have succeeded in bringing at least some human rights under the CIL heading. Similar efforts are underway with respect to a wide range of other norms some commentators would like to see become rules of CIL. For example, some states and scholars argue that torture is prohibited under CIL despite the fact that the practice is still prevalent throughout the world.<sup>146</sup> Others argue that environmental protection is CIL, even without evidence of consistent and general practice.<sup>147</sup> In the investment area, there continues to be disagreement about whether the duty to pay full compensation for expropriation of foreign-owned property is a rule of CIL.<sup>148</sup> By influencing perceptions, advocates may be able to alter the beliefs of states and, therefore, influence CIL.<sup>149</sup>

### B. *The State Practice Requirement*

The second element in most definitions of CIL is the requirement of consistent state practice. Once again, however, if we penetrate the surface of this element there is considerable disagreement among commentators. In fact, virtually every part of the state practice inquiry is the subject of debate. There is, for example, no consensus regarding the

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145. For a discussion of the normative implications of CIL rule formation, see Eugene Kontorovich, *The Efficiency of International Customary Norms*, draft manuscript on file with author (2005).

146. See *supra* note 13.

147. *Id.*

148. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 712 cmt. d (1987)(stating that states have a duty to pay full compensation for the expropriation of foreign-owned property); see also *Amoco Int'l Fin. Corp. v. Gov't of the Islamic Rep. of Iran*, 15 Iran-U.S. Cl. Trib. Rep. 189, 223, 234 (1987). But see S. N. Guha Roy, *Is the Law of Responsibility of States For Injuries To Aliens a Part of Universal International Law?*, 55 AM. J. INT'L L. 863, 888-89 (1961); E. Jimenez de Arechaga, *The Duty to Compensate for the Nationalization of Foreign Property*, 2 Y.B. INT'L L. COMM'N 237, 239 (1963).

149. The resources spent in an attempt to establish certain norms as rules of CIL and to demonstrate compliance with rules of CIL provide evidence that CIL matters to states. If CIL did not have some independent impact on state decisions no rational state would expend resources to dispute its meaning.

importance of state practice relative to *opinio juris*, the number of states that must engage in the practice, the time over which the practice must be followed, the necessary consistency of the practice, or what behaviors count as state practice.

The scope of opinions on the practice requirement is too broad for this Article to provide a comprehensive presentation of views, but the discussion below provides a general sense of the debate. This section then applies the theory developed earlier to consider the role state practice plays in CIL. It explains why, contrary to conventional views, the state practice requirement cannot be a requirement for the establishment of CIL. Rather, CIL depends only on the existence of *opinio juris*. This view does not remove all significance from practice, however, because one of the ways to identify the beliefs and expectations of states is through practice. Practice, then, is best viewed as evidence of *opinio juris*. This approach helps us to resolve many of the most important debates surrounding the role of practice.

## 1. The Existing Doctrine of State Practice

### a. The Relative Importance of State Practice and *Opinio Juris*

One perspective views the practice requirement as the most important element of CIL.<sup>150</sup> In fact, some commentators go further, arguing that *opinio juris* is not required at all; widespread and consistent practice is sufficient to infer a legal obligation, at least if there is no evidence of objection to such a rule.<sup>151</sup> One can also find opposing arguments, however, claiming that the focus should be on *opinio juris* rather than on practice.<sup>152</sup> The existing literature, then, offers a wide range of proposals regarding the proper balance between the *opinio juris* and state practice requirements. There are even claims that *opinio juris* and practice can be traded off against one another, with varying weights put on each depending on the circumstances.<sup>153</sup>

Focusing on practice rather than *opinio juris* is sometimes referred to as the “traditional perspective” on CIL formation.<sup>154</sup> The alternative “modern approach” is more normative and considers the moral issues at stake when determining if a rule of CIL exists.<sup>155</sup> Some prominent

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150. See Roberts, *supra* note 7, at 758.

151. See, e.g., LAUTERPACHT, *supra* note 131, at 380.

152. See Roberts, *supra* note 7, at 757–59.

153. See Frederic Kirgis, *Appraisals of the ICJ's Decisions: Nicaragua v. United States (Merits)*, 81 AM. J. INT'L L. 77, 147–49 (1987).

154. See, e.g., Roberts, *supra* note 7.

155. *Id.* at 762–63.

scholars, including Theodor Meron, Richard Lillich, and Lori Bruun, argue that modern custom provides an important source of law in the international human rights arena.<sup>156</sup> Others, including Michael Reisman and Arthur Weisburd, argue that modern custom lacks the legitimacy of state consent and general state practice.<sup>157</sup>

The inability of scholars to come to some consensus on these requirements is not surprising. Without an underlying theory of CIL, its role, and its effect, scholars have no common principles from which to derive their conclusions.

#### b. How General Must the Practice Be?

Under any approach to CIL that includes a role for practice, it is necessary to determine the amount of practice that is needed. Under most formulations, a "general practice" is required.<sup>158</sup> Putting aside regional and bilateral custom for the moment,<sup>159</sup> this means, in principle, that a large share of affected states must be engaged in the practice. The particular density of practice required is difficult to specify with precision and, in any event, is the subject of disagreement among commentators. For present purposes it is sufficient to note that what is said to be required is practice that is "uniform, extensive, and representative."<sup>160</sup>

Formally, of course, all states have equal rights under international law,<sup>161</sup> and no single state or small group of states is able to create or change CIL on its own.<sup>162</sup> In practice, there is no doubt that analysis of CIL rules inevitably gives greater weight to more powerful and more affected states.<sup>163</sup> Whether this is desirable or not, it is hard to imagine

156. THEODOR MERON, *supra* note 57. Lori Lyman Bruun, Note, *Beyond the 1948 Convention—Emerging Principles of Genocide in Customary International Law*, 17 MD. J. INT'L L. & TRADE 193, 216–17 (1993); Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT'L & COMP. L. 1, 8 (1995/1996).

157. W. Michael Reisman, *The Cult of Custom in the Late 20th Century*, 17 CAL. W. INT'L L.J. 133 (1987); Arthur A. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L L. 1 (1988).

158. *See* Statute of the International Court of Justice, art. 38.

159. Regional custom is addressed later in Part IV.D.

160. *ILA Report*, *supra* note 110, II.C.12.

161. U.N. Charter art. 2, para. 1.

162. *See* Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 533 (1993) ("Despite the difference in power and influence of States, no individual or small group of States is now dominant. Decisions tend to reflect the power relationships and the right of all States to participate in reaching them.").

163. *See* WOLFKE, *supra* note 42, at 78 ("The possibility of the big powers openly imposing rules on minor nations no longer exists . . . . [However,] [p]ractice being the nucleus of custom, those states are the most important which have the greatest share and interests in such practice—that is, in most cases the great powers . . . . Such acceptance on the part of the great powers frequently has a decisive effect . . . ."); David P. Fidler, *Challenging the Classical*

any other outcome.<sup>164</sup> One of the important implications of this reality is that the number of states involved in the formation of CIL is smaller than it initially seems. For many rules of CIL, powerful states dominate the question of state practice. The group may grow still smaller once it is recognized that only states with a stake in the issue must be considered.

It is also worth mentioning that the privileged position held by powerful states, though it features a certain inequity, may have a positive side. Violations of international law, at least when they are widespread and ongoing, weaken the international system. When powerful states commit violations, the harm to the system is likely to be greater still because such violations tend to have a widespread impact and affect other powerful states more forcefully. Giving powerful states a larger role in the creation of CIL reduces the risk that those states will be frequent violators.

Furthermore, powerful states are less likely than weaker states, all else equal, to be deterred by a rule of CIL, so the benefits of applying a rule to them is smaller than it is with a weaker state. Because the costs of a violation are larger and the benefits of CIL rules smaller for powerful states, the system may be better off if these states have greater influence in shaping the relevant rules.

### c. What Counts as Practice?

If state practice is relevant to the CIL inquiry, it is necessary to determine what counts as evidence of practice. Clearly, actions by states are included. For example, a decision to provide diplomatic protection to foreign representatives is an action that forms part of state practice. Beyond these observable actions, however, there are other behaviors whose relevance is more controversial.

In particular, there is no consensus among commentators about whether statements or omissions should be considered in the evaluation of state practice.<sup>165</sup> D'Amato asserts that only physical acts count and statements, by diplomats or UN officials for example, are not part of state practice.<sup>166</sup> Wolfke makes a similar claim, arguing that statements in

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*Concept of Custom: Perspectives on the Future of Customary International Law*, 39 GERMAN Y.B. INT'L L. 198, 203–04 (1996).

164. Relatedly, it is hard to imagine an inquiry into the general practice of states that truly purported to identify such a practice for all or almost all states. See Kelly, *supra* note 6, at 521 (noting that “state practice is rarely general, and a few incidents from one culture or even several countries cannot evidence general acceptance”).

165. See D'AMATO, *supra* note 2, at 61–64 (discussing omissions); *ILA Report*, *supra* note 110, at II.A.6 (“In appropriate circumstances omissions can count as a form of State practice.”).

166. See D'AMATO, *supra* note 2, at 88.

the form of voting in international organizations do not "constitute acts of conduct, nor, even multiplied, any conclusive evidence of any State practice."<sup>167</sup> He observes that "repeated verbal acts are also acts of conduct in their broad meaning and can give rise to international customs, but only to customs of making such declarations, etc., and not to customs of conduct described in the content of the verbal acts."<sup>168</sup> Akehurst takes a much more permissive approach, including, for example, domestic laws,<sup>169</sup> resolutions of international organizations (though only if they "claim to be declaratory of existing law"),<sup>170</sup> and even "standing or ad hoc instructions by a State to its officials, or criticisms by one State of the conduct of other States, or treaties (including treaties which have not entered into force)."<sup>171</sup> In fact, his definition of state practice is sufficiently broad to include actions by international organizations and even bodies such as the United Nations secretariat, which is not composed of state representatives.<sup>172</sup>

The problem with such a broad interpretation of the state practice element is that there is no certainty that these statements bear any relationship to what states actually believe or do. Statements made by governments and their representatives serve a variety of purposes, are often made strategically, and will often not reflect the reality of practice. Torture is the clearest example. There is no shortage of agreements and statements condemning torture, yet its use by states is commonplace.<sup>173</sup> To declare, based on statements, that state practice is inconsistent with torture is simply a fiction.

Nevertheless, the majority view is that the practice requirement can indeed be satisfied with reference to statements and claims made by states.<sup>174</sup> In fact, the most common view would include virtually any utterance by the state or its representatives as evidence of state practice.<sup>175</sup>

167. WOLFKE, *supra* note 42, at 84.

168. *Id.* at 42.

169. *See* Akehurst, *supra* note 4, at 9 ("[T]he mere enactment of a law is a form of State practice.").

170. *See id.* at 5-6.

171. *Id.* at 10.

172. *Id.* at 11; *see also* BROWNLIE, *supra* note 39, at 5.

173. *See supra* note 13.

174. *See, e.g.,* Akehurst, *supra* note 4, at 1-2.

175. *See* BROWNLIE, *supra* note 39; *ILA Report, supra* note 110, at II.A.4 ("Verbal acts, and not only physical acts, of States count as State practice . . . Diplomatic statements (including protests), policy statements, press releases, official manuals (e.g., on military law), instructions to armed forces, comments by governments on draft treaties, legislation, decisions of national courts and executive authorities, pleadings before international tribunals, statements in international organizations and the resolutions those bodies adopt . . . are all forms of speech-act.").

This perspective appears to have the support of the ICJ as well. For example, in the *Rights of Nationals of the United States of America in Morocco* case, the court used diplomatic correspondence to evaluate a claim of state practice.<sup>176</sup>

It should be clear from the above that the state practice requirement is interpreted in many different ways, ranging from a view that practice is the only requirement for the establishment of CIL to it being no more than a minor part of CIL formation. Some only consider state actions as evidence of practice, while others include virtually anything said by states and their officials. Once again, without a foundational theory, there is no particular reason to favor one of these approaches over the other. Without knowing how CIL works or what it is supposed to do, one cannot evaluate the merits of alternative interpretations. Because there is no good theoretical foundation for the practice requirement, there is no principled way to determine how to satisfy it.

## 2. A Rational Choice Analysis of State Practice

The main lesson to be drawn from the theory presented here is that CIL is really about the *opinio juris* requirement and not the practice requirement. This is so because, as already discussed,<sup>177</sup> what matters for the presence of reputational sanctions is the perspective of other states. If states as a group believe there is a legal obligation, this is enough to generate reputational (and perhaps direct) sanctions. The question of practice is not directly relevant to the issue. Thus, for example, if there is a general perception that torture is a violation of international legal norms, it can be a rule of CIL notwithstanding the fact that its use is widespread.<sup>178</sup>

A rational choice approach, then, leaves no room for a state practice requirement other than as an evidentiary touchstone to reveal *opinio juris*. Practice can shed light on whether a particular norm is regarded as obligatory, but it does not by itself make it so.

***There is no practice requirement for the establishment of a CIL rule. Practice may be relevant inasmuch as it affects the***

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176. See *Rights of Nationals of the United States of America in Morocco* (Fr. V. U.S.), 1952 I.C.J. 176, 200 (Aug. 27).

177. See *supra* Part III.

178. It is true that frequent practice would plausibly reduce the reputational sanction of engaging in torture, but this would be because the practice reduced the sense among states that to engage in the activity is to violate an important legal norm. In other words, the driving force behind the use of reputational sanctions is not the practice itself, but rather the sense that a state has failed to honor legal obligations.

***perceptions of states regarding the existence of a legal rule (opinio juris).***

With this understanding of state practice, one can consider how observers evaluate state behavior.<sup>179</sup> Though *opinio juris* determines whether states face a rule of CIL, it is difficult to observe. We must, therefore, use what we can observe as evidence. State practice, whether in words or deeds, can be evidence of *opinio juris*. Not only does this clarify the role of practice, it sheds light on how a particular incident should be viewed. Explicit state action that seems contrary to the short-term interests of a state, and that is accompanied by claims that the state is acting out of a sense of legal obligation, offers strong evidence of *opinio juris*. In contrast to this evidence, statements including, for example, votes on General Assembly resolutions offer weaker evidence of *opinio juris*. The precise evaluation of such evidence will inevitably depend on the context of the acts or statements, but this approach articulates clearly how practice can affect judgments about *opinio juris*.

***State practice may offer evidence of opinio juris.***

Relegating state practice to an evidentiary role is a change from the standard formulation of CIL. It is not, however, without support in the literature or the jurisprudence of international law. In the *Military and Paramilitary Activities* case, the ICJ found a rule of CIL, consistent with Article 2(4) of the UN Charter, requiring states to refrain from the use of force.<sup>180</sup> It did this without reference to practice. The Court focused instead on *opinio juris*, which it found by looking at, among other things, UN resolutions.<sup>181</sup>

The *Military and Paramilitary Activities* case suggests that the ICJ is, at times, prepared to accept *opinio juris* as sufficient to establish the existence of CIL. That said, one can question whether the ICJ evaluated the evidence of *opinio juris* in a sensible way. Both the United States and Nicaragua had, as the ICJ observed, recognized the prohibition on the use of force in many ways. The ICJ relied in particular on the UN Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the

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179. The discussion that follows is written in a somewhat normative style in that it discusses how practice should be interpreted as evidence of *opinio juris*. The same discussion can be seen as a positive one, however, if it is interpreted as a discussion of what information practice offers regarding *opinio juris*.

180. See *supra* note 134.

181. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶¶ 191–92 (June 27).

United Nations,<sup>182</sup> a resolution adopted by consensus.<sup>183</sup> In contrast to this declaration, the conduct of both parties suggested that they viewed the use of force, in certain situations where it was not permitted by the UN Charter, as an acceptable tool. Given the difficulty of establishing the beliefs of states, it is sensible to use UN resolutions and other statements as evidence of *opinio juris*, but the fact that states at times make statements that do not represent their true beliefs suggests that such statements should normally be considered less probative than actions.

This discussion of the *Military and Paramilitary Activities* case can be generalized to shed light on how various types of practice should be weighed. Actions of states, especially those that seem contrary to state interests but for the existence of an international law rule, offer the most persuasive evidence of *opinio juris*. Other actions might also carry significant weight. Omissions, unless there is some credible reason to believe that a state refrained from an action out of a sense of legal obligation, have a more tenuous claim as evidence. Statements by countries are suspect unless the context suggests they are credible representations of beliefs. More generally, whatever evidence is put forward, its value depends on the extent to which it can credibly be said to represent the beliefs of states about international legal obligations.

***Practice (including statements) that is more probative of opinio juris should be given greater weight in evaluating the existence of CIL.***

One of the ways in which a rule of CIL may show itself is through a United Nations resolution.<sup>184</sup> If the resolution reflects *opinio juris*, it also reflects CIL. Notice the implication of this analysis for UN resolutions. Consistent with the fact that the General Assembly lacks legislative power, the resolution does not “make” CIL. Rather, it provides evidence of the underlying *opinio juris*. This also means that there is no sense in which the General Assembly is able to “change” the law. And if General Assembly resolutions represent evidence of *opinio juris*, they need not all be viewed in the same way. That is, the relevance of a resolution depends on its context. Some resolutions will provide little or no information about the underlying *opinio juris*, whereas others may be highly probative.

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182. G.A. Res. 2625, 25 U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1971).

183. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶¶ 191–92 (June 27).

184. Bin Cheng, for example, discussed UN resolutions on outer space. Cheng, *infra* note 197.

The general approach to CIL adopted here speaks to what is sometimes termed the “modern approach” to CIL. The modern approach considers the moral issues at stake in evaluating the existence of CIL.<sup>185</sup> It turns out that this view cannot be reconciled with a rational choice approach to CIL. Putting aside the significant question of who decides the moral importance of an issue, the existence of a moral imperative for states to act in a certain way says nothing about whether the states themselves believe that such actions are legally required. Because we model CIL as a set of rules the violation of which will generate costs, a norm can only be a rule of CIL if the *opinio juris* element is met. If it is not, there is no reason for any state to adjust its behavior. Note that the claim here is not that states ignore the morality of their actions, but rather that CIL norms only matter if there is a sense of *opinio juris*. Nor is this a claim that moral arguments do not, cannot, or should not matter. Moral arguments may affect the attitudes of states, including their beliefs about international legal obligations. The critical point is that moral arguments cannot directly influence the formation of CIL. They can only do so to the extent that they affect the beliefs of states. Aspirational statements by the General Assembly, for example, may influence beliefs, but they do not independently support the notion that there is rule of CIL.

***“Modern CIL,” to the extent it is based on moral and normative claims rather than opinio juris, does not create a legal obligation.***

The rational choice approach also largely resolves the question of how much practice is necessary. Because practice is relevant only as evidence of *opinio juris*, we must ask, in any given situation, what existing practice tells us about the legal obligation states perceive. In general, then, more practice is more likely to evidence a sense of legal obligation, though the relevance of any particular practice will be contextual.

The view of *opinio juris* and practice advanced here is different from past discussions of CIL and has some significant differences with respect to its implications, but it nevertheless resembles statements made by some commentators. Akehurst, for example, argues that “[c]ustomary international law is created by State practice. State practice means any

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185. See, e.g., Frederic L. Kirgis, Jr., *Custom on a Sliding Scale*, 81 AM. J. INT’L L. 146, 147–48 (1987) (stating that the fundamental rights articulated in the Universal Declaration of Human Rights are regarded as customary law, regardless of persistent violations or nonconforming state practice); Roberts, *supra* note 7, at 764 (“[T]he customary prohibition on torture expresses a moral abhorrence of torture rather than an accurate description of state practice.”) (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 702 (1987)).

act or statement by a State from which views about customary law can be inferred.”<sup>186</sup> Though framed as giving primacy to practice, in fact this formulation looks to practice to learn about the “views” of states. This is close to the perspective advanced herein, in which practice offers evidence of state beliefs.

It should be acknowledged that there is a certain unsatisfying vagueness to all of this. Actors within a legal system normally prefer clear rules so they can anticipate the consequences of their actions. Certainly, the formulation of CIL advanced here cannot claim to provide this sort of certainty. This ambiguity is unfortunate, but unavoidable. Because CIL is formed by state beliefs, which are unobservable, and actions, which can be interpreted in many ways, the process of identifying CIL is difficult and dependent on context. When this is combined with the lack of a process to explicitly identify CIL rules, there is no way to avoid the vagueness of CIL.<sup>187</sup>

### C. *Instant Custom*

#### 1. The Existing Doctrine of Instant Custom

One of the many areas of disagreement regarding CIL relates to the amount of time necessary to establish or change a rule. One view, normally credited to Bin Cheng, is that CIL can change in a moment, creating what can be referred to as “instant custom.”<sup>188</sup>

In contrast to instant custom, the traditional CIL requirement of a “general practice” suggests some minimum period of time over which there must be a practice before one can speak of a rule of CIL. Consistent with this traditional approach, the majority view today is that although there is no minimum amount of time required to generate CIL, some time must nevertheless elapse.<sup>189</sup>

ICJ jurisprudence is consistent with this majority view. In the *North Sea Continental Shelf* cases, the court dismissed the requirement of an extended period of practice, observing that “the passage of only a short

186. Akehurst, *supra* note 4, at 53.

187. With the exception of claims that CIL is irrelevant, I am not aware of any writing that provides an approach to CIL with substantially more clarity and certainty than the one advanced here.

188. See Bin Cheng, *Custom: The Future of General State Practice in a Divided World*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY* 513, 532 (R. St. J. MacDonald & Douglas M. Johnston eds., 1983).

189. See *ILA Report*, *supra* note 110, at II.C.12(ii); G.M. DANILENKO, *LAW-MAKING IN THE INTERNATIONAL COMMUNITY* 97, 97 n.74 (1993) (stating that the practice requirement “presupposes duration of custom-generating practice over a certain period of time,” and that “[i]t follows that there can be no such thing as ‘instant’ customary international law”).

period of time is not necessarily . . . a bar to the formation of a new rule.”<sup>190</sup> The court refused to abandon the notion of a practice requirement, however, stating:

[A]n indispensable requirement would be that within the period in question, short though it may be, State practice . . . should have been both extensive and virtually uniform . . . and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.<sup>191</sup>

The report on CIL by the International Law Commission to the General Assembly (ILA Report) and the Restatement on Foreign Relations both follow the lead of the *North Sea Continental Shelf* cases. The ILA Report, for example, concludes that there is no specific time requirement for the formation of CIL.<sup>192</sup> Like the ICJ, the report stops short of eliminating the practice requirement, stating instead that there must be “practice of sufficient density.”<sup>193</sup> The Restatement provides that “The practice necessary to create customary law may be of comparatively short duration but under Subsection (2) it must be ‘general and consistent.’”<sup>194</sup>

Some academic commentary has strongly criticized instant custom. Van Hoof asserts that “customary law and instantaneousness are irreconcilable concepts.”<sup>195</sup> Weil correctly observes that instant custom is “no mere acceleration of the custom-formation process, but a veritable revolution in the theory of custom.”<sup>196</sup> This is so because acceptance of instant custom requires that one discard the requirement of a general practice. After all, practice, especially among many states, cannot change instantly. If CIL depends on practice, then the pace at which it can form or change is limited by the pace at which practice changes.

## 2. A Rational Choice Analysis of Instant Custom

Bin Cheng’s approach, which he does not attempt to apply to CIL as a whole, is quite close to that proposed in this Article. Like this Article,

190. *North Sea Continental Shelf* (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, ¶ 74 (Feb. 20).

191. *Id.*

192. *See ILA Report, supra* note 110, II.C.12 cmt. b.

193. *Id.*

194. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102 cmt. b (1987).

195. *See* G.J.H. VAN HOOFF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* 86 (1983).

196. Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT’L L. 413, 435 (1983).

Cheng believes that *opinio juris* is sufficient to establish a rule of CIL. Practice is relevant, but “the role of usage in the establishment of rules of customary international law is purely evidentiary: it provides evidence on the one hand of the contents of the rule in question and on the other hand of the *opinio juris* of the States concerned.”<sup>197</sup>

If one accepts that *opinio juris* is sufficient to establish a rule of CIL, it follows that such rules can develop or change as easily and as quickly as *opinio juris*. It is possible, therefore, for a rule to develop in a very short period or even instantly. As Cheng puts it, “as international law is a horizontal legal system in which States are both the law-makers and the subjects of the legal system, *opinio juris* can arise or change instantaneously.”<sup>198</sup>

***CIL arises or changes “instantly” if opinio juris changes instantly.***

#### D. Special Custom

##### 1. The Existing Doctrine of Special Custom

Most discussions of CIL focus on “general custom” that applies worldwide. There can, however, be CIL over smaller groups of states.<sup>199</sup> This “special” or “regional” CIL can exist among any number of states and potentially as few as two.<sup>200</sup> If a subset of states meet the requirements of *opinio juris* and state practice (under the traditional definition of CIL), they are bound by a rule of special CIL.

The ICJ has produced several opinions that discuss special custom, and these provide the best guidance on the topic. In the *Right of Passage Over Indian Territory*, the ICJ looked to the relationship between Portugal and India and the course of dealing between them. It treated silence on the part of India as acquiescence with regard to the Portuguese right of passage.<sup>201</sup> India had customarily allowed passage and honored terms in treaties that dealt with the right of passage to Portuguese enclaves

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197. Bin Cheng, *United Nations Resolutions on Outer Space: “Instant” International Customary Law?*, 5 INDIAN J. INT’L L. 23, 36 (1965).

198. Cheng, *supra* note 188, at 532.

199. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102 cmt. e (1987); D’AMATO, *supra* note 2, at 233–34; Akehurst, *supra* note 4, at 28–31.

200. See *Right of Passage (Port. v. India)*, 1960 I.C.J. 6, 39 (Apr. 12) (“The Court sees no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States.”).

201. *Id.*

surrounded by Indian territory, at least with respect to the passage of civil officials and private persons and their goods. The ICJ held, therefore, that both countries accepted the rule of CIL for these purposes, and Portugal was entitled to the right of passage.<sup>202</sup>

The ICJ's decision in the *Anglo-Norwegian Fisheries* cases also demanded conspicuous objection from a state seeking to escape local custom. The United Kingdom claimed that the ten-mile bay closing line rule was a general rule of CIL and Norway could not use its system of straight baselines to create exclusive fishing rights in the waters surrounding its entire coastline north of the Arctic Circle.<sup>203</sup> The court held that Norway had applied their system of delimitation, with the use of straight lines, "consistently and uninterruptedly from 1869 until the time when the dispute arose" without a challenge from the United Kingdom or the international community.<sup>204</sup> The court further held that the practice had become regional custom and the United Kingdom, which had been silent on the matter for over 60 years, could not claim otherwise.<sup>205</sup>

The *Asylum* case produced a different rule.<sup>206</sup> In that case, Peru had refrained from signing the Montevideo Conventions of 1933 and 1939, which allowed a state granting asylum in its embassy the right to qualify the asylum seeker as a political offender.<sup>207</sup> The ICJ ruled that where a regional custom was at issue, silence on the part of a state signaled objection to the custom.<sup>208</sup> This view—that special custom requires some affirmative proof from a state—is supported by D'Amato, who claims that "[s]pecial custom does indeed require stringent proof of consent or recognition of a practice on the part of the defendant state."<sup>209</sup>

## 2. A Rational Choice Analysis of Special Custom

When viewed through a rational choice lens, special custom becomes a simple application of the theory already presented. The basic model of this Article provides that states are bound by a rule of CIL when other states believe there is a relevant legal obligation. That is, a rule of CIL exists if and only if *opinio juris* exists.

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202. *Id.* at 43. However, the court noted that "no right of passage in favor of Portugal involving a correlative obligation on India had been established in respect of armed forces, armed police, and arms and ammunition." *Id.*

203. *Fisheries* (U.K. v. Nor.), 1951 I.C.J. 116, 131 (Dec. 18, 1951).

204. *Id.* at 138.

205. *Id.*

206. *Asylum* (Colom. v. Peru), 1950 I.C.J. 266 (Nov. 20).

207. *Id.* at 268–69, 277–78.

208. *Id.* at 278.

209. D'AMATO, *supra* note 2, at 234.

This view applies directly to both general and special custom. Over any group of states (ranging from two to all states), the presence or absence of *opinio juris* determines the existence of a rule of CIL.

***Special custom can arise within any group of states, including as few as two states. For such custom to arise, it is sufficient that the states involved have the requisite opinio juris.***

The question debated in the ICJ cases, and to some extent in the literature, about whether to require explicit consent to a special custom does not come up in this formulation because only *opinio juris* is relevant.

One might still wonder how matters of special custom should be handled when they come before international tribunals. In particular, should a tribunal require more evidence of *opinio juris* for special custom than it would for general custom? This would be similar to the approach taken in the *Asylum* case and favored by D'Amato.

My view is that it is neither necessary nor desirable to increase the showing required to find *opinio juris* in special custom. In a world of heterogeneous states, there is reason to think special custom will play an important role in the relations among them. Special custom has the potential to facilitate cooperation among states in areas where it is simply too difficult to establish general norms of CIL. Where states are interacting in a way that indicates the presence of *opinio juris*, I see no reason why a tribunal should be reluctant to make that finding.

## V. A NORMATIVE ASSESSMENT OF CIL DOCTRINE

The previous section applied the rational choice theory of compliance and evaluated what that theory means as a positive matter for CIL. This Part examines more normative questions relevant to some additional aspects of CIL. In particular, it considers the relationship between treaties and CIL, the persistent and subsequent objector doctrines, and the application of CIL to new states. In each case, the rational choice theory yields conclusions about how the relevant doctrine should be applied.

### A. *Treaties and CIL Formation*

#### 1. The Existing Doctrine of Treaties and CIL Formation

There is debate about the extent to which treaties can or should be used as sources in the formation of CIL. Conceptually, treaties are problematic sources for CIL because by their very nature they can alter legal

obligations. That is, one of the main functions of treaties is to establish new obligations among states—obligations that do not exist under CIL.<sup>210</sup> When faced with practice based on treaty obligations, then, it is difficult to know if this reflects *opinio juris*. To cite one example, the vast majority of states are members of the WTO and, accordingly, have accepted obligations with respect to trade. They have agreed, for instance, to provide national treatment and most favored nation status to imports. These same obligations are present in many other treaties, including regional and bilateral trade agreements. These requirements are not present because there is some underlying customary law that requires them, but rather because the states involved wanted to create additional legal obligations beyond those provided by CIL.

Of course, treaties can also codify custom, and so one cannot use treaty provisions as evidence against the existence of CIL. The easiest example here is the ban on the use of force in the UN Charter.<sup>211</sup> The presence of this rule in the Charter is generally thought to reinforce, rather than change, a CIL rule.

The ICJ seems to accept that treaties can serve as evidence of CIL, and it has used them in this way on numerous occasions. In the *S.S. Wimbledon* case, the court used treaties concerning the Suez and Panama canals to support the principle of neutrality of international canals.<sup>212</sup> The PCIJ similarly used the Covenant of the League of Nations to support the principle of unanimity of states in its Advisory Opinion on *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne (Frontier between Turkey and Iraq)*.<sup>213</sup> In the *Fisheries Jurisdiction* case of 1974, the court made use of bilateral and multilateral international agreements to demonstrate a widespread acceptance of the preferential rights of fishing.<sup>214</sup> In the 1969 *North Sea Continental Shelf* cases, the court noted that treaty provisions may indeed generate CIL, stating that treaties are “one of the recognized methods by which new rules of customary international law may be formed.”<sup>215</sup>

The views of commentators on this question are varied and often conclusory.<sup>216</sup> Whatever the merit of these claims, they do not emerge from a coherent theory of international law and so it is difficult to evalu-

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210. See Mendelson, *supra* note 114, at 295.

211. U.N. Charter, art. 2, para. 4.

212. See WOLFKE, *supra* note 42.

213. Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne (Frontier between Turkey and Iraq), Advisory Opinion, 1925 P.C.I.J. (ser. B) No. 12 (Nov. 21).

214. Fisheries (U.K. v. Nor.), 1951 I.C.J. 116, 138 (Dec. 18).

215. North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 41 ¶ 71 (Feb. 20).

216. For a more complete discussion, see BYERS, *supra* note 2, at 166–80.

ate them. It is perhaps for this reason that debate here, and on so many other questions of CIL, has failed to generate a consensus view.

D'Amato adopts a position that favors the use of treaties as evidence of state practice. "[A] treaty arguably is a clear record of a binding international commitment that constitutes the 'practice of states' and hence is as much a record of customary behavior as any other state act or restraint."<sup>217</sup> Akehurst adopts a similar, though less aggressive position, stating that he "has no difficulty in regarding treaties as State practice," but noting that treaties "must be accompanied by *opinio juris* in order to create customary law."<sup>218</sup> One way to satisfy the *opinio juris* requirement, at least for the parties to a treaty, he argues, is to find statements in the text of the treaty or the *travaux préparatoires* stating that the treaty codifies existing customary law. According to Akehurst, statements and actions subsequent to the treaty can also satisfy this requirement.<sup>219</sup> Mendelson adopts a restrained view of the role of treaties, stating that "there is no legal presumption that a treaty does or does not reflect customary law if it does not give such an indication on its face."<sup>220</sup> A more critical position of the use of treaties as sources of custom is offered by Wolfke, who argues that treaties only bind the parties who have accepted their terms, and those obligations cannot be imposed on third parties without further action.<sup>221</sup>

## 2. A Rational Choice Analysis of Treaties and CIL Formation

Recall that what matters for CIL is whether states believe that a norm amounts to a legal obligation. Once it is recognized that this is the focus of the inquiry, the role of treaties is obvious. To the extent that a treaty (or set of treaties) evidences *opinio juris*, it is useful evidence of a rule of CIL. If, on the other hand, treaties are in place to establish a rule that would not otherwise exist, then they are evidence against a CIL rule. Notice that because we only look to practice as evidence of *opinio juris*, it is not necessary to concern ourselves with the role of treaties as evidence of state practice.

***Treaties are relevant to the formation of CIL only to the extent they represent evidence of opinio juris.***

In the context of the evaluation of a potential rule of CIL, a focus on *opinio juris* can often resolve the question of how treaties should be

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217. D'AMATO, *supra* note 2, at 104.

218. Akehurst, *supra* note 4, at 43–44.

219. *Id.* at 49–51.

220. Mendelson, *supra* note 114, at 301.

221. WOLFKE, *supra* note 42, at 68–72.

considered. If, for example, one accepts that a treaty or group of treaties was established to derogate from existing custom or to create rules where no CIL rules previously existed (as in the case of most trade treaties), then it is safe to say that the treaties are not, by themselves, evidence of CIL. I have previously advanced an argument along these lines to suggest that bilateral investment treaties (BITs) should not be seen as evidence of a CIL rule governing investment.<sup>222</sup> The conclusion that BITs are not evidence of custom follows from the claim that these treaties are not the result of states codifying an existing legal rule, but rather are the product of developed states seeking protection for their foreign investors that exceeds the protection provided by the background rules of international law.<sup>223</sup>

To some extent, this position is consistent with that of Akehurst, who views treaties as evidence of practice and who would look for evidence of *opinio juris*, much as this Article proposes. As Akehurst points out, there may be evidence of *opinio juris* in the text of the agreement itself or in the *travaux préparatoires*.

None of this discussion is meant to suggest that the inquiry into treaties will be simple. It will often be difficult to know if treaties are meant to codify custom or establish some alternative rule. The point is that the inquiry into the role of treaties will be much more productive if it is focused on this one issue.

## B. Persistent and Subsequent Objectors

### 1. The Existing Doctrine of Persistent and Subsequent Objectors

CIL doctrine provides that a state can avoid being bound by a rule of CIL by establishing itself as a “persistent objector.”<sup>224</sup> A state is considered a persistent objector if, “whilst a practice is developing into a rule of general law, [it] persistently and openly dissents from the rule.”<sup>225</sup> A persistent objector loses that status if it does not object consistently over

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222. Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639 (1998).

223. *Id.*

224. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102 cmt. d (1987) (“[A] dissenting state which indicates its dissent from a practice while the law is still in a state of development is not bound by that rule of law even after it matures.”); Charney, *supra* note 115, at 2 (“[V]irtually all authorities maintain that a State which objects to an *evolving* rule of general customary international law can be exempted from its obligations.”); Mendelson, *supra* note 114. Other useful articles on the persistent objector doctrine include David A. Colson, *How Persistent Must the Persistent Objector Be?*, 61 WASH. L. REV. 957 (1986); Stein, *supra* note 120, at 457.

225. *ILA Report*, *supra* note 110, art. 15; Akehurst, *supra* note 4, at 24.

time once the rule is in place. Furthermore, a state that fails to object during the formation of the rule remains bound regardless of its later attempts to protest. This is true even if the state had no interest in the rule at the time of its emergence but subsequently came to be affected by it.<sup>226</sup>

The above represents the conventional view of the persistent objector doctrine. It is not, however, a consensus view; like the rest of CIL, the doctrine is contested. Most authors accept that it is part of CIL,<sup>227</sup> but others argue that it does not exist or is of minimal importance.<sup>228</sup> The ICJ has provided some support for the doctrine, though the jurisprudence is not definitive. In the *Anglo-Norwegian Fisheries* case, for example, the court stated that the CIL rule in question was “inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast.”<sup>229</sup> In the *Asylum* case, the court stated that even if a relevant regional custom existed, it did not bind Peru because that state had repudiated the norm.<sup>230</sup> Though these cases are often used to support the existence of the persistent objector doctrine, critics, including D’Amato, argue that they speak to special or regional custom rather than general custom.<sup>231</sup> Charney, in turn, argues that the cases are not authoritative because they are dicta.<sup>232</sup>

Even those who grant the existence of the rule have no strong theoretical justification for it.<sup>233</sup> The ILA Report defends the rule as a compromise between notions of consent and the need for development of the law:

It respects States’ sovereignty and protects them from having new law imposed on them against their will by a majority; but at the same time, if the support for the new rule is sufficiently widespread, the convoy of the law’s progressive development

226. See *ILA Report*, *supra* note 110, art. 15, cmt b.

227. See BROWNLIE, *supra* note 39, at 10; Akehurst, *supra* note 4; Weil, *supra* note 196, at 413.

228. See D’AMATO, *supra* note 2, at 233–63; Charney, *supra* note 115, at 24; Stein, *supra* note 120, at 457.

229. Fisheries (U.K. v. Nor.), 1951 I.C.J. 116, 131 (Dec. 18, 1951).

230. Asylum (Colom. v. Peru), 1950 I.C.J. 266, 277–78 (Nov. 20). The separate opinion of Judge de Castro in the *Fisheries Jurisdiction* case stated that a fisheries limit of 12 miles did not apply to Iceland because it had persistently objected to that rule. Fisheries (U.K. v. Nor.), 1951 I.C.J. 116, 91–92 (Dec. 18, 1951).

231. D’AMATO, *supra* note 2, at 252–54.

232. Charney, *supra* note 115, at 9–10. *But see* Mendelson, *supra* note 114, at 231.

233. See Fidler, *supra* note 3, at 209 (“The solid place the persistent objector rule occupies in the pedagogical perspective confuses students given the lack of a credible theoretical explanation and limited support for the rule found in State practice.”).

can move forward without having to wait for the slowest vessel.<sup>234</sup>

This explanation has a number of problems, even if we put aside its conclusory nature. For example, if the doctrine represents a compromise between sovereignty and the need for progress, why must the objector raise its objection at the time the rule is formed? Surely it is no less an affront to sovereignty to bind a state that was previously disinterested but is now affected by a rule than it is to bind a state that objected at the time the rule came into being. Furthermore, there is no reason why this supposed compromise is served by a requirement that the objection be persistent and open. Nor would subsequent objectors impede the progress of the law. Rather than challenging and undermining existing rules of CIL, a state could become a subsequent objector. Exempting subsequent objectors would also protect state sovereignty more effectively than the current rule.

A consent-based theory, of course, would have to provide an exception for those who fail to consent. But consent theories cannot explain why the persistent objector doctrine puts such a significant burden on the objector not only to demonstrate its lack of consent, but to do so repeatedly and during the emergence of the rule.<sup>235</sup>

The failure to establish a solid theoretical justification for the rule should not surprise us. CIL is under-theorized in general, and what theory it has is often incompletely formulated.<sup>236</sup> The conventional theoretical justification, such as it is, turns on notions of state consent that have already been criticized in this Article.<sup>237</sup> Once the notion of state consent is abandoned, “the persistent objector rule loses coherency.”<sup>238</sup>

## 2. A Rational Choice Analysis of Persistent and Subsequent Objectors

The theoretical foundation for CIL presented in this Article allows us to consider the persistent objector doctrine in a more systematic way, to identify its potential benefits, and to judge its desirability. This analysis leads to the conclusion that the persistent objector doctrine is not only

234. *ILA Report, supra* note 110, I.L.C.15, cmt. c.

235. *See supra* note 118; *see also* Charney, *supra* note 115, at 6 (pointing out that consent cannot explain the persistent objector doctrine because a consent-based approach would allow both passive and subsequent objectors to avoid application of the rule).

236. For a formal model analyzing certain features of the persistent objector doctrine, *see* Fon & Parisi, *Stability and Change in International Customary Law, supra* note 10.

237. *See supra* notes 114–144 and accompanying text.

238. *See* Fidler, *supra* note 3, at 209; *see also* Charney, *supra* note 115, at 16.

defensible, but its role in the system should almost certainly be increased. Given the role that such a doctrine can serve, it should be extended to include new states and “subsequent objectors” that cannot currently take advantage of any analogous exception, and it should be made easier to use.<sup>239</sup>

The relevance of the persistent and subsequent objector doctrines depends, ultimately, on the beliefs of states. For example, does a state that persistently objects to a CIL rule thereby exempt itself from that rule in the eyes of other states? There is no way to answer this question as a theoretical matter, and so the Article does not attempt to do so. What follows seeks instead to determine whether the system would better function with some sort of exceptions for persistent and/or subsequent objectors and, if so, what the doctrine providing those exceptions should look like.

To examine the merits of the persistent objector exception, consider the way in which CIL might affect a state’s behavior. A state considering an action that would be a violation of a CIL norm must include in its calculation of costs and benefits the reputational and direct costs that will result. For some states in some circumstances, the additional costs resulting from the presence of an international law rule will be sufficient to deter them from taking the action in question. For other states, however, the sanction for a violation of CIL will be insufficient to prevent the action.<sup>240</sup>

The key question is how the CIL system should deal with those states for which existing sanctions are insufficient to generate deterrence. If no exception is created for these states, they will nevertheless violate the relevant rule and suffer the associated reputational and direct sanctions. These sanctions impose a cost on the violating state and possibly on other states. Direct sanctions in particular are likely to be costly to all states involved. Furthermore, the presence of states that are consistently and systematically violating the law will weaken the international legal system.

Alternatively, the system could provide an exception for states that cannot be deterred. This would avoid the systemic costs associated with ongoing violations, the cost to sanctioned states, and the costs to sanctioning states. Given the underlying reality that CIL cannot deter the

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239. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102 cmt. d (1987).

240. Because CIL is the product of state beliefs and expectations (*opinio juris*), the rule itself will cease to apply if enough states come to believe that it is not a legal obligation. To focus on a circumstance in which the persistent objector would have some relevance, it is assumed that the CIL rule remains intact in the examples given.

states in question, the creation of an exception is sensible because it generates these savings without related costs.<sup>241</sup> The problem with an exception, of course, is that there must be some way to identify the states to which it should apply.

We are faced, then, with a familiar sorting problem. Ideally, the exception would apply to all states that, absent an exception, would violate the law, but would not apply to any other states. If this were possible, the CIL rule would have the same impact on behavior whether or not an exception was in place (i.e., it would deter the same amount of illegal conduct), and the total costs associated with violations would fall.<sup>242</sup>

The states that cannot be deterred by a CIL rule are those for which the modest increase in costs triggered by a violation is insufficient to make compliance worthwhile. Because these states know they will violate the rule, they also have an incentive to oppose its formation and to discredit it as a rule of CIL.

It costs these states very little to make it clear that they do not intend to comply with the relevant rule. Doing so also has the benefit of putting others on notice and reducing the cost of a violation and the associated reputational sanction.

States that can be deterred, however, face a different calculus. For these states, absent a persistent objector exception, compliance with the norm is the best option and it is in their interest to make clear to other states that they plan to follow the CIL rule. Doing so signals they are willing to abide by the rules, yields reputational benefits, and allows other states to act in reliance.

Now consider how these same states will behave in the presence of a persistent objector exception. The undeterred state must choose between signaling to others that it will not comply and waiting until the time to act arrives and then violating the rule. If there is an exception for persistent objectors, the state can reduce the costs of its noncompliance by meeting the requirements of this objection. It may still face some costs for failing to behave consistent with prevailing norms, but it will not face the additional costs associated with a violation of international law. That is, by establishing itself as a persistent objector, the state avoids being in violation and, therefore, reduces the costs of its actions.

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241. This is something of an overstatement because reputational costs, which are a cost to the sanctioned state, represent a gain to other states. States that observe the violation and update their beliefs about the violating states gain information as a result of the violation.

242. I have previously written on how treaties among states are designed to avoid unnecessary costs in the event of violations. See Andrew T. Guzman, *The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms*, 31 J. LEGAL STUD. 303 (2002); Guzman, *supra* note 104.

Forcing the state to declare its refusal to comply in advance serves several goals. First, it discourages opportunistic use of the exception by limiting it to states that are prepared to bear the cost of declaring themselves objectors. Second, it puts other states on notice and allows them to behave accordingly by, for example, not relying on compliance by the objecting state. Finally, it increases the costs of being a persistent objector because it requires the state to object to the rule itself and not simply to the rule as it applies in a particular circumstance. This is important because it discourages states that can be deterred by the rule from posing as states that cannot be deterred.

***The persistent objector doctrine is a sensible mechanism to separate those who can be deterred by a legal rule from those that cannot and to apply the rule only to the former.***

The requirement that the objection be made consistently also makes sense in this context because it makes the role of persistent objector more costly and, therefore, discourages opportunistic objections by states that can be deterred.

***To preserve its status as a persistent objector, a state should have to object consistently over time.***

So a rational choice theory of CIL supports a persistent objector doctrine that resembles the one currently in place.<sup>243</sup> But more should be said. If there is merit in allowing states to object to a rule at the time it is formed, what about after its formation? Should there also be a subsequent objector doctrine?

In contrast to current doctrine, the theory developed in this Article suggests that there is no bright line distinction between a state that objects when a rule is formed and one that objects later in time. A state that did not object at the time of formation because, for instance, it had no interest in the rule may subsequently be a state with an interest and one that cannot be deterred by the rule.

To illustrate, suppose that a CIL rule governing the limits of a state's territorial waters comes into being. A state that does not venture far from its own coast and has only a modest fishing industry may have little interest in the rule. Years later, however, that state may develop a large fishing industry that is affected by the rule. Under the existing doctrine, only those states that had an interest in the rule at the time it was formed are able to become persistent objectors. This is problematic because the

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243. To be clear, I do not claim that the existing rule emerged *because* it is consistent with this theory. Rather, the theory provides an independent justification for the doctrine.

question of whether a state can be deterred by the rule (and therefore whether it makes sense to label it an objector and give it an exception) is unrelated to the state's interest in the rule at the time the rule came into being. What matters is the interest of the state at the time it acts. The logic that makes the persistent objector doctrine sensible for those that object at the time a rule is formed also makes it sensible for states that object later in time—absent an exception to the rule, some states will prefer to violate the law rather than comply with it. A rule that allows persistent and subsequent objectors to escape this legal obligation avoids the unnecessary costs associated with labeling such states violators.<sup>244</sup>

An exception that allows subsequent objectors to avoid the application of a rule does have one complication that the persistent objector exception does not. Part of the merit of the latter is that it forces states to identify themselves as objectors early on, often before they have to make a decision about compliance or noncompliance. Forcing this early declaration prevents states from opportunistically claiming an exemption from a rule of CIL when a situation arises in which they wish to violate that rule.

The persistent objector doctrine's requirement that objections be made at the time the rule emerges, then, serves an important role in distinguishing states that would not comply in any event from those that can be deterred by the rule. A subsequent objector doctrine does not have a natural way to make this distinction. If a state is able to make its objection clear on the eve of an action that is in violation of a CIL rule, it is much less likely that we will be able to separate states that cannot be deterred from those that can.

An effective subsequent objector doctrine, then, should have some additional features. A sufficient condition for use of such an exception is that the state object from the moment at which it has an interest in the issue. In the territorial sea example above, this would require a subsequent objector to make clear and consistent objection to the rule from the time it affects the objector's fishing industry in a significant way.<sup>245</sup>

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244. There may be instances in which allowing objectors to opt out of a rule generates costs that exceed the benefits. This would be the case if the marginal impact of the persistent (or subsequent) objector doctrine on compliance was sufficiently costly that it more than offset the gains from allowing states to object clearly in advance. Where this is the case, obviously the system would be better off without a persistent or subsequent objector doctrine.

245. There would clearly not be a particular date at which time the objection must begin, but this is equally true of the existing persistent objector rule—there is no fixed date on which a rule of CIL comes into being. Rather, the rule develops over time and a state must object at some point during the period in which the rule is emerging. For example, as a state develops a fishing fleet, they are more likely to be affected by the territorial sea rules, and though we

***Subsequent objectors whose objection to a rule of CIL is clear and consistent from the moment they have a significant interest in the issue should be exempt from the CIL obligation.***

Notice that the rational choice approach to CIL now provides a rationale for the persistent objector doctrine that is unrelated to the traditional and problematic notion of state consent. This offers a response to D'Amato, who dismisses the doctrine because it relies on the discredited idea that CIL emerges from a consent-based theory of international law.<sup>246</sup>

If, as stated in the above analysis, the persistent objector doctrine is valuable, there remains the practical problem that it rarely seems to be used by states. One would think that in a world with a large number of heterogeneous states there would be many instances in which one or more would wish to exempt themselves from a particular rule. Indeed, in the mid-1980s Stein predicted an increase in use of the exception for precisely these reasons.<sup>247</sup> Yet, it remains difficult to identify instances in which the exception has been used. This lack of use of the doctrine is troubling; if the exception has value but is not being used, we should be concerned that the possible gains from the exception are being lost.

One possibility is that the lack of a subsequent objector doctrine explains the light use of the exception. For rules of CIL that have been in place for a long time, states that wish to object but did not do so when the rule was established have no further opportunity to do so. To the extent the lack of a subsequent objector doctrine explains the very limited use of the persistent objector doctrine, the proposal herein helps to address the problem.

Notice that the rational choice approach to CIL and the associated implications for the persistent objector doctrine represent an important change from existing views. Under this formulation, the exception is justified because it adds value. As such, the working of the exception should be adjusted to get as much value from it as possible. This is in stark contrast to many existing views that treat the exception as a necessary evil, required by some notion of sovereignty and consent, and suggesting that the exception should be cabined and discouraged as much as possible.

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cannot identify a particular day when it happens, at some point we can say that the state is affected and it is the proper time for the state to object.

246. See D'AMATO, *supra* note 2, at 187–99, 233–34.

247. Stein, *supra* note 120.

### C. New States

#### 1. The Existing Doctrine of New States

This Article's approach can also provide a clear explanation of how new states come to be bound by CIL. When a state comes into being after the establishment of a rule of CIL, the majority view is that it is unable to take advantage of the persistent objector doctrine.<sup>248</sup> The theoretical justification for the rule governing new states is problematic.<sup>249</sup> Commentators typically claim that new states are bound by customary law by virtue of their status as states.<sup>250</sup> Byers argues that a new state, "by participating in the customary process and relying on customary rules, is implicitly consenting to that process as well as to all of the customary rules which have previously been developed through it."<sup>251</sup> This claim reduces the notion of consent to an absurd fiction. There is no sense in which a state chooses or consents to participate in the "customary process." It is not possible to be a state without participating. So the argument is really that new states are subject to existing rules of CIL, without the ability to object, simply because they are states.

Not only is this argument contrary to consent-based notions of CIL, it demonstrates how conclusory CIL discussions often become. Most discussions of new states simply apply existing rules to these new members of the international community. This should not surprise us. Once again, without a sound theory to explain and understand CIL, there is no principled way to determine how its rules should apply in novel situations. Faced with the emergence of many new states, then, commentators simply applied existing rules in a mechanical fashion without consideration of the particular characteristics of new states.

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248. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 210 cmt. i (1987); Akehurst, *supra* note 4. There is a minority view that new states can exempt themselves from a rule if they object shortly after they become states. See VIL-LIGER, *supra* note 123, at 16 ("Newly independent States are treated as persistent objectors, if they raise their objections within a reasonable period of time after their emergence as States, even if the customary rule has already emerged."). Even Villiger, however, does not accept a "subsequent objector" rule. See *id.* at 17-18; see also Gennady M. Danilenko, *The Theory of International Customary Law*, 31 GERMAN Y.B. INT'L L. 9, 44 (1988) ("[N]ew States may be held to be bound by customary norms only if their binding character has in one form or another been recognized by them.").

249. See Kelly, *supra* note 6, at 508 ("This disparate treatment [between new States and persistent objectors] reflects an incoherence that cannot be reconciled with either the consent or consensus theory of CIL or the concept of customary law.").

250. See FRANCK, *supra* note 32.

251. BYERS, *supra* note 2, at 77.

## 2. A Rational Choice Analysis of New States

The proposed rules governing the applicability of CIL to new states emerge naturally from the discussion that has already been presented. First, new states are generally bound by existing rules of CIL for the same reasons every other state is bound—as a result of *opinio juris* among states as a group. Because the theory of obligation is not based on a notion of consent, convoluted arguments attempting to reconcile notions of consent with the arrival of new states can be dispensed with.

Under this same reasoning, however, it follows that new states should have the same opportunity to object to rules of CIL as do established states. Even if one adopts the narrow notion that states must object from the time a rule is formed, the only coherent position would be to give new states the opportunity to object from the time the state is formed. The logic here is simple: if a persistent objector rule is desirable from a systemic perspective, it is because giving states the ability to object offers benefits that outweigh the costs. One way of reducing the opportunistic use of the persistent objector rule is to demand that states object from the time of the formation of the rule. New states obviously cannot object before they are formed, so they must either be allowed to object to existing rules from the time they are formed or not at all. If allowing objection is desirable in general, it is also desirable for new states. The only remaining concern, then, is whether there is too great a potential for opportunistic objections by a new state. If objection must take place soon after the establishment of a state, however, it seems unlikely that there would be any more opportunism than is present when states choose to object at the formation of a rule.<sup>252</sup>

***A state should be permitted to object to a rule of CIL at the time of the state's formation. An objecting new state should be treated in the same way as a persistent objector.***

The proposed exception for new states is, in effect, a special case of the subsequent objector proposal advanced earlier, in which a state may establish itself as a subsequent objector once it has an interest in a rule.<sup>253</sup> Because the new state has not had the opportunity to do so prior to its formation, the first moment at which it has an interest is when it

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252. New states are also relevant to existing custom because they become part of the international dynamic by which custom is formed and changed. If a large number of new states enter the system, as happened following the Second World War, for example, existing rules of CIL may be changed if these new states do not share the *opinio juris* of existing states.

253. See *supra* Part V.C.

becomes a state. This would allow the state, under the subsequent objector proposal, to object at that time.

#### D. Adjudication and CIL

If CIL is viewed in functional terms, as this Article proposes, there is a question of its treatment by international and domestic tribunals. By their nature, courts are more comfortable with doctrinal questions that allow them to apply settled law to the facts at hand and reach a decision in the case. In principle, traditional definitions of CIL had this doctrinal character. Norms for which there was the requisite state practice and appropriate *opinio juris* were rules of CIL, and tribunals could declare them to be so. In practice, CIL has been anything but easy for courts to apply. Among other problems, and as shown throughout this Article, the requirements for a rule of CIL are not at all settled (contrary to the traditional definition) and systematic canvassing of state practice is virtually impossible.

A functional definition of CIL presents its own difficulties for tribunals, but their task is dramatically simplified relative to the traditional view. To begin with, there is no need for a universal assessment of state practice; all that matters is an assessment of *opinio juris*. This, needless to say, is not simple, but it is easier than an inquiry into both *opinio juris* and practice. The discussion in this Article also gives considerable guidance about how evidence should be evaluated. As discussed with respect to state practice,<sup>254</sup> evidence that is more probative of *opinio juris* should be given more weight.

The rational choice approach presented in this Article also sheds light on the role of international tribunals when they make CIL decisions. The assumption that states are self-interested and have no underlying preference for compliance with international law implies that they will only comply with the decisions of tribunals when doing so is in their interest. This means that the key function of a tribunal cannot be to compel compliance.

Once we recognize how CIL and reputational sanctions work, however, the value of tribunals is clear. When a neutral third party evaluates the facts of a case and issues a decision, all states, whether involved in the case or not, receive information about the behavior of the parties to the case. If, for example, a tribunal finds that a state has violated a CIL obligation, other states can use that information to update their beliefs about the defendant. If the defendant is exonerated, it will avoid any re-

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254. See *supra* Part IV.

putational loss (and may enjoy a reputational gain). The key function of the tribunals, then, is informational. They clarify the state of the law, the actions taken by the states, and the interplay of law and fact. Better information leads to sharper distinctions between states that tend to comply with international law and those that tend to violate it.

## VI. CONCLUSION

CIL is an easy target for critics. While it is central to our understanding of international law, whatever theoretical justifications it may have had in the past (natural law and consent) are either dismissed by modern theorists (natural law) or difficult to reconcile with doctrine (consent). Without a theoretical base on which to build, CIL has become a collection of doctrinal claims and counterclaims, few of which can be demonstrated to be either true or false and most of which have weak justifications. It is hardly surprising that such a vulnerable area of law should find itself challenged.

Yet stripped to its most basic level, there is no *a priori* reason to think that a theory of CIL cannot be developed. It seems eminently plausible that states interacting with one another over time would develop norms to guide behavior. It is similarly plausible that some such norms would come to be regarded as "law."

Defending CIL from attack is reason enough to develop a theory that can explain this set of legal norms, but there is more at stake. If one concludes that CIL is irrelevant, it becomes difficult to understand how other aspects of international law can be sustained. There is, after all, no enforcement authority for international law obligations. Although a treaty is a written agreement, its enforcement must depend on largely the same mechanisms as does the enforcement of CIL. In both cases, a failure to comply may prompt some form of retaliatory action by other states, or it may generate a reputational cost. If we conclude that these forces are not present in the CIL context, it is difficult to see why they would be present in the treaty context. In this sense, a defense of CIL is related to a defense of international law more generally.

It is not only critics of CIL that must be addressed. Supporters of CIL, many of whom are among the most prominent figures in international law, must recognize that current notions of CIL are untenable. As this Article shows, existing views of CIL lack theoretical consistency and integrity. It is past time to adopt a more rigorous approach to analyzing this source of international law.

The good news is that once one adopts a standard social science approach to CIL, it is possible to develop a fairly comprehensive

understanding of how international legal norms can affect behavior and how CIL doctrine should be viewed. This Article does not exhaust the implications of this approach, but it does demonstrate that it is possible to build a strong and coherent foundation for CIL.

Critics of CIL should recognize that there is no theoretical reason why CIL cannot exist or why it cannot influence state behavior. Supporters of CIL should recognize that much of our understanding of this source of law must evolve to reflect a more rigorous approach to the topic.