Customary International Law in the 21st Century

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By Andrew T. Guzman and Timothy L. Meyer

A. Introduction

In 1932, in his seminal work *Progress in International Organization*, Professor Manley O. Hudson declared that, "the customary part of international law is an unsatisfactory condition."[1] Citing a host of concerns about customary international law (CIL) that are by now familiar to scholars, Professor Hudson's misgivings about the state of CIL foreshadowed more modern critiques based on traditional legal scholarship,[2] as well as those grounded in international relations theory.[3] Yet developing a coherent theory of CIL remains crucial to advancing our understanding of international law.[4] This is not only because CIL is one of only two primary sources of international law, the primary source of universal law, and the sole source of law governing certain issue areas.[5] In a very real sense, CIL and the customary process that gives rules of CIL their force undergird the entire system of international law, regardless of doctrinal category.

CIL is the most rudimentary of legal obligations. Unlike soft law and treaties, CIL does not emerge from a specific process that marks the creation of a legal obligation. This lack of a defining procedure creates considerable confusion as to the content of CIL and its relevance to state behavior. In part, this confusion stems from the fact that procedures marking the creation of legal obligations produce information about the nature and content of those obligations.[6] For example, the process of seeking and obtaining domestic ratification of a treaty reveals information about the seriousness, as well as the interpretations, the parties attach to their commitments.[7] Where such procedures are lacking, information about legal obligations will also be in short supply.

Nevertheless, it would be a mistake to think of the international legal landscape as being dotted with clear and rigid legal obligations against a backdrop of lawlessness. More accurate would be a view that recognized legal obligations with greater or lesser strength or credibility. Just as domestic laws vary in the strength of the state's commitment to a substantive behavioral standard, as measured by the penalties for violation, so too does the range of international legal obligations reflect a choice on the part of sovereign states to create legal obligations that vary in terms of their strength.[8]

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[1] Manley O. Hudson. *Progress in International Organization* 83 (1932).

[2] Anthony D'Amato. *The Concept of Custom in International Law* (1971); Karol Wolfke, *Custom in Present International Law*, (2d ed. 1993).

[3] Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law* (2005).

[4] Andrew T. Guzman. Saving Customary International Law. 27 *Michigan Journal of International Law* 115, 116 (2006).

[5] Id.

[6] See, e.g., Richard H. McAdams. An Attitudinal Model of Expressive Law. *79 Or. L. Rev. 339* (2000) (noting that "law signals the existence of information held by the law-maker").

[7] See, e.g., Lisa L. Martin. The President and International Agreements: Treaties as Signaling Devices. 35 *Presidential Studies Quarterly* 440 (2005).

[8] Kal Raustiala. Form and Substance in International Agreements. *99 Am. J. Int'l L. 581* (2005) (describing the "wide range of variation" in the bindingness of legal agreements).

This chapter argues that rules of CIL support "harder" legal agreements by reducing the costs associated with such agreements. Beyond this supporting role for CIL, this chapter also argues that formal legal institutions provide ways in which states can create more credible rules of CIL. Under standard rational choice assumptions, states create legal obligations to maximize their cooperative gains, taking into account transaction costs. In an environment in which states exercise a veto over legal obligations flowing from explicit agreements, transaction costs can prevent the creation, by way of agreement, of an otherwise beneficial legal obligation. CIL can bridge this gap, allowing the creation of less credible but still valuable legal obligations. As is argued below, states have found ways to use formal legal institutions to increase the credibility of particularly valuable rules of CIL in situations in which transaction costs might prevent the creation of a treaty-based regime.

This chapter proceeds in five parts. Section B reviews traditional definitions of CIL, as well as criticisms of traditional approaches. Section C develops a model of CIL based on rational states. This model provides a functional theory of CIL. Section D considers several ways in which CIL remains relevant to a world in which the predominant legal instrument of international relations is the treaty. This Section demonstrates that the rise of more formal legal institutions in the last century has reinforced and complemented the way in which CIL impacts state behavior, rather than rendering CIL irrelevant to international relations. Section E concludes.

B. Traditional Definitions and Critiques

Article 38 of the International Court of Justice, which provides the most commonly cited definition of CIL, states that "international custom, as evidence of a general practice accepted as law, is one of the sources of international law."[9] The Restatement (Third) of Foreign Relations Law of the United States defines CIL as "result[ing] from a general and consistent practice of States followed by them from a sense of legal obligation."[10] Thus, CIL, as traditionally defined, has two elements: state practice and *opinio juris*. State practice is an objective requirement that focuses on the behavior of states. In contrast, the *opinio juris* requirement focuses on the subjective belief of the state in question. Specifically, the *opinio juris* requirement requires that a state believe itself to be bound by the customary rule in question.

This conception of CIL has long been under attack from a variety of directions. Traditional critics of CIL have pointed out that the definition of CIL is circular,[11] that rules of CIL are vague and thus difficult to apply,[12] and that we lack standards by which we can judge whether the two requirements for a rule of CIL have been met.[13] D'Amato, for example, has pointed out that traditionally, in order for a rule of CIL to exist, states must have the requisite *opinio juris*; in other words, they must follow the rule from a sense of legal obligation.[14] But how can a state follow the rule from a sense of legal obligation unless it already has the requisite *opinio juris*?

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[9] Statute of the International Court of Justice, art. 38 sec. 1 cl. b; Ian Brownlie, Principles of Public International Law 3 (4th ed. 1990).

[10] Restatement (Third) of the Foreign Relations Law of the United States, §102(2) (1987).

[11] D'Amato, supra note 2, at 58; Michael Byers, Custom, Power and the Power of Rules, 136 (1999); Phillip R. Trimble, A Revisionist View of Customary International Law, 33 UCLA L. Rev. 665, 710 (1986).

[12] Wolfke, supra note 2, at xiii.

[13] D'Amato, supra note 2, at 58; Guzman, supra note 4, at 124.

[14] D'Amato, supra note 2, at 53, 66.

The state practice requirement is no less problematic. The amount of practice required is a central question for which is there is no single answer. While it is clear that universal state practice is not required, opinions as to the degree of state practice that is required diverge considerably.[15]

Furthermore, both the *opinio juris* requirement and the state practice requirement suffer from enormous evidentiary problems. With respect to *opinio juris*, it is extraordinarily difficult to determine whether a state has taken a given action because it believes itself to be bound by a rule of CIL, or if it would have taken the same action in the absence of such a rule. State practice is even more complicated. Before one can evaluate "state practice," one must first determine what actions count in assessing whether or not a "state practice" exists. Some commentators have urged that everything from the actual actions of states to treaties, domestic laws, diplomatic correspondence, and even public statements by heads of state be considered evidence of state practice.[16] Others have urged a more restrictive view, suggesting that only physical acts should count.[17] Of course, views between these extremes abound.[18]

Even if consensus as to what counts as state practice could be achieved, practical problems relating to canvassing the enormous amount of evidence would still exist. Decision-makers on international tribunals face severe resource constraints in their efforts to assemble a record of state practice.[19] They are limited both in terms of time, personnel, and language. This necessarily has the effect of biasing international tribunals in favor of large states who are able to produce a wealth of evidence as to their practices in languages easily understood by the tribunal.

More recently, a new sort critique has arisen, based on rational choice theory. Using the conventional assumptions of rational choice theory, some scholars have argued that, as a theoretical matter, CIL has no, or at least extremely limited, impact on state behavior.[20] This theoretical claim, however, cannot withstand scrutiny. States interact with each other over an extended period of time, and, thus, a failure to comply with rules today will have consequences tomorrow. For CIL, or any other type of law, to have an impact on state behavior, it is a necessary but not sufficient condition that states place some value on the future. In other words, as long as states are concerned with their ability to cooperate in the future, rules of CIL can have some effect on a state's decision as to whether or not to comply with prevailing norms. The extent to which states value this future cooperation will in part explain the variation in compliance.

Pointing out that states interact with each other in long-term relationships rather than one-shot prisoner's dilemmas does not necessarily mean that CIL can generate cooperation. International law skeptics have grasped onto the decentralized nature of enforcement in the international environment to claim that, even when states expect to interact with each other in the future, they will often violate their present commitments because there will likely be no future repercussions for such violations.[21]

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[15] See Guzman, supra note 4, at 124 (describing the different views of commentators on the state practice requirement).
[16] Michael Akehurst, Custom as a Source of International Law, 47 Brit. Y.B. Int'l L. 1, 1 (1977).

[17] D'Amato, supra note 2, at 88.

[18] See Guzman, supra note 4, at 126 for a detailed list of possibilities.

[19] For example, in the famous *Paqueta Habana* case, 175 U.S. 677 (1900) the U.S. Supreme Court found a rule of customary to exist based on the practice of fewer than a dozen states. The Permanent Court of International Justice found a rule of CIL to exist on similarly scant evidence in the *S.S. Wimbledon*, 1923 P.C.I.J. (ser A.) No. 1 (Jan. 16).
[20] Goldsmith and Posner, supra note 5, at 43; 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.").

[21] See e.g., Goldsmith and Posner, supra note 5; Hans Morgenthau. *Politics Among Nations* (1966).

This view suffers from a narrow conception of what constitutes future sanctions. It is of course true that in many cases violations of international law will not result in multilateral sanctions, military reprisals, or anything else that is analogous to an "enforcement action." However, this does not mean that there is no sanction for violation of international commitments. Because states interact with each other over a long period of time, a reputation for abiding by cooperative arrangements is valuable to states. It permits them to extract concessions from other states in the future, and it allows other states to rely on their behavior, thus inducing welfare-enhancing behavioral regularities. It follows that, to the extent states value future cooperation with other states, they may be induced to comply with rules of international law when they otherwise would not. In other words, reputational sanctions can support a cooperative system of norms, be those norms rules of CIL or treaty-based rules.

C. Rational States and CIL

Besides explaining why states comply with rules of CIL, a functional theory of CIL also must explain why states violate such rules. This Section begins by laying out the ways in which international law can influence states' compliance decisions.[22] The second part of this Section applies the framework developed in the first part to further elaborate the theory of CIL.[23]

This theory uses basic rational choice assumptions to show how CIL, properly conceived, can affect state behavior. In this chapter, we treat the state as a unitary actor. Such a choice is increasingly common in international legal scholarship,[24] and reflects the fact that theories that peer into the internal dynamics of the state, most notably liberal theory and public choice theory, have difficulty generating predictions about how rules of international law will affect state behavior. The complexity that is present in domestic politics makes it nearly impossible to isolate the effect that international law has on states' decision-making processes. Thus, treating the state as a unitary actor allows us to think about CIL in a way that focuses on the impact of international law alone on states' decisions.

I. CIL and Reputation

As noted above, for international law to affect states' decisions, states must care about the future, and there must be future consequences for present compliance decisions. States have three methods for sanctioning behavior that is noncompliant with international law: reciprocity, retaliation, and reputational sanctions. The imposition of all three requires action by other states.[25] Such action will necessarily depend on how these other states perceive the action taken by the violating state and how they understand the content of the legal obligation. Thus, every state individually is an arbiter of the legal obligations of other states.

Reciprocity and retaliation both involve direct action by the offended state. In the case of reciprocity, a state withdraws its compliance with the legal rule in reaction to another state's

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[22] In discussing the role of CIL in the development of international law, and CIL's connection with other forms of international law, this chapter will draw on a theory of CIL developed by Guzman, supra note 4..

[23] For a normative critique of rules of CIL, see Eugene Kontorovich, *The Efficiency of International Customary Norms*, (forthcoming 2006).

[24] See e.g., Andrew T. Guzman, A Compliance-Based Theory of International Law, 90 Cal. L. Rev. 1823 (2002); Edward T. Swaine, Rational Custom, 52 Duke L.J. 559, 563 (2002).

[25] Such action may be directly observable, as in the case of reciprocity or retaliation, or not, as in the case of a state updating its beliefs about the violating state's likelihood to comply with international law in the future.

withdrawal of compliance.[26] Such a withdrawal ensures that the violating state does not continue to receive the benefits of cooperation without having to pay the costs. Retaliation involves a state taking action specifically to punish a violating state. Retaliation is used as a means to ensure that the violating state will comply with legal rules in the future and can also enable the retaliating state to establish a reputation as a state willing to punish violators.[27] Retaliatory action need not be related to the same issue area as the violation prompting the retaliation.

Reciprocity and retaliation both suffer from severe limitations. Because reciprocity, as understood here, is limited to reciprocal withdrawals of compliance, reciprocity will support only a limited number of legal obligations, most of which will be bilateral.[28] In contrast, retaliation has the potential to significantly deter violations of international law by imposing large costs on violators. However, retaliatory sanctions are costly for the state imposing them. Furthermore, because the compliance generated by retaliatory sanctions has the features of a public good, meaning that many states benefit from the violating (and thus punished) state's future compliance, all states have an incentive to free ride on the retaliatory sanctions imposed by other states. The result is that sanctions are rare, and generally provided only in situations in which the punishing state captures most of the gains flowing from the punishment.[29]

A reputation for compliance with international law is the third important method for influencing states' compliance decisions. States rarely find themselves in a one-shot prisoner's dilemma with other states. Instead, states are usually locked into relationships with each other that span decades and even centuries. Thus, action taken by a state today can be used by other states to assess the likelihood that a given state will abide by its legal commitments in the future. A state's reputation for compliance can thus be defined as the expectations of other states as to the circumstances in which compliance will be forthcoming.[30] Reputational sanctions can be thought of as the marginal decrease in states' expectations of the violating state's future compliance as a result of a violation. This marginal decrease in expected compliance reduces the ability of the violating state to cooperate in the future with other states, or to extract concessions in a bargaining context.

Of course, for reputation to matter for compliance, states must value their reputations, but it does not seem very far-fetched to assume that they do. Because states seek to enter into agreements with other states all the time, as well as to benefit from existing cooperative arrangements, a reputation for compliance with one's international legal commitments is valuable. In dealing with a state with a good reputation for compliance, other states can predict with higher certainty, and thus more accurately rely on, the "good" state's behavior, and so will be willing to grant greater concessions in a bargaining context. In other words, a commitment from a state with a

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[26] Some scholars use reciprocity to refer to action taken in a situation involving only two states that has the effect of punishing one state for a violation. See James D. Morrow The Institutional Features of the Prisoners of War Treaties, 55 International Organization 971, 973 (2001). Here, however, reciprocity is distinguished from retaliation by the motivation of the state. Reciprocal action is thus not designed to punish the violating state, although it will often have that effect. Instead, reciprocal action is taken to maximize the non-violating state's payoffs, given the violation of the other state.

[27] This is a reputation of a different sort than the one being discussed here. The reputation that supports international law is a reputation for compliance with international law, as opposed to a reputation for being willing to punish those who violate international law, or who refuse to capitulate to a state's wishes.

[28] Thus, reciprocity might support certain types of special custom, rules of CIL that are binding on only a few parties, as opposed to most rules of CIL, which are universally applicable.

[29] In other words, sanctions will be less likely in the multilateral context than the bilateral context. See Guzman, supra note 24, at 1869 (noting that bilateral sanctions are more effective than multilateral sanctions due to the collective action problem with the latter).

[30] See Andrew T. Guzman. *The Theory of International Law: A Rational Choice Approach*, forthcoming (2007).

good reputation is worth more than a commitment from a state with a worse reputation, and thus the possessors of good reputations will be able to extract more from cooperative partners.[31]

Reputation has an additional feature that increases its effectiveness over retaliation and reciprocity: it does not depend on collective action. Reputational sanctions are created when each state updates its estimation of a violating state's future compliance with international law. This updating does not require states to coordinate with each other. Each state has its own perceptions of legal obligations, and will determine for itself whether a given action violates the perceived obligation .

Further, reputational sanctions are not costly for states to impose. Reputational sanctions result from individual states' self-interested collection and assessment of information regarding the likelihood of future compliance. Because states update their beliefs out of self-interest, reputational sanctions will be present even in situations in which cost-benefit concerns or attempts to free-ride on the actions of others prevents direct sanctions. Thus, reputational sanctions will be by far the most common type of sanctions for noncompliance.

Finally, in deciding on a particular course of action, states face a number of incentives that are not related to legal obligations. For example, the economic benefits from whaling in certain waters may outweigh the costs from violation of a legal commitment to refrain, particularly if whaling is a significant part of the nation's economy.[32] Likewise, the decision to build an extensive navy may be justified in terms of the gains in security, even if a legal obligation forbids such actions.[33] Such economic or security-related incentives will, in large part, determine the actions that a state takes when faced with a given decision. The legal ramifications of its decision are another factor that a state must consider when making a decision in which a rule of international law is implicated. Thus, to the extent that international law can sanction non-compliant behavior (or reward compliant behavior), international law can affect states' decision-making calculus.

II. A Functional Theory of CIL

With this understanding of the legal underpinnings of compliance with international law, we can now develop a functional theory of CIL. Traditionally, scholars have considered consent to be the hallmark of international law.[34] States that did not consent to a certain rule of international law could not be bound by that rule. The significance of consent is most clearly demonstrated in the case of treaties. States are only bound by a treaty if they consent to be so bound (although if the rules embodied in the treaty are also rules of CIL, non-parties may still be bound by the rules of

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[31] The workings of reputation are considerably more complex than this short description indicates. See Andrew T. Guzman, *The Theory of International Law: A Rational Choice Approach*, forthcoming (2007). See also Anne E. Sartori, *Deterrence by Diplomacy* (2005).

[32] Iceland in particular has struggled with the legal commitment to refrain from whaling. After failing to enter an objection to the International Whaling Commission's moratorium on whaling, as other whaling nations such as Japan and Norway did, Iceland resigned from the IWC in 1992, only to seek reentry in 2001. Following reentry, Iceland recommenced whaling under the cover of the moratorium's "scientific exception." See Ramsey Henderson. The Future of Whaling: Should the International Whaling Commission Create a Broadened Cultural Exemption to the Whaling Moratorium for Iceland? *33 Ga. J. Int'l. & Comp. L. 655* ((2005).

[33] Multilateral Limitation of Naval Armament (Five-Power Treaty or Washington Treaty), Feb. 6, 1922, Art. 4, TS No. 671, 2 Bevans 351 (entered into force Aug. 17, 1923). Both Japan and Italy failed to comply with the Washington Treaty in the build-up to World War II,

[34] 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.").

CIL). Thus, treaty law is universally understood to come about through a bargaining process in which states exercise a veto. States, in other words, always have the last say as to what treaty commitments will bind them.

Perhaps reasoning by analogy, legal scholars have long thought that the process governing the development of CIL must be based, even if somewhat loosely, on consent. The *opinio juris* requirement, as traditionally understood, is thus little more than the requirement that states consent to legal rules that bind them.

In contrast, a theory that focuses on why states comply with rules of international law has little room for state consent as a basis for determining which rules are binding.[35] Instead, states comply with international law when it is in their interest to do so. This understanding of international law explains why states comply with CIL rules even when they have not meaningfully consented. This approach also has the advantage of allowing us to understand the circumstances in which states will violate commitments to which they have consented.

From this functional standpoint, consent is valuable only to the extent that it is a reliable signal about future behavior.. The existence of a legal obligation is based on the views of other states as to whether or not a legal obligation is binding on a given state. In the case of explicit agreements, these expectations are largely shaped by consent. *But it is these expectations, and not consent, that create legal obligations*.

Under this approach, the only rules that count as rules of CIL are those rules that actually affect state behavior by virtue of their status as legal rules. Given this definition, it is necessary to reinterpret the traditional doctrinal elements of CIL. *Opinio juris*, as traditionally interpreted, was intended to protect the integrity of state sovereignty by requiring state consent to be bound. However, under a functional analysis, the *opinio juris* requirement can be understood as referring to the beliefs of other states as to the legal obligations binding a given state. This notion of *opinio juris* comports with the reputational mechanism mentioned above that generally serves to enforce legal obligations. The views of states generally will determine the existence and magnitude of the reputational sanction, and, thus, will determine whether a legal obligation that will influence the decision-making processes of a given state exists.

Furthermore, the existence of a legal obligation does not depend at all on state practice, the second traditional element of CIL. The existence of a legal obligation is determined exclusively by the beliefs of states as to the existence of such an obligation. State practice remains relevant only insofar as it provides evidence of what states believe to be legal obligations. It should be noted that the familiar problem with drawing inferences as to state beliefs about legal obligations from state practice remains. States may strategically claim an obligation exists that they do not, in fact, believe exists. Furthermore, because a functional account of international law expects violations of law to occur, the fact that states sometimes fail to comply with a purported rule of CIL does not mean that the state does not consider the rule to be binding.

Significantly, the value of a reputation for compliance with CIL is not exactly the same as the value of a reputation for compliance with more explicit agreements, where the credibility of a state's explicit commitments to be bound is at stake. Because states have not explicitly contracted for obligations that arise under CIL, a state's ability to extract concessions in a bargaining context based on its reputation for compliance will only be affected by violation of rules of CIL to the extent that states interpret violations of rules of CIL as indicating a willingness to violate other

[35] Guzman, supra note 18, at 1833.

legal commitments. In other words, violations of CIL can affect the bargaining value of a reputation for compliance to the extent that reputations for compliance generalize across legal obligations, rather than being compartmentalized so that states have separate reputations for compliance with treaties, soft law and CIL. However, even if reputations are completely compartmentalized, a reputation for compliance with CIL is still valuable because it allows other states to rely on a state's cooperative behavior. This reliance is, in turn, valuable, because it permits welfare-enhancing behavior regularities without transaction costs involved in bargaining.

Practically speaking, reputational sanctions will vary with a number of factors. Because each state individually updates its beliefs, the magnitude of the sanction for a given violation will depend on the number of states that observe the violation, as well as the clarity of the obligation.[36] Thus, greater information about violations and greater clarity and consensus as to the nature and content of obligations promote compliance by increasing the reputational sanction for violation.[37] A lack of clarity as to the content of rules of CIL is likely to be a major factor in weakening the impact of CIL. To the extent that states diverge in their interpretations of what rules of CIL require, or even the existence of a rule of CIL, reputational sanctions can shrink to the point that they have no significant impact on state behavior. Thus, mechanisms for promoting consensus as to the content of legal rules are valuable to states because they increase the compliance pull of the obligations.

These concerns create problems when states, or tribunals, are trying to determine the existence of a rule of CIL, but they do not make such an inquiry impossible. Certain state actions will be more costly than others, and, thus, may more reliably indicate a state's belief that a legal obligation exists. One such example, which will be dealt with at greater length in the next section, is the creation of a treaty that incorporates or expounds on rules of CIL. Thus, looking to treaties as evidence of CIL can remain a valuable practice under a functional theory of CIL because treaties can send credible signals as to what rules states believe to be binding on non-parties. Delegation to an adjudicatory body to decide questions based on CIL can be another costly signal. Because the decisions of adjudicatory bodies can be costly to states, both in terms of providing information about violations of rules of CIL and by clarifying and creating consensus as to the specific content of rules, permitting such bodies to rule on the basis of CIL may be an indication that states believe a rule of CIL to exist.

D. CIL in the 21st Century

The functional model of CIL described here, with rational states as its core assumption, demonstrates that it is theoretically possible for CIL to have an impact on state behavior in the same way that any legal commitment does. Because states value their reputation for compliance with legal agreements, rules of CIL are one consideration among many that states take into account when deciding on their best course of action. However, unlike treaties and soft law, where states have explicitly bargained over their legal commitments, CIL presents an

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[36] Other factors will also affect the magnitude of the reputational sanction. Specifically, states may have diverging estimates of a state's likelihood to comply with future obligations. Those states that already believe the likelihood of future compliance to be low may not have to update their expectations in response to a violation, thus reducing the overall sanction. See Guzman, supra note 23.

[37] An increase in sanctions for violation is not costless. As noted earlier, in an international context sanctions are negative sum, making them collectively costly to the parties in the event of violation. This explains why states do not as a matter of course create mechanisms to increase transparency or clarify obligations. They only do so to the extent that the value from increased compliance as a result of greater clarity and information is greater than the marginally greater expected loss in the event of violation. See Andrew T. Guzman, The Design of International Agreements, 16 Eur. J. Int'l L. 579 (2005).

informational problem. States can only respond to legal commitments to the extent that they are aware that a legal commitment exists. Thus, although this model of CIL allows us to understand how CIL can affect state behavior, understanding the depth of cooperation that CIL can support requires an account of how states indicate to each other the rules that have legal status, and thus the violation of which will result in a reputational sanction.

At the outset, we note that the most common tool that states use to signal to each other their understanding of each other's commitments is an explicit agreement (either a treaty or a soft law agreement). Signature or ratification of an agreement, thus, not only signals an intent to be bound by a state's own commitments, but also signals an understanding of the other side's commitments. In other words, consent to an explicit agreement reveals information to a given state about how other states view the legal commitments binding on the original state.

However, as most states have not actually consented to rules of CIL, scholars have invented doctrines of constructive consent, or consent to secondary rules of CIL, to explain how states were bound by CIL.[38] This dilemma was most clearly presented by new states, which never had a chance to become persistent objectors to a rule while it was forming, but were nonetheless deemed to be bound by all of the rules in existence at the time the state formed.[39] Eventually, most commentators came to accept that the consent, or *opinio juris*, required for a rule of CIL applied to states generally, and not to a violating state specifically.[40] Thus, although traditional theories had a place for consent, the tenuous connection to deliberate, explicit consent meant that states revealed little information as to which obligations they felt had the status of legal rules, and little information as to the content of those obligations.

This lack of information about the existence and content of rules of CIL necessarily weakens the compliance pull of those rules. If there is uncertainty about the content of a legal rule, states will be unsure how to interpret action they consider to be violative. For example, if State A observes State B take an action that State A considers to be a violation of a rule of CIL, State A may interpret the action as a willingness to violate the rule under the prevailing conditions. Alternatively, however, State A may believe that State B is acting in compliance with its own understanding of the rule. In the latter case, State A would not update its beliefs about State B's willingness to comply with its legal obligations. Furthermore, State A's beliefs about State B's motivations will often fall in between these two poles. States rarely admit to being in violation of their agreements, and it can be difficult to tell whether their statements to this effect reflect a sincere belief, or are merely strategic.

It follows from this that states have an interest in clarifying the perceptions of legal obligations and the situations in which those obligations will be binding. To do so, states have created a series of devices designed to clarify customary norms. These devices allow states to capture the benefits of greater clarity by revealing information about what rules states view as legally binding.

I. Codifying Custom

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[38] Mark Villiger, Customary International Law and Treaties 18-22 (1985); Vaughan Lowe, Do General Rules of International Law Exist?, 9 Rev. of Int'l Studies 207, 208-10 (1983).

[39] Jonathan I. Charney, The Persistent Objector Rule and the Development of Customary International Law, 56 Brit. Y.B. Int'l L. 1, 16 (1985)

[40] Id.

The most obvious method for clarifying customary obligations is by codifying them in treaty form. A number of major multilateral treaties purport to be doing just this. For example, the Vienna Convention on the Law of Treaties is widely viewed as codifying much of the customary law of treaties.[41] Similarly, the Vienna Convention on Diplomatic Relations codifies much of the customary international law relating to the protection and treatment of diplomats.[42] Indeed, in the last century many areas of international law that were exclusively governed by CIL have been addressed with treaties, such as human rights and the laws of war, a trend noted by Professor Hudson in the early 1930s.[43]

The basic trade-off in codifying customary international law is between the benefit of greater clarity in the rules, and the costs associated with the treaty-making process, as well as the costs that accompany the greater credibility of the commitment.[44] Indeed, the latter is likely to be significant. By increasing certainty as to the specific contours of an obligation, states are able to more accurately assess whether actions by another state that it deems violative were taken in good faith. Because reputational sanctions are often negative sum, this greater certainty results in a larger net loss to the parties in the event of violation.[45] Thus, rules of CIL should only be codified when this loss is outweighed by the benefits of greater compliance and the ability to more accurately rely on this compliance.

The conditions in the modern world that create the need for greater reliance are fairly evident. As states interact with each other in more issue areas, with greater frequency, and with higher stakes, the costs incurred through codification sometimes come to seem small relative to the benefits. Thus, for example, the proliferation of treaties in the twentieth century made the law of treaties an ideal issue area in which to codify custom. An increase in the density of transactions increases the net benefits from greater certainty and, therefore, greater cooperation. Similarly, decolonization in the mid-twentieth century saw the emergence of many new states. Previously, what might be termed the law of diplomatic relations was governed by CIL. This was appropriate because it served primarily to govern the conduct of European nations towards each other. Decolonization not only led to the birth of many new states, it created states that were typically quite different from their former colonial masters. The increase in the heterogeneity of states made customary norms a less effective device for the management of cooperation. It became important to stipulate expressly the terms that would govern those relationships.[46] Like the Vienna Convention on the Law of Treaties, the Vienna Convention on Diplomatic Relations can be seen in part as a reaction to this need by codifying an aspect of states' relationships with each other.

It may be objected that the codification of custom in the most important areas of law indicates that CIL has no future relevance, regardless of its historic significance. This view is mistaken for several reasons. First, CIL, with the exception of special custom, is thought to bind states universally. Thus, despite the fact that the United States has not ratified the Vienna Convention on the Law of Treaties, other states view the United States as being bound by the customary law

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[41] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 332.

[42] Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95.

[43] Hudson, supra note 1, at 83.

[44] Guzman, supra note 27.

[45] Id.

[46] Berdal Aral. An Inquiry into the 'Turkish' School of International Law. *16 Euro. J. Int'l. L. 769,* 774,(2005) ("In the aftermath of decolonization, for example, some newly independent states asserted that they should not be bound by customary law as they had played no part in its development.")

of treaties. Insofar as the Vienna Convention is the most authoritative statement of what the customary law of treaties is, the United States is bound by the terms of the treaty.

Significant for this conclusion is the fact that the Vienna Convention purportedly codifies custom, and that it has so many members. Under traditional definitions of CIL, treaties are often said to provide evidence that rules of CIL exist. This evidentiary device can be problematic, however, because treaties may be created either to capture the increased gains from cooperation, or to alter the default rules as between the parties to the treaty. Thus, it may be argued that treaties really indicate that any existing rules of CIL were inadequate to govern the relationship of the parties to the treaty, without indicating whether the inadequacy stemmed from lack of clarity and credibility, or from the substantive rules themselves. Given this uncertainty, it is difficult to infer whether or not a universal obligation exists.

From a rational choice perspective, however, the explicit codification of custom has an additional function. Rather than being evidentiary, the codification of custom can play a signaling role. Where a treaty is purported to embody customary norms, the treaty sends a signal to non-parties that the parties to the treaty consider the terms to be binding on all states. Because, under a rational choice model of CIL, the beliefs of other states determine a given state's legal obligations, this signal reveals information to all states about the content of the rules of CIL in question. In the extreme, even where treaty rules arguably deviate from conventional rules of CIL, a treaty can, in situations in which the parties assert that the treaty codifies custom, still signal information about how interpretations of the relevant rules may be changing.

Furthermore, the signal being sent is more credible than a simple joint statement by the parties to the treaty because sending the signal in treaty form is costly. By binding themselves to each other in treaty form, the parties increase the credibility of their commitment to abide by the customary rules, at least with respect to other parties. The resulting signal is more credible because a breaching party must bear a larger cost. The more costly the signal, the less likely it is that the parties to the treaty are strategically trying to manipulate the information other states possess. Conversely, where the treaty imposes few costs on the parties, the signal sent about the parties' beliefs about custom are quite weak. Thus, a larger number of parties should increase the significance of the signal sent to non-parties.

It follows from this analysis that the codification of custom, far from being the demise of CIL, can actually increase the significance of the customary process. Codifying custom gives states a way to signal information to each other about their beliefs about the prevailing norms, and, thus, gives them a way to "bind" states that remain outside of a given treaty. The examples of the aforementioned Vienna Conventions, governing the relationships of states with each other, provide an illustrative example of this proposition. When the number of relevant states was small, states felt comfortable allowing the terms of their interactions to be governed by customary norms. When, however, there was a sharp rise in the number of states, as occurred in the middle of the twentieth century, existing states likely found it valuable to signal to new states what laws the former believed governed the interaction of states.

The second reason that CIL as a form of law retains vitality is that CIL is interstitial, filling in the gaps in more explicit legal instruments such as treaties and soft law, and provides a basis for the operation of those legal instruments.[47] The Vienna Convention on the Law of Treaties, for

[47] While traditional theories of international law have considered treaties and CIL to be the primary types of international law, a reputational theory of international leads to a different conclusion. Soft law agreements, to which states have explicitly consented, generally yield clearer expectations, and thus larger reputational sanctions in the event of violation, than unclear CIL obligations. Thus, in many cases, soft law agreements will be more "binding" on the parties, in the sense

example, provides in its preamble that "the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention."[48] The Convention thus contemplated that existing rules of CIL would complement the Convention in establishing states' expectations about the law of treaties.

Furthermore, these expectations drive all international law, regardless of its form. Simple cost/benefit analysis prevents states from committing to paper all of their legal expectations. Just as a contract will remain silent on issues to be governed by default or background rules, international agreements will be rationally incomplete. Customary norms will fill in many of the rational holes in treaties and soft law agreements. Without these background and default rules and expectations, the cost of creating commitments would be exorbitantly high. States would have to explicitly negotiate over the allocation of certain rights each time they entered into an agreement. As with contracts, however, default rules reduce transaction costs, thus creating a greater cooperative surplus and more possible agreements. Thus, even where CIL by itself may not deter violations of international law, it supports the creation of harder, more credible forms of law.

Third, the customary process permits the reinterpretation of more formal legal obligations, such as those arising from treaties, without resorting to a formal amendment process. Because a given state's legal obligations are defined by the beliefs of states generally about those obligations, a shift in beliefs results in a shift in the underlying legal obligations. If, for example, a treaty is initially understood to require X but over time states come to believe, perhaps through informal discussions or perhaps through changed political or economic circumstances, that instead of X the provision requires the state to do Y, the legal obligation effectively is Y.

Withdrawal or denunciation clauses in certain international treaties are an example that illustrates both the interstitial nature of the customary process as well as its ability to change the meaning of provisions of international agreements. Withdrawal clauses are often vague, stating only that states may withdraw, and sometimes stipulating that the withdrawal must be for reasons of "supreme interest."[49] Given the vague formulation of such clauses, one might think that states frequently invoke withdrawal clauses to escape legal obligations that have become onerous. However, the opposite appears to be true. States rarely invoke withdrawal clauses, despite their frequent inclusion in agreements.[50] Such reluctance to use a seemingly open-ended right that has been negotiated in the treaty-making process is best explained through a process that results in a narrowing of the substantive right despite its wording. The customary process allows us to understand how such legal obligations can be reinterpreted and elaborated without resorting to costly amendment processes requiring universal acceptance among parties.

Consider, for example, North Korea's withdrawal from the Nuclear Non-proliferation Treaty. North Korea withdrew from the NPT pursuant to Article X in January of 2003, citing the nation's "supreme interests" in protecting itself from American aggression.[51] At the same time, North

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of having larger reputational costs associated with violation, than rules of CIL. *See* Andrew T. Guzman, A THEORY OF INTERNATIONAL LAW, *forthcoming* (2007).

[48] Vienna Convention on the Law of Treaties, *supra* note 41, Preamble.

[49] See, e.g., Treaty on the Nonproliferation of Nuclear Weapons, art. X, July 1, 1968, 729 U.N.T.S. 161; Treaty on the Limitation of Anti-Ballistic Missile Systems, U.S.-U.S.S.R., art. XV, May 26, 1972, 23 U.S.T. 3435.

[50] Barbara Koremenos, Contracting Around Uncertainty, 99 Am. Pol. Sci. Rev. 549, 561(2005); *but cf* Laurence R. Helfer, Exiting Treaties, 91 Va. L. Rev. 1579, 1602 (2005) (noting that the exercise of withdrawal clauses, while infrequent, is not as aberrant as conventional wisdom would suggest).

[51] "Text of North Korea's Statement on NPT Withdrawal," January 10, 2003, available at: http://cns.miis.edu/research/korea/nptstate.htm

Korea declared itself no longer bound by the safeguards agreements that it had signed with the International Atomic Energy Agency pursuant to Article III of the NPT.[52] As such, North Korea became legally free to use the technology other nations had shared with it during its membership in the NPT to pursue a nuclear bomb, despite the fact that any technology transfers under the NPT and IAEA safeguards are made in reliance on the receiving nation's compliance with its nonproliferation obligations. In other words, nothing in the text of the NPT prevents a state from receiving technology transfers under the premise that it is in compliance with its nonproliferation norms, and subsequently withdrawing from the NPT and using the technology to pursue a nuclear capability.

Nevertheless, such a course of action is clearly at odds with the spirit of the NPT. In transferring sensitive nuclear technology to non-nuclear weapons states (NNWS), transferring states assume that the NNWS intend to comply with their legal obligations during the time that they remain NNWS. Thus, following North Korea's withdrawal, France argued that states such as North Korea that withdrew from the NPT in superficial compliance with the plain text should remain responsible for violations committed while a member.[53] Germany sought to generate support for an amendment to the nonproliferation regime that would explicitly forbid states from using benefits received under the NPT to develop a nuclear weapon.[54] Under the theory developed in this chapter, however, such an amendment is unnecessary. The fact that states believe that the NPT has an implicit prohibition on actions such as those taken by North Korea, despite the lack of explicit language to that effect in the text, means that the obligation exists. Thus, North Korea's actions likely resulted in a loss of reputation. Indeed, in the case of the North Korea and specifically in light of North Korea's history of disregarding its nonproliferation obligations, this willingness to violate both implicit and explicit obligations has likely contributed to the inability of the Six Party talks to reach a negotiated settlement to the North Korean nuclear issue.

This analysis suggests that the customary process operates to create implicit legal obligations that go beyond the open-ended wording of legal texts, both hard and soft. Just as there are rules prohibiting a state from undermining a treaty that it has signed,[55] it may be that states understand withdrawal clauses to limit the ability of states to profit from membership in a treaty regime after they have withdrawn from the regime, or more generally to escape from an obligation, no matter how informal, on which other states have relied. This certainly seems be the understanding of states with respect to the NPT, and to the extent that this hypothesis generalizes, it explains why we states fail to take advantage of seemingly liberal withdrawal provisions in treaties. Implicit obligations based on state beliefs can trump the plain meaning of explicit legal texts.

II. Tribunals

Delegating dispute resolution to tribunals, a term used here to encompass at the international level not only courts but also investigative bodies, such as the U.N. Human Rights Committee and the Inter-American Commission on Human Rights, to whom disputes can be submitted, can

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[52] Id.

[53] See Claire Applegarth and Rhianna Tyson, "Major Proposals to Strengthen the Nuclear NPT: A Resource Guide," April 2005, at 31.

[54] Preparatory Committee for the 2005 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, "Strengthening the NPT Against Withdrawal and Non-Compliance: Suggestions for the Establishment of Procedures and Mechanisms," NPT/CONF.2005/PC.III/WP.15, April 29, 2004, available at http://www.reachingcriticalwill.org/legal/npt/prepcom04/papers/GermanyWP15.pdf.

[55] Vienna Convention on the Law of Treaties, art 18, supra note 32.

also increase compliance with CIL by increasing information, clarity of obligations, and commitment to observing rules of CIL. Not all of these tasks can be accomplished by international tribunals and, thus, domestic tribunals, primarily courts, have begun to play an increasing role in the development of CIL.

As noted above, any legal system that is supported largely by reputational sanctions requires that there be information about violations. Often, this information will be publicly available. States can observe the behavior of other states, and, thus, can assess whether or not other states' behavior comports with their legal obligations. However, in many other instances, state action will not be observable to any but an affected state, and even an affected state may not be entirely sure whether the alleged violation actually violated the norm as it is understood by the putatively breaching state or by states more generally. Tribunals and international organizations can aid compliance in these situations by increasing the amount of information available. When individuals or other states file an action against a state in an international court, or when an international organization investigate a state's compliance with a rule, observing states are given information about violations that might have been previously unavailable.

Furthermore, the reputational sanction from a negative verdict encourages states to reveal information about the circumstances surrounding an alleged violation and the states' interpretation of the relevant rules of CIL. Where states refuse to produce such information, observing states can infer that the cost of disclosing the information exceeds the expected gains in the proceedings. In many cases, but not all, this will be because the state is actually in violation, and revealing information cannot help their case. Of course, where information is produced about circumstances and particularly about interpretations, states must remain wary that other states are strategically trying to manipulate their information set.

Second, tribunals can play an agenda-setting role in clarifying the content of international norms. Proceedings before a tribunal give the tribunal the ability to elaborate on the content of particular rules of CIL.[56] States' expectations as to what counts as a rule of CIL can shift with decisions or reports of tribunals, either coalescing around a decision or recommendation, or forming in opposition to the same. In some cases the mere act of establishing a tribunal to pass on certain questions sends a signal that the states establishing the tribunal believe that a rule of international law exists. Such is arguably the case with the Nuremberg trials and the establishment of crimes against humanity.[57] Furthermore, the compliance of a government with CIL-based tribunal (either international or domestic) decisions that are adverse to its interests can send a costly, and therefore credible, signal to other states as to what that state considers the relevant rules of CIL to require.

Lastly, the delegation to domestic tribunals of enforcement of CIL rules can create more fora to perform the informational and agenda setting functions discussed above, particularly for *jus cogens* norms and other human rights norms. This is important because standing and jurisdictional requirements are typically lower in domestic courts than in international tribunals. Indeed, domestic courts have become increasingly important to the development of CIL in recent decades. In the United States, for example, this trend began with the historic *Filartiga* decision,

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[56] For example, in the context of foreign investment, see e.g., Surya, P. Subedi. The Challenge of Reconciling The Competing Principles Within the Law of Foreign Investment With Special Reference to the Recent Trend in the Interpretation of the Term "Expropriation." *40 Int'l Law. 21* (2006) (discussing how international tribunals have interpreted the customary international law of foreign investment). In the human rights context, the Inter-American Commission on Human Rights found the execution of juveniles to be customary international law, and possible a jus cogens norm. See Michael Domingues, Case No. 12.285, Inter-Am. C.H.R. 62, at P 84-85 (2002).

[57] Sheri P. Rosenberg. The Nuremberg Trials: A Reappraisal and Their Legacy, 27 Card. L. Rev. 1549, 1550 (2006).

which interpreted the Alien Tort Statute as conferring jurisdiction on federal courts for claims based on violations of CIL.[58] The Supreme Court recently reaffirmed this in *Sosa v. Alvarez-Machain*, although the Court declined in that case to find a violation of a rule of CIL.[59] Notably, Congress has the power to overturn these judicial interpretations of the Alien Tort Statute, but has not done so. As the U.S. courts become more confident that Congress' silence represents acquiescence, they may become bolder in interpreting CIL as imposing domestic requirements.

A particularly salient example of the role of domestic courts in the development of CIL is the decision of the U.S. Supreme Court regarding the illegality of military tribunals used to try foreign detainees from the war on terror held at Guantanamo Bay. In its decision, the Court interpreted provisions of the Geneva Conventions governing the military tribunals by reference to "those trial protections that have been recognized by customary international law," and found the government's procedures failed to comply with the Geneva Conventions and the applicable rules of CIL.[60] Because the United States is engaged in widespread activities that fall under the purview of the laws of war, both customary and as codified, any action taken by the United States in response to an adverse decision by its highest court is costly, and thus sends a costly signal to other nations as to the content of the relevant legal rules.

E. Conclusion

Given the increasing use of treaties and soft law agreements in the conduct of international relations, and the fierce criticism of traditional notions of CIL, one might very well wonder if CIL has a place in international legal relations in the 21st century. Yet to dismiss CIL, either because of the prominence of the treaty in modern international relations or because of the theoretical shortcomings of traditional CIL doctrine, would be an error. States are not forced into an artificial choice between creating law through treaties or having no law at all. Instead, a variety of different legal modes are available to states when crafting their legal environment. While CIL may be the weakest type of international law from a compliance standpoint, the fact that it is capable of altering state incentives makes it an important tool for adding to the value of the international legal order.

More importantly, international law is a holistic system, in which different legal modes complement each other. To emphasize only explicit agreements at the expense of customary norms causes one to miss the effects of the significant interactions between custom and international agreements. By focusing our attention on expectations as the source of legal commitments, CIL can inform our study of international law and the myriad ways in which states craft their legal environment. Only by understanding how and why states use the different legal tools available to them can we truly understand the role of international law generally in shaping state conduct.

[58] Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980).

[59] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

[60] Hamdan v. Rumsfeld, 548 U.S. ___ (2006).