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## Separation Anxiety? Rethinking the Role of Morality in International Human Rights Lawmaking

Vijay M. Padmanabhan

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# Separation Anxiety? Rethinking the Role of Morality in International Human Rights Lawmaking

*Vijay M. Padmanabhan\**

## ABSTRACT

*The conventional accounts of international law do a poor job accounting for human rights. International legal positivists generally argue that there is a strict separation of law and morality, with no role for moral obligation in the validation of law. But human rights practice reveals many situations in which it appears that morality is validating legal obligation. Process theorists recognize an intrinsic role for the values underlying international law in understanding its commands. But they embrace a vision of law as dialogue that fails to protect the right to self-determination that is a core value of human rights.*

*This Article argues that inclusive positivism provides the best model to understand international human rights law. Unlike process theory, inclusive positivism accepts that law is a discrete object identified through application of validation criteria. This model allows states to retain control over the content of their legal obligations. Unlike conventional international legal positivism, inclusive positivism acknowledges that moral obligation plays a role in the validation of human rights law consistent with the practice of human rights actors.*

*This Article suggests hypotheses as to how the commonly accepted rules that define human rights law can be modified to account for the role moral obligation plays in human rights practice.*

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## I. INTRODUCTION

The role of the moral obligation of states, or how states ought to behave, in international law is a source of significant controversy. The dominant twentieth century positivist paradigm of international lawmaking was predominantly, exclusively positivist in nature because it saw no formal role for moral obligation in determining the

content of the law.<sup>1</sup> Exclusive positivism holds that there is a separation between law and morality (separation thesis) and that moral criteria cannot play a role in validating law.<sup>2</sup> Adherents to this view of the separation thesis defend it as necessary in international law to overcome different conceptions of justice in the heterogeneous international community.<sup>3</sup> Exclusive positivists also believe that a separation of law and morality fosters greater predictability regarding the content of law, which is critical to avoiding fragmentation in a legal regime without an organized settlement system.<sup>4</sup> While many nonpositivist international scholars have challenged the viability of the separation thesis, most international legal positivists have adhered to a strict view of the separation of law and morality.<sup>5</sup>

This Article argues that inclusive positivism provides the proper framework for understanding international human rights law. Inclusive positivists, like all positivists, are committed to the social fact thesis, which provides that the secondary rules that tell legal officials when law exists are social facts, observed through the practice of legal officials.<sup>6</sup> But unlike exclusive positivists, inclusive positivists permit moral criteria to validate law if the social practice of a legal community assigns moral criteria such a role. Inclusive positivism retains the real benefits of positivism as compared to nonpositivist theories of law, such as New Haven School process theory, while accurately describing human rights practice.<sup>7</sup>

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1. This is true for the most part. As is described in Part II.B, some aspects of the conventional positivist account of international lawmaking could be interpreted in such a manner as to allow moral obligation to play a role in the validation of international law. *See infra* text accompanying notes 33–36 (arguing that the role of peremptory norms in treaty practice and *opinio juris* in customary practice could be understood as allowing for moral obligation to play a role in lawmaking).

2. *See infra* notes 90–100 and accompanying text (describing the approach of positivists to the separation thesis). Inclusive positivists, by contrast, believe that moral obligation can validate law if legal officials in a community recognize such a role. *See infra* text accompanying note 246 (defining inclusive positivism).

3. *See infra* Part II.C (describing views of Prosper Weil and other international legal positivists).

4. *See infra* Part II.C (explaining the positivist view that it is easier to use pedigree criteria rather than moral criteria in determining the content of law).

5. *See infra* Part II.D (comparing views of process theorists and international legal positivists on this question).

6. *See infra* text accompanying note 12 (defining the social fact thesis and its role in positivist thinking).

7. *See infra* Part IV.A (arguing that positivism better protects self-determination than process theory).

This Article defends the application of the inclusive-positivist framework to international human rights law in four Parts. Part II describes the conventional positivist account of international lawmaking, including an analysis of the normative benefits normally attached to this model. It also analyzes criticisms of this approach made by nonpositivist scholars.

Part III argues that the conventional positivist account of international lawmaking does not work with respect to international human rights law. The moral nature of human rights and the normative commitments of international human rights law make the positivist account of international lawmaking unrealistic in this field. Part III then provides examples of practice in the area of *jus cogens* norms, customary law, and treaty law where it appears moral obligation is driving the understanding of law among human rights actors.

Part IV advocates for the adoption of an inclusive-positivist approach to international human rights lawmaking. Inclusive positivism protects the commitment to self-determination that is at the core of international human rights law better than process-based approaches to law. Inclusive positivism adheres to the social fact thesis better than exclusive positivism.

Part V concludes by offering hypotheses as to the precise role of moral criteria in the validation of international human rights law. Future scholarship must test these hypotheses against additional practices of law.

## II. SEPARATION THESIS IN INTERNATIONAL LAWMAKING

The prevailing conception of international lawmaking in the twentieth century was positivist in nature.<sup>8</sup> While the positivist account arguably remains the dominant understanding of international lawmaking, nonpositivist accounts that challenge the separation of law and morality also enjoy significant support. This Part undertakes four tasks. First, it describes briefly the two central theses of positivism: the social fact thesis and the separation thesis. Second, it provides the conventional positivist account of international lawmaking, highlighting how the rules of recognition exclude or include moral criteria in the validation of international law. Third, this Part provides an assessment of why the separation thesis is attractive in international law. Fourth, it describes how nonpositivists have challenged the positivist account.

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8. See Louis Henkin, *International Law: Politics, Values, and Functions*, 216 RECUEIL DES COURS 19, 46 (1989) (attributing the shift away from natural law in international law to the rise of secular Western states).

### A. Central Theses

Positivism is committed to two central theses. First, the social fact thesis provides that the truth conditions that validate law are observable social facts found in the practice of officials in a legal community.<sup>9</sup> H.L.A. Hart, who wrote a preeminent exposition of positivism, argues that a modern legal system is a union of primary and secondary rules. Primary rules govern behavior directly, requiring persons to commit or abstain from particular conduct and, in the process, imposing duties upon members of the community.<sup>10</sup> For example, the rule that a driver of a car may drive no faster than sixty-five miles per hour is a primary rule.

In a modern legal system, Hart explains, legal officials in a community know that a primary command is law because it satisfies secondary rules that these officials recognize validate law.<sup>11</sup> The most important secondary rule is the “rule of recognition,” or ultimate rule. The rule of recognition specifies the feature or features of a primary rule, which, when present, conclusively demonstrate that a primary rule is a binding rule of the community.<sup>12</sup> For example, in Tennessee, legal officials understand that the sixty-five miles per hour speed limit is law because that primary rule satisfies the rule of recognition that law is created when it passes both houses of the legislature and is signed into law by the governor. Because secondary rules emerge through the social practice of a particular community of legal officials, they can be descriptively evaluated as facts.

Second, positivists adhere to the separation thesis, which provides that law and morality are conceptually distinct.<sup>13</sup> This

9. See Kenneth Einar Himma, *Inclusive Legal Positivism*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 125, 126 (Jules Coleman & Scott Shapiro eds., 2002) (defining *social fact thesis* as belief that distinction between law and nonlaw is made by reference to socially observable fact). The social fact thesis is complemented by the “conventionality thesis,” which explains that the authoritative nature of the validity criteria comes from its acceptance by the legal officials of a community as the grounds which define law. See *id.* at 129–30 (defining *conventionality thesis*). For the purposes of this Article, the social fact thesis will be used to refer to these two concepts together—what validates law is a social fact observed in the practice of legal officials of a given community.

10. H.L.A. HART, THE CONCEPT OF LAW 81 (3d ed. 2012).

11. See *id.* at 94 (“[Secondary rules] specify the ways in which primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.”).

12. *Id.* at 94–95. Other secondary rules specify when rules may be altered or terminated (“rules of change”), as well as who is empowered to determine whether a primary rule is violated in a particular circumstance (“rules of adjudication”). *Id.* at 95–97.

13. See Andrei Marmor, *Exclusive Legal Positivism*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW, *supra* note 9, at 104 (“[A]ll law is source based, and anything which is not source based is not law . . . [T]hese are basically about the relations between law and morality.”).

position divides positivism from many natural law theories, which reject the possibility of cleaving law from morality. Because there is no necessary connection between law and morality, law may be validated by the rule of recognition alone. If law is adopted or developed in the manner specified by the rule of recognition, then it is law, irrespective of whether the substance of the law is consistent with morality. Thus, positivists would argue that the sixty-five miles per hour speed limit is law in Tennessee if it meets the validation criteria in the state constitution, even if the law violates moral commands with respect to the dangers of fast driving.

Positivists are divided, however, on whether validation criteria can have a moral component. Law is defined by exclusive positivists as a reason to act that is created by social convention.<sup>14</sup> While morality also provides reasons to act, moral reasons are not created by social convention; to the contrary, morality provides reasons for action that exist independently of social convention.<sup>15</sup> Therefore, while morality may provide reasons to act, this does not convert moral reasons into legal reasons.<sup>16</sup>

Inclusive positivists reject this interpretation of the separation thesis. Inclusive positivists believe that a link between law and morality is not necessary in every legal system.<sup>17</sup> But they argue there is nothing within positivism to prevent moral criteria from being part of a rule of recognition if the practice of community officials so demonstrates.<sup>18</sup> Not every source of law must be socially based; rather there must be social acceptance of every source of law.<sup>19</sup> The presence of moral criteria in rules of recognition is likely to produce greater disagreement about the content of law than criteria, which are social facts. However, so long as this is disagreement about application of the rule of recognition, as opposed to its content, the requirement of consensus in the social fact thesis is met.<sup>20</sup>

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14. See *id.* at 105–09 (attributing the belief that there are only conventionally recognized sources of law to the heart of positivism).

15. See *id.* at 112 (“[I]t simply makes no sense to suggest that conventions can constitute a practice which partly consists in the expectation that people do that which they have reasons to do regardless of the practice.”).

16. Joseph Raz, *Legal Principles and the Limits of Law*, in RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 84–85 (Marshall Cohen ed., 1983).

17. See Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139, 142 (1982) (arguing that it is possible for a legal system not to link law and morality).

18. See *id.* at 140–44 (claiming positivism is consistent with moral criteria validating law).

19. See HART, *supra* note 10, at 247 (“[T]he ultimate criteria of legal validity might explicitly incorporate besides pedigree, principles of justice or substantive moral values . . .”).

20. See Coleman, *supra* note 17, at 157 (emphasizing the difference between content and application disagreements regarding the rule of recognition).

### B. Positivist Account of International Lawmaking

International legal positivists have identified three rules of recognition for international law. The first rule of recognition is premised on state consent: a state is legally bound by those obligations to which it consents.<sup>21</sup> Consent is clearly a rule of recognition that is a social fact; international law is validated by the decision of a state to adhere to the rule. Treaty obligations are validated by state consent.<sup>22</sup> Once formed, treaties are modified or terminated only by the agreement of States Party.<sup>23</sup>

Even when consent is present, however, the Vienna Convention on the Law of Treaties (VCLT) provides that treaties are invalid when they conflict with peremptory norms, or *jus cogens*.<sup>24</sup> A norm is peremptory if it is “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”<sup>25</sup> A potential interpretation of this rule is that it places a moral filter on treaty law, meaning treaties that violate international morality are not valid.

However, a closer look at the VCLT suggests that this limitation is arguably consistent with an exclusive positivist understanding of the separation thesis. The restriction on treaty practice posed by

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21. See *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, ¶ 44 (Sept. 7) (“The rules of law binding upon States . . . emanate from their own free will . . . Restrictions upon the independence of States cannot therefore be presumed.”). This rule emanates from a natural law conception of states. States, like men, are free, independent, and equal entities in the state of nature, and they, therefore, enjoy autonomy in their internal affairs. See Emer de Vattel, *Preliminaries*, in *THE LAW OF NATIONS* § 4 (Joseph Chitty ed., 1863) (“[S]overeign states . . . are to be considered as so many free persons living together in the state of nature.”). Consent ensures that state autonomy is limited only when it chooses to do so, through a commitment to another state or to the international community of states. It is manifested through formal mechanisms, such as signature of the treaty or exchange of instruments of ratification. See Vienna Convention on the Law of Treaties art. 11, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT] (“The consent of a State to be bound . . . may be expressed by signature, exchange of instruments constituting a treaty . . . or by any other means if so agreed.”).

22. See VCLT, *supra* note 21, at arts. 12–15 (providing criteria by which to evaluate treaty signature, exchange of instruments of ratification, and accession).

23. See *id.* at art. 39 (limiting treaty modification to situations where the parties agree); *id.* at art. 40, ¶ 4 (providing that States Party to an amended multilateral treaty who do not accede to the amendment are not bound by the amendment); *id.* at art. 54 (permitting termination where provided for by treaty or with the consent of all parties); *id.* at art. 56 (permitting termination if no provision exists regarding termination where it was intent of parties to permit termination or the nature of the treaty implies such a right).

24. *Id.* at art. 53.

25. *Id.*



peremptory norms was adopted by parties to the VCLT through their consent, meaning state consent, rather than moral obligation, validates this restriction on treaty practice. Moreover, the VCLT identifies peremptory norms based upon their recognition by the international community of states as a whole. This definition means peremptory norms are validated as such by the consensus of the international community of states that the norms are deserving of such status,<sup>26</sup> not their moral truth.<sup>27</sup> Thus, Article 53 provides that when the international community of states agrees that a treaty cannot require some form of conduct, treaties cannot. Such a restriction on treaty practice is pedigree based.

The second rule of recognition in international law is states are legally bound to behave as states have customarily behaved.<sup>28</sup> Traditional customary law exists where there is demonstration of uniform, extensive, and widespread state practice and evidence of a sense of legal obligation (*opinio juris*).<sup>29</sup> Such a rule validates

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26. See Henkin, *supra* note 8, at 61 (describing “authentic systemic consent” as the justification for *jus cogens*). Of course, morality may be the reason a state believes a norm is peremptory.

27. See Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT’L L. 291, 300–01 (2006) (describing persuasive consensus that the VCLT creates a regime of peremptory norms created through state consent). Nevertheless, it is in the area of *jus cogens* that even positivists have been willing to concede that moral truth plays a role in determining the content of law. See *infra* Part II.C (describing acknowledgements that there is a moral component to the location of peremptory norms).

28. See HANS Kelsen, *GENERAL THEORY OF LAW AND STATE* 369 (1945) (including customary behavior within a discussion of the sources of international legal order). Kelsen argued that *pacta sunt servanda*, the principle underlying the legal effect of treaties, comes from its status as a customary norm, meaning the requirement that states behave as they have customarily behaved is the ultimate “*grundnorm*.” *Id.* at 369–70. Heinrich Triepel provided a more elegant version of this point. Triepel argued that customary law represents the common will of states and that once established, individual states were no longer free to repudiate it unilaterally. See Stephen Hall, *The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism*, 12 EUR. J. INT’L L. 269, 283 (2001) (summarizing Triepel’s conclusions in English). To cast Triepel’s insight as a rule of recognition: Individual states are legally bound to behave as required by the common will of states.

29. Voluntarists sometimes claim that customary law is also validated by state consent. States engaging in practice that leads to custom arguably consent to an international legal obligation by acting consistently with the rule out of a sense of legal obligation. See INT’L LAW ASS’N, *STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW* §§ 18, 18(a) (2000) (explaining that states whose practice initiates the formation of custom consent to be bound by the rule). Customary law, however, binds all states, including those that do not contribute practice relevant to the creation of a customary norm, either due to failure to confront the issue that is the subject of the custom or because the state did not come into being until after the norm was formed.

The doctrine of tacit consent reconciles this practice with the consent principle by presuming consent from a failure to dissent from the norm through contrary practice or persistent objection. See *id.* (explaining tacit consent theory). However, this doctrine is

international law on the basis of a social fact, whether states have behaved in a particular manner consistently over time.

While this analysis captures the state-practice prong of traditional custom, it does not adequately address the requirement of *opinio juris*, or the belief that practice is legally required. One potential contribution of *opinio juris* is to provide a moral component to customary law; the reason a state believes a pattern of practice is legally obligatory is because that pattern reflects the moral obligations of states. Such an analysis has the potential to alleviate the conceptual riddle of how a belief that something is legally obligatory develops when that belief is required for the norm to be legally obligatory. Nevertheless, the literature on *opinio juris* has not developed this point. Rather than focus on why states might feel a pattern of behavior is legally required, most writing on the topic focuses on how to prove that states believe the pattern of behavior is legally required.<sup>30</sup> Thus an ambiguity on the nature of *opinio juris* has persisted.

Today, however, international human rights and humanitarian customs are often recognized by international actors despite failing to satisfy this rule of recognition. Many putative human rights and humanitarian customs are characterized by widespread violation of the norms in question.<sup>31</sup> Torture, for example, is widely practiced within the international community. Under the traditional test, if torture is sufficiently pervasive, that fact will defeat the conclusion that custom exists because there is no widespread and uniform state practice consistent with the putative norm. Yet, the torture norm is regularly affirmed as customary.<sup>32</sup> The reason is that human rights law employs the theory of “modern custom,” which claims customary

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illusory. States may not even be aware a custom is being formed during the time they are allegedly acquiescing to its formation. See Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 537 (1993) (criticizing the practice of giving weight to state silence when “many states do not know that the law is being made and thus have not formed an opinion”). Moreover, new states have no real choice with respect to whether to accept customary norms. See, e.g., J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 513 (2000) (describing inconsistencies in customary practice).

30. See JEAN D'ASPROMONT, *FORMALISM AND THE SOURCES OF INTERNATIONAL LAW: A THEORY OF THE ASCERTAINMENT OF LEGAL RULES* 151–54 (2011) (describing efforts among international legal scholars and courts to develop formalized evidentiary standards to validate the existence of customary law). d'Aspremont argues that this effort has failed because the inherently deformed nature of custom precludes the development of meaningful formal criteria of validity. *Id.*

31. See Vijay M. Padmanabhan, *The Human Rights Justification for Consent*, 35 U. PA. J. INT'L L. 1, 14–15 (2013) (noting that even widely proclaimed human rights customs like the prohibition on torture are characterized by widespread violations).

32. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1987) (listing prohibition on torture as one of seven human rights protections that are generally accepted as customary law).

law is formed through the normative pronouncements of treaty text and resolutions of international organizations.<sup>33</sup> Such verbal practice forms law even in the face of widespread violations if the state engaging in the behavior justifies its conduct with reference to the putative rule.<sup>34</sup>

Modern custom evinces a third rule of recognition applicable in international human rights and humanitarian law: states are legally bound to behave as the international community of states systemically agrees they should behave.<sup>35</sup> Treaty text and statements from international organizations are evidence of the collective views of the international community of states.<sup>36</sup> Physical practice corroborates or refutes the conclusion created through verbal practice that custom exists. This test is pedigree based: whether the international community of states systemically agrees a norm is custom is a social fact.

This rule of recognition also validates *jus cogens*, at least as defined by the VCLT, as law.<sup>37</sup> As explained above, the VCLT makes the general acceptance by the international community of states as a whole the marker for a norm's peremptory status. This test means that individual states cannot veto the formation of a peremptory

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33. Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 758 (2001) (explaining that modern custom "relies primarily on statements rather than actions").

34. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 186 (June 27) (announcing that contrary practice would be treated as confirming the existence of custom if defended consistently with a putative rule).

35. See Charney, *supra* note 29, at 550–51 (defending modern customary law as providing a way for the international community of states to bind outlier states to resolve problems of global importance); Noura Erakat, *The US v. the Red Cross: Customary International Humanitarian Law & Universal Jurisdiction*, 41 DENV. J. INT'L L. & POL'Y 225, 238–40 (2013) (arguing it is appropriate to consider the international community of states as an "aggregate whole" in evaluating the content of customary human rights and humanitarian law); Alain Pellet, *The Normative Dilemma: Will and Consent in International Law-making*, 12 AUSTL. Y.B. INT'L L. 22, 36–37 (1992) (arguing modern customary law validates legal obligation on the basis of "general, communal acceptance" in the international community of states).

The shift in the applicable rule of recognition in modern custom compared to traditional custom has led some scholars to desire a different label for modern custom. See, e.g., Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT'L L. 82, 102 (1988–89) (preferring modern customs be characterized as "general principles of law").

36. See Charney, *supra* note 29, at 545–47 (arguing that international resolutions and treaty text provide greater clarity about international consensus on the content of law than do traditional methods of locating customary law); Roberts, *supra* note 33, at 768 (contending that since most states can participate in the negotiation of treaty text and UN resolutions these provide a "more democratic" basis for locating custom).

37. As is discussed in Part III, the concept of *jus cogens* is defined more broadly and used for a wider array of purposes than captured by the VCLT. See *infra* Part III.

norm and are bound even when persistently objecting to the norm in question.<sup>38</sup> The test is based in social fact: the systemic agreement of the international community of states validates a norm's elevated status.<sup>39</sup>

While systemic agreement is a social fact, it is unclear on its face whether consensus by states that an immoral norm is custom or *jus cogens* would be sufficient to produce law. With *jus cogens* there are historical reasons to believe morality may be relevant to the validation of a norm as peremptory. Alfred von Verdross, providing the first extended treatment of the concept, argued that *jus cogens* are general principles of morality "common to the juridical orders of all civilized states."<sup>40</sup> He explained that any treaty that prevented states from achieving tasks demanded by morality, such as maintaining law and order or providing for the welfare of citizens at home or abroad, would be invalid.<sup>41</sup> This apparent link between *jus cogens* and morality led positivists to object to the inclusion of the concept in the VCLT.<sup>42</sup> Positivists ultimately acquiesced to the inclusion of *jus cogens* in the VCLT because a conventional test for the norms was employed.<sup>43</sup> However, this compromise did not erase the conceptual link between morality and *jus cogens*.

At least three scholars have suggested that there is a moral component inherent within the notion of modern custom. It is unlikely these scholars would identify themselves as positivists, given their extensive use of Ronald Dworkin, a law-as-integrity legal philosopher, to support their views. But their approaches to

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38. See Padmanabhan, *supra* note 31, at 17 (describing the effects of *jus cogens* norms on consent).

39. Although, as will be discussed in Part III, in practice *jus cogens* norms are identified as such through means quite different from systemic agreement by the international community of States. See *infra* Part III.

40. Alfred von Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT'L L. 571, 572 (1937).

41. *Id.* at 575 ("It is immoral to keep a state as a sovereign community and to forbid it at the same time to defend its existence.").

42. See Markus Petsche, *Jus Cogens as a Vision of International Legal Order*, 29 PENN. ST. INT'L L. REV. 233, 245 (2010) ("[P]ositivists objected to the very concept of *jus cogens*, rejecting the inappropriateness of merging law with morality and criticizing the vagueness of natural law concepts."). In particular, they opposed an early report of the International Law Commission, which recommended that the VCLT include a provision voiding treaties because they violate "fundamental principles of international law." Shelton, *supra* note 27, at 299 & n.52. This proposal was dropped due to opposition of member states. *Id.*

43. See Petsche, *supra* note 42, at 240 ("[I]n order for a rule to qualify as a peremptory norm of international law, its non-derogable character and aptitude to be modified only by a subsequent *jus cogens* norm be 'accepted and recognized by the international community of States as a whole.'").

customary law are amenable to positivist analysis if their theories of customary law are borne out in the practice of human rights actors.<sup>44</sup>

Frederick Kirgis argues that modern custom is formed on a “sliding scale” between state practice and *opinio juris*.<sup>45</sup> In some instances custom may be formed with little or no state practice and much *opinio juris*; in other instances, the opposite may be true.<sup>46</sup> What determines the evidentiary burden for custom is a substantive determination regarding the extent to which the existence of a custom advances the goals of the international legal system.<sup>47</sup> The more normatively compelling the custom, Kirgis argues, the less state practice and *opinio juris* demanded to demonstrate custom.<sup>48</sup>

John Tasoulas uses Dworkin’s account of law as an interpretative concept to build upon Kirgis’s work. Tasoulas argues that determining the content of customary law requires evaluating which norms “fit” the raw data of state practice and *opinio juris*.<sup>49</sup> Fit is responsive to the values of the international legal system because a putative rule’s ability to advance those values is a relevant dimension.<sup>50</sup> When more than one putative norm fits the data set, the norm that is chosen as the applicable legal norm is the one that best advances the goals of the international legal system.<sup>51</sup>

Anthea Roberts modifies the approaches of Kirgis and Tasoulas by cabining the role that substance can play in the identification of custom. She argues that when locating custom one must first examine practice alone to answer the question of whether there is one putative custom, more than one putative custom, or not a putative custom.<sup>52</sup> When more than one putative custom emerges from state

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44. See, e.g., John Tasioulas, *Customary International Law and the Quest for Global Justice*, in *THE NATURE OF CUSTOMARY LAW* 307, 329–30 (Amanda Perreau-Saussine & James Bernard Murphy eds., 2007) (arguing his use of Dworkin did not preclude his understanding of customary law from being adopted by positivists). What Tasoulas meant more precisely is that there is nothing that prevents an inclusive positivist from adopting his views on customary law.

45. Frederic L. Kirgis, Jr., *Custom on a Sliding Scale*, 81 AM. J. INT’L L. 146, 149 (1987).

46. *Id.*

47. See *id.* (demonstrating that the more “destabilizing or morally distasteful” the activity that the proposed customary norm seeks to prevent is, and the more reasonable the norm is, the lower the evidentiary burden).

48. *Id.*

49. Tasioulas, *supra* note 44, at 325 (“[A] viable interpretation of [customary law] must be adequately supported by the raw data picked out by general practice and *opinio juris*.”).

50. See *id.* at 326 (explaining that substantive desirability of a custom can excuse deficiencies with respect to State practice when determining “fit”).

51. See *id.* at 325–26 (defining *substance*).

52. Roberts, *supra* note 33, at 775–76 (explaining that the need for custom to be at least minimally descriptively accurate to avoid being too utopian requires this distinction). Roberts goes on to argue that multiple interpretations are likely to arise in

practice, then considerations of substance, meaning the moral merit of the custom, are relevant in determining which rule best fits the practice provided.<sup>53</sup>

Although this approach is reconcilable with an inclusive-positivist approach to the separation thesis, it has not been adopted by all positivists. Jason Beckett argues that in the absence of a court to decide the meaning of customary law, use of the Tasoulias approach will result in “radical indeterminacy.”<sup>54</sup> He explains that because fit is itself influenced by moral values, an interpreter could arrive at any conclusion about the content of customary law. This is especially true because there is no objective test as to the content of international community morality.<sup>55</sup> The result is such severe uncertainty about the law’s content that it effectively lacks substance.<sup>56</sup> Thus, the existence of a moral component even to modern custom is disputed by some positivists.<sup>57</sup>

### C. Normative Defense of Exclusion of Moral Criteria from International Lawmaking

The positivist account of international lawmaking as described is generally reluctant to embrace a role for moral criteria in the validation of law, although there is arguably a moral component to traditional and modern customary law and *jus cogens*. There are two normative reasons for this reluctance. This Part describes those reasons, as well why one might be dubious that those goals are achieved in practice by the conventional positivist account of international lawmaking.

First, the heterogeneity of the international community counsels against a role for moral criteria in validation of international law. The international community of states possesses within it a great diversity of religious, cultural, and ideological systems that often

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areas like human rights depending upon the definition of practice and the threshold of evidence needed to establish a valid interpretation. *Id.* at 776–77.

53. *Id.* at 778–79.

54. Jason A. Beckett, *Behind Relative Normativity: Rules and Process as Prerequisites of Law*, 12 EUR. J. INT’L L. 627, 637 (2001).

55. *See id.* at 637 (describing the relationship between the indeterminacy of world order values and the indeterminacy of the content of customary law under Tasoulias’s approach).

56. *See id.* at 635 (“[V]alue-centricism, and thus the diffusion of the right to embody values in the law, effectively denies the law content.”).

57. Anthea Roberts approach to modern custom arguably addresses Beckett’s criticisms. Roberts allows practices alone to define the universe of permissible customs, eliminating a source of “radical indeterminacy.” Moreover, she argues that the values which guide choosing between interpretations come from international resolutions and treaty text, reducing the risk of “value-centrism.” Roberts, *supra* note 33, at 763.

disagree on questions of morality and justice.<sup>58</sup> Because international law is designed to mediate between peoples of the world with different views on moral questions, it must maintain neutrality between competing moral systems.<sup>59</sup> Avoiding moral criteria in the validation of law prevents disagreement on substantive moral questions from dividing the community of states on the content of international law. It also evinces a commitment to pluralism that is itself a core value of international law.<sup>60</sup>

It is far from clear, however, that the use of social facts to validate law produces a corpus of law that is ideologically and culturally neutral. The traditional test for customary law uses at least one test of social fact to determine whether a legal obligation exists: have states customarily behaved that way. But the practice of a small number of Western and developed states, rather than the practice of the international community of states as a whole, is generally used to locate traditional customary law.<sup>61</sup> The result is that the way in which the test is applied privileges Western liberal and capitalist political thought.<sup>62</sup> Modern custom and peremptory norms similarly use the social fact of systemic agreement to validate law. But the nature of that social fact permits systemic agreement to override the will of individual states. If only the agreement of powerful states is needed to demonstrate systemic agreement, as some have worried, then the resulting body of law privileges the interests of the powerful over the weak.<sup>63</sup>

Second, the separation of law and morality is praised for fostering greater certainty about the content of law than moral criteria. Positivists are careful to acknowledge that any rule of

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58. See MICHAEL IGNATIEFF, *WHOSE UNIVERSAL VALUES?: THE CRISIS IN HUMAN RIGHTS* 44 (1999) (reciting anecdotes of metaphysical disagreements about rights attendant to the negotiation of the Universal Declaration of Human Rights).

59. See Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 440 (1983) (describing neutrality as the *conditio sine qua non* of international law).

60. See Gunnar Beck, *Legitimation Crisis, Reifying Human Rights and the Norm-Creating Power of the Factual: Reply to "Reifying Law: Let Them Be Lions"*, 26 PENN. ST. INT'L L. REV. 565, 572 (2008) (arguing that modern human rights theory is partially rooted in Isaiah Berlin's conception of value pluralism).

61. See Roberts, *supra* note 33, at 767 (describing shortcomings of traditional practice); Charney, *supra* note 29, at 537 (same).

62. See Roberts, *supra* note 33, at 768 ("Instead of being apolitical, traditional custom is arguably hegemonic, ideologically biased, and a legitimating force for the political and economic status quo.")

63. Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1190 (2007) ("[T]he presumed universal may also be the hegemonic."); Roberts, *supra* note 33, at 769 (noting the potential for "normative chauvinism" in modern custom); Weil, *supra* note 59, at 441 (describing the nonconsensual formation of customary norms as transferring lawmaking authority to a "de facto oligarchy" of the international community).

recognition will leave indeterminacy with respect to the content of the law as applied to hard or novel cases.<sup>64</sup> Indeed, many positivists reject the fact that certainty in identification of law is even a goal of positivism *per se*.<sup>65</sup> Nevertheless, pedigreed criteria provide an easier route to determining the content of law than do moral criteria.<sup>66</sup> Using the speed limit example provided earlier in this Part, it is easier to determine whether the speed limit rule passed the Tennessee legislature and was signed by its governor than it is to determine its moral probity given the dangers of fast driving.

The value of clarity is at its zenith in international law because of two features specific to this body law. First, there is no court in international law with the power to issue binding pronouncements on the content of international law writ large.<sup>67</sup> Using Hart's terminology, there is no general rule of settlement for international law.<sup>68</sup> As a consequence, to the extent that application of the rule of recognition produces uncertainty about the content of law, there is no mechanism by which to resolve that uncertainty. The result is the risk of "radical indeterminacy," which might in effect deprive international law of meaning.<sup>69</sup>

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64. See HART, *supra* note 10, at 128 (describing the limits on certainty created by the "open texture" of law and language).

65. See Marmor, *supra* note 13, at 107 (rejecting the idea that positivism adopts conventionalism because of a desire to render "certain or unequivocal, aspects of our life which would otherwise remain uncertain and fuzzy").

66. See Benedict Kingsbury, *Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law*, 13 EUR. J. INT'L L. 401, 415–16 (2002) (arguing that the continued influence of positivism in international law is due in significant part to its "coherence and manageability").

67. There are courts empowered to issue binding pronouncement regarding the meaning of specific instruments in international law. The European Court of Human Rights, for example, is empowered to issue binding pronouncements regarding the content of the European Convention on Human Rights. See Convention for the Protection of Human Rights and Fundamental Freedoms art. 32(1), *opened for signature* Nov. 4, 1950, 1950 C.E.T.S. 5, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) [hereinafter ECHR] (describing the jurisdiction of these courts as "compulsory" in "all matters concerning the interpretation and application of the present Convention"). In general, however, international actors are free to interpret international law for themselves.

68. See HART, *supra* note 10, at 93, 96–97 (describing rules of adjudication as reducing the inefficiencies created by a system in which legal disputes persist due to the lack of an institution with authority to settle disputes).

69. See Beckett, *supra* note 54, at 635 ("Stability, the independence of the law, can only be protected by the law itself. This is what necessitates a *process* to determine which values may enter the system, *and* necessitates that this process is not open to change based on substantive preference."). Beckett argues that courts are essential to theories of law that allow for morality to validate law because the court can resolve what morality requires. See *id.* (explaining that theorists like Dworkin depend upon the existence of courts empowered to issue binding opinions of law to avoid radical indeterminacy).



Second, there is frequently no coercive enforcement authority in international law, which results in a dependence on voluntary compliance.<sup>70</sup> Thomas Franck writes that, in international law, a rule's determinacy plays an important role in exercising compliance pull with audiences because clarity about the law's requirements is essential for actors to conform their behavior to those requirements and for the exertion of meaningful pressure on them to do so.<sup>71</sup> Uncertainty allows states to justify any sort of state conduct as consistent with the law, in essence depriving it of practical meaning.<sup>72</sup>

Nevertheless, there are good reasons to be dubious that there is clarity regarding even the application of social facts. As noted, whether states have or have not behaved in a particular manner is a social fact. But difficulties in collection of evidence and in defining the threshold of practice at which customary behavior is defined have created deep uncertainties with respect to how this test is applied in practice. Similarly, systemic agreement of the international community of states is a social fact, potentially measured by verbal and physical practice. But determining whether there is agreement when practice is mixed or spotty can create a great deal of confusion. Thus, while exclusive positivists identify potential benefits to validation criteria as social facts, these benefits may in many instances be illusory.

#### *D. Alternative Approaches to Moral Criteria Validating Law*

Nonpositivists challenge the positivist account of international lawmaking, in part for its failure to embrace adequately the role morality plays in guiding legal decisions.

The most prominent nonpositivists in international law are so-called New Haven School process theorists. Process theorists understand law not as a system of rules and standards as positivists do, but rather as a decision-making process designed to advance

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70. This holds particularly true in the area of international human rights law. See LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 235 (2d ed. 1979) ("The forces that induce compliance with other law . . . do not pertain equally to the law of human rights."). This point will be discussed much further in Part III.

71. See THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 52 (1990) (explaining that "rules which are perceived to have a high degree of determinacy . . . would seem to have a better chance of actually regulating conduct in the real world than those which are less determinate" in part because those governed by the rule "will know more precisely what is expected of them").

72. See JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 19 (2005) (noting that vague and indeterminate law imposes so few obligations on states that it "dissuades governments from treating international law as a meaningful source of real obligations at all").

moral ideals and goals.<sup>73</sup> This view argues that international law is the process of creating an “expectation of appropriateness” for states to conduct themselves in a manner that advances the ideals of the international community.<sup>74</sup> Thus, the “humanitarian, moral and social” goals of law guide the choice between competing, plausible accounts of what the law requires.<sup>75</sup> Thus, efforts to separate law and morality fail to appreciate their inevitable connection.<sup>76</sup>

The values that guide international legal decision making are both substantive and procedural. Substantively, scholars argue that the goals of international law include the protection of human rights, the peaceful co-existence and cooperation of the international community of states, the protection of the environment, and the promotion of free trade.<sup>77</sup> Decisions about the meaning of international law are made with reference to advancing these sorts of goals.

Procedurally, Benedict Kingsbury argues that law benefits from “publicness,” which exists when law is “wrought by the whole society” and “addresses matters of concern to the society as such.”<sup>78</sup> Such a procedural goal seeks broad political participation in the lawmaking process to advance the substantive goal of the self-determination of peoples.<sup>79</sup> Similarly, Jutta Brunnee and Stephen Toope have argued that international law is law when it satisfies Lon Fuller’s eight criteria of “legality,” which are procedural requirements Fuller

73. See Brian H. Bix, *Natural Law: The Modern Tradition*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW, *supra* note 9, at 61, 77–78 (describing Lon Fuller’s view that “law is not merely an object or entity, to be studied dispassionately under a microscope . . . [but rather] a human project, with an implied goal”).

74. Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253, 256 (1966).

75. See ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 3, 5 (1994) (arguing international law is about making choices between “claims that have varying degrees of legal merit” guided by the goals of international legal systems).

76. See Rosalyn Higgins, *Integrations of Authority and Control: Trends in the Literature of International Law and Relations*, in TOWARD WORLD ORDER AND HUMAN DIGNITY 79, 85 (W. Michael Reisman & Burns H. Weston eds., 1976) (“A refusal to acknowledge political and social factors cannot keep law ‘neutral,’ for even such a refusal is not without political and social consequence.”).

77. See, e.g., ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION 77–78 (2004) (arguing the moral goal of international law is “justice,” which is advanced through securing respect for human rights); Tasioulas, *supra* note 44, at 329 (listing potential values of international law such as “human rights, peaceful co-existence, environmental protection, etc.”).

78. See Benedict Kingsbury, *The Concept of ‘Law’ in Global Administrative Law*, 20 EUR. J. INT’L L. 23, 31 (2009) (describing the substantive value of “publicness” in lawmaking).

79. See Tasioulas, *supra* note 44, at 329 (arguing that international law should advance its goals in a manner that encourages political participation in order to respect self-determination).

believed are moral in nature. Compliance with these procedural virtues creates a moral obligation to follow the law.<sup>80</sup> Thus, process theorists argue that international law as a decision-making process is most effective when these procedural values are followed.

Of course, claims about the values of the international community are controversial except at the highest levels of generality. Some international legal positivists fear that the introduction of values into law fails to respect the pluralism of the international community.<sup>81</sup> There is no clear method by which to derive the values of the international community, and as a consequence, it may be that the values of the hegemon—today the liberal West—are simply identified as the values of the international community.<sup>82</sup> If so, international law becomes a tool to advance the moral and policy objectives of the powerful, instead of serving as an arbiter between communities with cultural differences.<sup>83</sup>

Positivists are also critical of using moral values to determine the content of law because such an approach promotes uncertainty, undermining the efficacy of international law. Process theorists are frank about the uncertainty their approach creates to law ascertainment;<sup>84</sup> indeed, law as a process suggests an ever evolving answer to the question of what the law requires.<sup>85</sup> Such uncertainty, positivists fear, may delegitimize international law in the eyes of states as nothing more than aspiration.<sup>86</sup> This risk is magnified

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80. See JUTTA BRUNNEE & STEPHEN TOOPE, *LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT* 27 (2010) (applying Fuller's criteria of legality to international lawmaking).

81. See Weil, *supra* note 59, at 421–23 (explaining that the idea of a unified “international community” . . . impart[s] the frustration of a Third World that has long felt itself powerless and aspires to place its new majority position within international organizations at the service of what it sees as a fight for justice”).

82. See HATHAWAY, *supra* note 72, at 20 (“[T]he policy-oriented perspective on international law facilitates an equation of international law with whatever norms are of value to dominant states.”).

83. For example, James Hathaway, an outspoken critic of the New Haven School's process approach to international law, argues that it is designed to free the United States to claim acts like unilateral intervention are lawful when those acts suit its policy objectives. See James C. Hathaway, *America, Defender of Domestic Legitimacy?*, 11 *EUR. J. INT'L L.* 121, 126–28 (2000) (critiquing Michael Reisman's process-based argument in favor of unilateral humanitarian intervention).

84. See HIGGINS, *supra* note 75, at 8 (admitting that process theory requires “harder work” to identify and apply law because it rejects a mechanistic approach to understanding law).

85. See D'ASPROMONT, *supra* note 30, at 2 (attributing loss of interest in determining the content of law partly to the rise of the view of law as a spectrum of normativity).

86. See HATHAWAY, *supra* note 72, at 17 (“This entanglement of admittedly worthy moral claims with matters of strict legal duty is not only intellectually and legally dubious, but risks stigmatizing all human rights law as no more than a matter of aspiration.”).

because without clarity regarding the content of law, holding states responsible for violations of international law becomes much more difficult.<sup>87</sup>

Given these criticisms, it is not surprising that few positivists have embraced a central role for morality in their description of the validation of law. The work of Harlan Cohen constitutes a potential exception.<sup>88</sup> He has in two instances argued that moral obligation validates norms as law. First, Cohen claims that international law includes what he terms “Internalized Norms,” which are human rights norms that constitute “core international morality.”<sup>89</sup> Such norms are validated as law based upon the truthfulness of the moral propositions they embody. Presumably moral truth validates Internalized Norms as law because international legal officials agree it is so, given Cohen’s self-proclaimed adherence to the social fact thesis.

Second, Cohen has raised in passing that fealty to “human dignity,” as it is understood in the human rights community, validates a norm as law.<sup>90</sup> In a footnote, he explains that human dignity has replaced “state sovereignty’ as the touchstone against which . . . human rights law” is evaluated.<sup>91</sup> This fact, he says, suggests an emerging rule that human rights law exists to the extent the norm in question upholds human dignity. Such an approach to human rights lawmaking would expressly tie the content of human

87. See Hathaway, *supra* note 83, at 128 (arguing process theory “depletes international law of the certainty required for meaningful accountability”); see also *supra* notes 90–92 and accompanying text (detailing benefits that accrue to international law from certainty regarding its content).

88. Cohen self-describes his work as “somewhat Hartian” because he hews to the social fact thesis. Harlan Cohen, *Finding International Law: Rethinking the Doctrine of Sources*, 93 IOWA L. REV. 65, 110 n.225 (2007). However, he argues that treaty and customary law are either “legitimated” or “aspirational” to varying degrees based upon the extent to which they meet process values, which are procedural norms that confer legitimacy to law. *Id.* at 112–14. This approach is nonpositivist in that it views law as a spectrum from legitimate to aspirational based upon their adherence to values. Positivists, by contrast, view the distinction between law and nonlaw as binary.

89. *Id.* at 111.

90. See Harlan Cohen, *Finding International Law, Part II: Our Fragmenting Legal Community*, 44 N.Y.U. J. INT’L L. & POL. 1049, 1077 n.93 (2012) (explaining that “potential human rights rules are increasingly judged legitimate or not based on how well they uphold human dignity”). Cohen is the rare scholar who has taken on the question of validation of human rights law, separate from international law. He argues that states are legally bound by their solemn promises in the area of human rights law. See *id.* at 1077 (positing that “[t]he exact form of a state promise is less important than its solemnity and seriousness”). Cohen appears to believe a promise’s solemnity is marked by its form. *Id.* For example, he claims that the reason international resolutions or treaties are viewed as creating “instant’ custom” by some is due to the solemnity of a promise made in such a form. *Id.* Such an approach suggests that it is form, not moral obligation, that determines whether a legal obligation exists, although it is certainly possible the content of a promise would be a factor in its solemnity.

91. *Id.* at 1077 n.93.

rights law to its substance because human rights actors agree that substance is relevant.

Thus, nonpositivists have identified a central role for morality in international law. However, the work of Cohen aside, positivists have been reluctant to do the same.

### III. FAILURES OF THE SEPARATION THESIS IN INTERNATIONAL HUMAN RIGHTS LAWMAKING

This Part argues that any account of international human rights lawmaking as a subset of international law requires accounting for the role morality plays in validating law. The central commitments of human rights make a legal model positing the separation of law and morality untenable.

This Part then describes notable instances in practice when something other than consent or the systemic agreement of the international community of states validates the conclusion that human rights law exists. The failure of the conventional account to explain this practice is likely due to adherence to the exclusive positivist understanding of the separation thesis.

#### A. *Missing Morality*

This subpart argues that as a matter of theory it is difficult to conceive of human rights law in a manner that does not include a role for moral criteria in the validation of law. Positivists, including Hart, are clear that there are limits to the extent to which positive law can provide guidance to all questions that arise. The nature of human rights makes morality a natural touchstone by which to resolve ambiguities in the law.

Negotiated human rights treaties often capture rights as concepts, which are vague or general ideals of protection. Concepts are purposely vague both to cover factual circumstances not envisioned by those drafting the treaty, as well as to leave room for changing understandings over time. However, concepts by definition leave significant uncertainty regarding their application to specific facts, or the appropriate conception of the concept.<sup>92</sup> When determining which conception of a right should apply, those engaging in treaty interpretation must look beyond State consent because the traditional indicia of consent produces no answer.

A different uncertainty arises in the context of customary law and *jus cogens*. Both of these bodies of law are derived inductively

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92. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 134–36 (1977) (describing the differences between concepts and conceptions of law).

from inchoate raw data, as interpreters sift through categories of state practice, physical and verbal, to search for the consensus of the international community of states. Yet, it is often the case that multiple reasonable interpretations will emerge from the data. When that is the case, those interpreting the data must somehow decide which interpretation constitutes the law.

In both cases, morality is an appealing reference point to resolve uncertainty in the law.<sup>93</sup> Human rights law differs from some other areas of international law in that its subject matter is inherently moral.<sup>94</sup> As a consequence, many seeking to establish the content of human rights law will begin with the premise that there is a right answer to the question. This right answer guides the resolution of uncertainty.<sup>95</sup>

Compare human rights law to the UN Convention on the Law of the Sea (UNCLOS),<sup>96</sup> which sets international legal standards defining the legal obligations of states at sea. UNCLOS grants a state an exclusive economic zone up to two hundred nautical miles from its territorial sea baseline in which it enjoys exclusive rights over natural resources like fish, minerals, and oil.<sup>97</sup> While an individual state may disagree with where this boundary is drawn, there is no moral reference point by which to determine whether and where such a zone exists. Exclusive economic zones have no existence separate and apart from that conferred by positive law. By contrast, human rights questions frequently invoke in an interpreter the sense that they have a right answer. For example, there is a strong sense of *ought* attached to the question of whether a state can ever transfer an individual to another state when there is risk the individual will be tortured. Similarly, many international actors believe there is a *should* as to whether customary law prohibits torture or mandates the prosecution of individuals who commit atrocity crimes. These *oughts* and *shoulds* provide a moral reference point by which to ascertain the content of law not present in the UNCLOS example.

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93. Of course morality is not the only relevant reference point. Politics, for example, may also provide an additional reference point by which to judge the content of law. Morality nevertheless plays a unique role in the area of human rights due to the subject matter of rights.

94. While this is not true of all areas of international law, it is true of some other areas besides human rights. International humanitarian law, international criminal law, and international environmental law all appear to share this phenomenon.

95. Cf. RONALD DWORKIN, *THE MODEL OF RULES 41* (explaining that some legal principles judges use to decide cases come from "a sense of appropriateness developed in the profession and public over time" as opposed to "a particular decision of legislature or court").

96. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

97. *Id.* at Part VI, arts. 56(1)(a), 57.

As a consequence, separation of law and morality appears unlikely in human rights law. Pedigree tests will produce uncertainty regarding the content of law, and, given the moral subject matter of human rights, the interpreter's sense of the moral obligations of states is a powerful touchstone for determining what the law requires. Fully separating moral obligation from law in the regulation of essentially moral subjects is difficult to achieve.<sup>98</sup>

A role for moral obligation in the validation of human rights law is also critical to achievement of universal human rights. It is a bedrock principle of human rights law that all humans enjoy rights by virtue of being human.<sup>99</sup> Such an outcome is difficult to achieve using the positivist framework for international lawmaking described in Part II. The conventional rules of recognition make states—whether individually or as a community—the sole reference point for determining whether rights exist. Such a lawmaking mechanism is in tension with universality in at least two ways.<sup>100</sup>

First, states are likely to disagree with one other about the content of human rights. The conventional positivist account of international law allows dissenting states to opt out of legal obligations; this is possible both individually, as with treaty obligations or persistent objection to customary norms, and in groups, such as when states create sufficient physical or verbal practice to defeat the conclusion that a customary or peremptory norm exists. Total state control over human rights will result in geographic differences regarding the content of rights that are difficult to reconcile with the promise of universal rights.<sup>101</sup>

Second, as a conceptual matter it is difficult to understand why, if humans enjoy rights by virtue of being human, state consent is required to enshrine such rights in the law. States are regulated by human rights law and therefore will have an incentive to define the corpus of rights narrowly to maintain power. Historians have argued

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98. An exclusive positivist might not contest that morality plays this role, but argue that resort to moral reasons is by definition extra-legal. Such an argument overlooks the fact that actors believe that human rights law requires what demands. Such practice is dispositive of what the law requires for positivists because of the social fact thesis. See Part IV.B *infra*.

99. See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 2, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").

100. These problems exist despite the fact that states are responsible for implementation and facilitation of human rights. See Hall, *supra* note 28, at 302 (explaining that "[s]tate sovereigns can facilitate the exercise of our natural rights, but cannot grant them" and "are physically capable of hindering or preventing the enjoyment of our natural rights, but cannot withhold them").

101. See Padmanabhan, *supra* note 31, at 11 (describing the tension between the premise of universal human rights and state control over the content of those rights).

that the universal human rights movement emerged out of skepticism of the claim that states can be counted upon to protect the rights of their people.<sup>102</sup>

This mismatch between the tools for making international law and the aspirations of human rights results in a “legitimation crisis” or “spiritual crisis” for human rights.<sup>103</sup> The crisis arises only if human rights lawmaking is dependent solely upon state action to create law.<sup>104</sup> A role for morality in validating human rights law obviates this crisis because a human rights corpus at least partially grounded in moral obligation provides a coherent account of universal human rights. Moral obligations are not subject to state action; rather, they provide independent justifications for action that cannot be altered by states. If moral obligations validate human rights obligations as law, then obligations are universal when the underlying moral obligations are universal.

Thus, adherence to the exclusive positivist understanding of the separation thesis in human rights law is incoherent. The remainder of this Part describes the ways in which the conventional account of international lawmaking fails to accurately describe human rights practice.

## B. *Jus Cogens*

The rule of recognition for *jus cogens* described in Part II cannot fully account for human rights practice. The VCLT establishes a rule of recognition based on pedigree for peremptory norms: norms obtain superior status in the hierarchy of international legal norms through the consensus of the international community of states. However, this narrative provides an implausible explanation of significant aspects of *jus cogens* practice.<sup>105</sup>

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102. See SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* 118–19 (2010) (arguing that human rights law emerged into its current form in the 1970s due to disillusionment with previous utopian theories including self-determination).

103. See Beck, *supra* note 60, at 572 (intimating “a ‘legitimation crisis’ for human rights” that results from both believing in universal rights and rejecting a natural law foundation for such rights); see also IGNATIEFF, *supra* note 58, at 44 (describing the spiritual crisis that exists in international human rights law from failing to establish the metaphysical roots of rights).

104. See Hall, *supra* note 28, at 301–02 (dismissing the possibility that human rights may have a purely positive origin); Paul W. Kahn, *Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order*, 1 *CHI. J. INT’L L.* 1, 11 (2000) (arguing that an implied premise of individuals as the subject of international human rights is that state consent is not their foundation); see also Padmanabhan, *supra* note 31, at 11–12 (arguing that consent regime protects states’ rights, not individual rights).

105. It is also inconsistent with the history of *jus cogens* as a concept. See *supra* notes 45–50 and accompanying text (detailing the historical link between *jus cogens* and morality).



A small number of international actors openly reject the idea that *jus cogens* are solely creatures of systemic state consent. For example, Mexico, the Inter-American Commission on Human Rights (IACHR), and the Inter-American Court of Human Rights (IACtHR) all claim that morality could validate as peremptory the obligation not to discriminate against migrants in domestic labor laws. Mexico argued that the United States violated peremptory norms of international law by discriminating against aliens in its domestic labor law.<sup>106</sup> Mexico claimed the prohibition on discrimination against aliens is peremptory because of “universal morality.”<sup>107</sup>

The Commission was still clearer on this point. It specifically found that the prohibition on discrimination writ large was *jus cogens* even though consensus on this point in the international community of states was limited to discrimination on the basis of race.<sup>108</sup> The Commission based its broader finding on the “fundamental importance” of the values underlying nondiscrimination to international law. For the Commission, as for Mexico, the strong *ought*—states *ought* not discriminate against illegal migrants—justified elevating the prohibition to *jus cogens*.

The IACtHR picked up on Mexico and the Commission’s theory in deciding that the prohibition on discrimination was in fact *jus cogens*. The IACtHR concluded that discrimination on the basis of “gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status” constitutes a *jus cogens* prohibition.<sup>109</sup> The IACtHR did not justify this wide-ranging conclusion on the basis of the consensus of the international community of states; it could not, given that most states have laws that discriminate on at least some of the bases listed. Rather, it relied on its sense that the principle is today a “fundamental” principle of law.<sup>110</sup> Put another way, the IACtHR believed that states ought not discriminate, and that fact validated the norm as peremptory despite evident disagreement in the international community of states on the question.

Many more international actors, while not openly rejecting the conventional account of *jus cogens*, find norms to be peremptory without a plausible account of consensus in the international community of states to support such exalted status. Such a move is difficult to reconcile with the conventional rule of recognition. The

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106. Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 47 (Sept. 17, 2003).

107. *Id.*

108. *See id.* (explaining consensus was limited to the prohibition on racial discrimination being peremptory).

109. *Id.* ¶ 101.

110. *Id.*

International Court of Justice (ICJ) in *Armed Activities on the Territory of the Congo* held that the prohibition on genocide is peremptory without any attempt to prove consensus in the international community of states.<sup>111</sup> Examples of this sort might reflect the laborious nature of proving consensus. When a norm is widely described as peremptory, it may be reasonable to take a short cut and avoid collecting evidence needed to support the claim.

But other international actors have declared norms to be *jus cogens* without the benefit of popular acclamation. The Court of First Instance of the European Union held that the right not to be arbitrarily deprived of property<sup>112</sup> and the right to access judicial remedies<sup>113</sup> were *jus cogens* without providing any evidence that they were accepted as such by the international community of states.<sup>114</sup>

A significant number of scholars declare *jus cogens* without establishing consensus in the international community of states. As Dinah Shelton explains, “[T]he literature has abounded in claims that additional international norms constitute *jus cogens*,” with “little evidence” presented to demonstrate it is so.<sup>115</sup> Some notable human rights scholars contend that all human rights are *jus cogens*, an implausible claim if it depends upon consensus in the international community of states to be true.<sup>116</sup> States have taken a large number of reservations and derogations to human rights norms, which is

111. *Armed Activities in the Territory of the Congo* (Dem. Rep. Congo v. Rwanda), 2006 I.C.J. 4, ¶ 64 (Feb. 3); see also Shelton, *supra* note 27, at 306 (noting the failure of the court to provide any evidence to support its claim).

112. See Case T-315/01, *Kadi v. Council & Comm’n*, 2005 E.C.R. II-3649, ¶ 242, available at <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=59906&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=378990> [<http://perma.cc/WA7-T9GA>] (archived Mar. 14, 2014) (“[I]n so far as respect for the right to property must be regarded as forming part of the mandatory rules of general international law, it is only an arbitrary deprivation of that right that might, in any case, be regarded as contrary to *jus cogens*.”).

113. See *id.* ¶ 288 (“[T]he Court considers that the limitation of the applicant’s right of access to a court[ ] . . . is inherent in that right as it is guaranteed by *jus cogens*.”).

114. The Court of First Instance decision on these points was not reviewed by the Court of Justice for the European Union because its decision was reversed on other grounds by the Court. See generally Case C-402/05 P, *Kadi v. Council & Comm’n*, 2008 E.C.R. I-6351, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005CJ0402:EN:HTML> [<http://perma.cc/VV4Z-VL5H>] (archived Feb. 20, 2014).

115. Shelton, *supra* note 27, at 303.

116. See Louis Henkin, *Human Rights and State “Sovereignty”*, 25 GA. J. INT’L & COMP. L. 31, 38–39 (1995–96) (arguing all of human rights law is *jus cogens* to which persistent objection does not apply); Bruno Simma, *International Human Rights and General International Law: A Comparative Analysis*, in IV COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 153, 229–30 (1995) (asserting persistent objection is inconsistent with the structure of human rights).

strong evidence that states do not in fact view all human rights norms to be *jus cogens*.

Other scholars have argued that a wide range of particular human rights norms are *jus cogens*, including the duty to assassinate political leaders in certain circumstances;<sup>117</sup> the duty to prosecute those who commit serious violations of international law;<sup>118</sup> the right to development,<sup>119</sup> and the right to free trade.<sup>120</sup>

While one cannot demonstrate conclusively that morality is driving the practice Shelton catalogs, context clues in some of this literature suggest the writer's sense that states' moral obligations is driving the conclusion that norms are *jus cogens*. M. Cherif Bassiouni, for example, makes the claim that the duty to prosecute those who commit serious violations of international law is *jus cogens*, derivative from the peremptory nature of the underlying obligation itself.<sup>121</sup> Tellingly, Bassiouni does not make this claim in the context of a demonstration that there is consensus within the international community of states on the matter because there is none. Rather, he makes the claim in the context of a normative argument that combating impunity is essential to establishing peace, thereby rejecting the oft-made claim that prosecutions must wait until after the transition to a postconflict environment.<sup>122</sup> The context of Bassiouni's argument suggests that he is basing his claim that the duty to prosecute is peremptory at least partially on his belief that states ought not grant impunity to those who commit atrocity crimes.<sup>123</sup> This moral claim validates the norm as peremptory.

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117. See Louis René Beres, *Prosecuting Iraqi Crimes Against Israel During the Gulf War: Jerusalem's Rights Under International Law*, 9 ARIZ. J. INT'L & COMP. L. 337, 357-58 (1992) (arguing Israel may have a *jus cogens* duty to assassinate Saddam Hussein).

118. See M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROBS. 9, 17 (1996) (arguing that *jus cogens* nature of crimes against humanity, genocide, war crimes, and torture creates a *jus cogens* duty to prosecute); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2608-09 (1991) (describing the ways in which a position permitting derogations "from the duty to prosecute" is "untenable").

119. See Shashank Upadhye, *The International Watercourse: An Exploitable Resource for the Developing Nation Under International Law?*, 8 CARDOZO J. INT'L & COMP. L. 61, 66-68 (2000) (citing to General Assembly resolutions to support this claim).

120. Michael H. Allen, *Globalization and Peremptory Norms in International Law: From Westphalian to Global Constitutionalism?*, 41 INT'L POL. 341, 342 (2004) (commenting on how "the problem of markets has produced a new peremptory norm, that of Free Trade").

121. See Bassiouni, *supra* note 118, at 17 (indicating that "the obligation to prosecute" arises from "international crimes that have risen to the level of *jus cogens*").

122. See *id.* at 12 ("[J]ustice is frequently necessary to attain peace.").

123. M. Cherif Bassiouni does attempt to tie the peremptory nature of the duty to prosecute to the peremptory nature of the underlying prohibitions. See *id.* at 17

These examples suggest that at least some human rights actors use moral obligation as the basis to validate *jus cogens* norms.

### C. Customary Law

There are reasons to believe moral obligations play a role in the validation of human rights customs.

Scholars have noted that international legal actors rarely apply the conventional test for customary law in practice.<sup>124</sup> The ICJ regularly makes claims that norms are custom without providing documented evidence from the practice of a broad cross section of states or evidence that states believe their practice is legally obligatory.<sup>125</sup> The ICJ's practice may simply reflect the scope of the task required to demonstrate traditional custom, given that the international community of states today numbers over 190.<sup>126</sup>

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(explaining that the “international crimes that have risen to the level of *jus cogens*” give rise to certain duties, including “the obligation to prosecute or extradite”). Nevertheless, international law frequently treats different duties attached to the same prohibition differently with respect to the extent to which derogations, limitations, reservations, etc. are permitted. See Vijay M. Padmanabhan, *To Transfer or Not to Transfer: Identifying and Protecting Human Rights Interests in Non-Refoulement*, 80 FORDHAM L. REV. 73, 108–10 (2011) (explaining how different duties attached to the torture norm alternatively permit or prohibit exceptions to the rule). It is certainly not a given to be established in one sentence as is done by Bassiouni, that the peremptory nature of the underlying prohibitions gives rise to a peremptory duty to prosecute.

124. Such systemic departures raise questions regarding whether the rule of recognition for traditional customary law is accurately depicted. See Anthea Roberts, *Custom, Public Law and the Human Rights Analogy*, EJIL: TALK! (Aug. 14, 2013), <http://www.ejiltalk.org/custom-public-law-and-the-human-rights-analogy/> [<http://perma.cc/3M-G4ZG>] (archived Feb. 20, 2014) (arguing that the test for traditional custom needs to be rethought).

125. See Charney, *supra* note 29, at 537 (“[The ICJ] rarely presents a documented examination of the actual practice of a broad cross-section of the international community’s members, their opinions on the legal character of the practice, their knowledge of the facts that might produce new law, or their unpublicized opposition to the rule.”).

126. See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 24 (2005) (describing the task of complying with the traditional test for customary law as “practically impossible”); JÖRG KAMMERHOFER, *UNCERTAINTY IN INTERNATIONAL LAW: A KELSENIAN PERSPECTIVE* 60 (2011) (noting that most scholars claim norms are custom without attempting to prove it is such). Anthea Roberts argues that the traditional test for customary law is unreasonable as a consequence. State practice is difficult to find, leading most who claim custom exists to merely cite to others who have claimed it exists. See Roberts, *supra* note 124 (“Almost no one actually ‘finds’ custom. Instead, arbitrators, academics and counsel typically refer to other sources that supposedly have already ‘found’ custom.”). As a result, the traditional test for custom is only used to refute the claim that custom exists, not to actually establish its existence. See *id.* (explaining that in practice so-called customs “are largely used to critique the work of others”).

However, the need to take short cuts is apparently reduced with the resort to modern custom.<sup>127</sup> As discussed in Part II, the theory of modern custom is in wide usage in human rights law. Modern custom replaces the requirement that the customary behavior of states validate legal obligation with a validation based on the systemic agreement of the international community of states. As a consequence, the role played by state practice in the ascertainment of law is reduced, though not eliminated.<sup>128</sup> Systemic agreement is established primarily through treaty text and international resolutions, which are far easier to locate. International consensus is confirmed or refuted through examples of state practice.<sup>129</sup> Despite this reduced burden, actors within the human rights community attribute customary status to norms both when there is a paucity of evidence establishing that there is systemic agreement the norm is customary as well as in situations when there is significant contrary evidence.

International criminal courts have been at the forefront of interpreting the content of customary human rights law because they must determine if the crimes are established in customary law. Otherwise, the principle of *nullum crimen sine lege* would prohibit prosecutions on the basis of crimes that did not exist at the time the conduct occurred.<sup>130</sup> One would expect such courts to be exacting in the application of the test for modern custom because the rights of the defendant are at stake. But international courts have frequently located customs despite the absence of evidence of consensus in the international community of states. This practice might be explained by the fact that moral obligation is validating customs as law.

The International Criminal Tribunal for the former Yugoslavia (ICTY) is a good example.<sup>131</sup> In *Jelisić* the ICTY had to establish the

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127. See THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 92–94 (1989) (arguing human rights norms may be established as customary with less evidence in state practice than other kinds of international norms).

128. See *supra* note 43 and accompanying text (describing how it is easier to prove international consensus regarding the content of human rights law through reliance on verbal practice).

129. See MERON, *supra* note 127, at 94 (explaining that national laws and practice inconsistent with those laws confirm or limit the scope of human rights customs).

130. Most international criminal tribunals were established after many of the atrocities at issue were committed. In order to establish that defendants were on notice that their actions were illegal, which is a basic element of due process, the crimes tried by such tribunals must have been established in customary or treaty law before they were committed. See Beth van Schaak, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 122–24, 153–54, 158–59 (2008) (discussing the application of *nullum crimen sine lege* in international criminal law).

131. See generally Lorenzo Gradoni, *Nullum Crimen Sine Consuetudine: A Few Observations on How the International Criminal Tribunal for the Former Yugoslavia has Been Identifying Custom* (unpublished manuscript), available at <http://www.esil->

content of the customary definition of genocide, in order to determine the proof required to convict the defendant.<sup>132</sup> Genocide, the most severe human rights violation, requires specific intent “to destroy in whole or part a particular group as such.”<sup>133</sup> A difficult question is how widely the group’s members must be targeted for the intent of the attack to qualify as one targeting the group.<sup>134</sup> The ICTY Trial Chamber concluded that the customary offense of genocide does not require targeting a large number of group members, as was previously required by the International Criminal Tribunal for Rwanda (ICTR).<sup>135</sup> Rather, it concluded that genocide can occur when a limited number of leaders are killed if their destruction would harm the survival prospects of the group.<sup>136</sup>

In reaching this conclusion on the content of customary law, the ICTY does not invoke any international treaties, resolutions of global bodies, or state practice to establish the content of systemic agreement in the international community.<sup>137</sup> Rather, the ICTY cites primarily to the conclusions of a single committee of legal experts created to advise the secretary-general on crimes committed in the former Yugoslavia.<sup>138</sup> This committee applied the more expansive definition of genocide in its report. While the views of such experts are certainly probative of the content of international law, they are themselves very little evidence to establish the systemic agreement of the international community of states. The fact that the ICTY concluded that this definition of genocide is customary law—a

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sedi.eu/english/pdf/Gradoni.PDF [http://perma.cc/JSA6-45M7] (archived Mar. 14, 2014) (analyzing the varied and frequently weak evidence used by the ICTY to conclude norms are customary international law).

132. See *Prosecutor v. Jelusic*, Case No. IT-95-10-T, Judgement, ¶ 61 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999) (“In accordance with the principle *nullum crimen sine lege*, the Trial Chamber means to examine the legal ingredients of the crime of genocide taking into account only those which beyond all doubt form part of customary international law.”).

133. *Id.* ¶ 79.

134. See *id.* (quoting the International Law Commission explanation that the crime requires intent to destroy the group, as opposed to merely targeting particular members of the group).

135. See *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR 95-1-T, Judgement, ¶ 97 (May 21, 1999) (requiring a “significant number” of members of a group be targeted).

136. See *Jelusic*, Case No. IT-95-10-T, ¶ 82 (“[I]t may also consist of the desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such.”).

137. See Gradoni, *supra* note 131, at 6 (arguing that this conclusion by the ICTY is poorly supported).

138. The Committee of Experts was created by the Security Council in Resolution 780. The ICTY Trial Chamber also cites to a statement made to the U.S. Senate during the ratification debate for the Genocide Convention despite the fact that implementing legislation for the Convention defines genocide to require destruction of a numerically significant portion of a group. Gradoni, *supra* note 131, at 6–7.

substantial decision given the rights of the defendant—without further inquiry into the content of international consensus, raises questions as to whether the ICTY actually believes such consensus is required to validate a norm as customary.

A role for moral obligation in validating law better explains this practice. It is plausible, given the nature of the conduct at issue, that the ICTY judges implicitly concluded that there is a moral obligation not to target the leadership of ethnic or religious groups in order to harm the group. The ICTY then used its understanding of morality to validate this definition of genocide as custom. In other words, because there is a moral prohibition on targeting group leaders, very little or no evidence of systemic agreement in the international community of states is needed to establish a customary norm.

The Special Court for Sierra Leone (SCT) has similarly made claims about the content of customary law without establishing the systemic agreement of the international community of states. Article 4 of the SCT statute grants the court jurisdiction to hear charges related to the enlistment of children under the age of fifteen in armed forces or groups.<sup>139</sup> A defendant charged under this provision challenged its compatibility with the principle of *nullem crimen sine lege*, claiming the offense was not established in customary law at the time it was committed.<sup>140</sup>

The SCT permitted the prosecution to proceed on the charge, on the grounds that a criminal prohibition on enlistment of child soldiers was customary at the time the conduct occurred. In reaching this conclusion, the SCT, like the ICTY, did not cite to international

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139. See Statute of the Special Court of Sierra Leone art. 4(c), Jan. 16, 2002, 2178 U.N.T.S. 138 (“Conscripting or enlisting children under the age of 15 years into armed forces or groups using them to participate actively in hostilities.”). The Statute lists this provision under the heading “Other Serious Violations of International Humanitarian Law.” *Id.* Nevertheless, the major international instrument governing the practice of children in armed conflict is the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, *opened for signature* May 25, 2000, 2173 U.N.T.S. 222 (entered into force Feb. 12, 2002). Compliance with this instrument is monitored by the Children’s Rights Committee, a UN human rights body created by the Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990). Because the prohibition is located in an optional protocol to a major human rights instrument and its implementation is monitored by a human rights treaty body, this Article treats this rule as an element of human rights law, recognizing it may also be considered humanitarian law. *Cf.* Monica Hakimi, *A Functional Approach to Targeting and Detention*, 110 MICH. L. REV. 1365, 1367–68 (2012) (arguing against the strict categorization of norms and situations as human rights and humanitarian law).

140. See *Prosecutor v. Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction, ¶ (A)(1)(a) (May 31, 2004) (“The Defence raises the following points in its submissions: The Special Court has no jurisdiction to try the Accused for crimes under Article 4(c) of the Statute . . . since the crime of child recruitment was not part of customary international law at the times relevant to the Indictment.”).

treaties, resolutions of global bodies, or state practice. Instead, it supported its position by citing to early drafts of the Rome Statute, which ultimately created the International Criminal Court, and to a negotiating proposal made by Germany to include the enlistment of child soldiers in the Rome Statute as a crime.<sup>141</sup> Given the grave consequences for the defendant of this judgment, it seems unlikely that the SCT would have concluded the norm was customary on the basis of such evidence alone if it believed that the systemic agreement of states is a *sine qua non* for customary law.

Moral obligation may provide a better explanation. The harm to youths from recruitment by armed groups plausibly led the SCT to conclude that the conduct violated the moral obligations of states. This moral obligation reduced the need to locate systemic agreement in the international community of states. The SCT admits that the gravity of the conduct involved partially drives its decision to conclude that the conduct at question was prohibited under customary law.<sup>142</sup>

These last two examples reflect situations in which there is a paucity of evidence supporting the conclusion a human rights norm is customary. In other instances, human rights actors are confronted with contrary evidence to the conclusion a norm is custom. Mixed evidence would seem to suggest there is no custom because there is no systemic agreement on the point. Yet, in many instances human rights actors nevertheless find a custom. This approach is difficult to explain if the systemic agreement of the international community of states is the sole validating criterion for modern customary law.

Consider, for example, the oft-proclaimed customary law prohibition on torture. While states regularly repeat that torture violates customary law,<sup>143</sup> international practice is replete with examples of states that torture.<sup>144</sup> Thus, under the rubric of modern custom, the question must be asked as to whether there is systemic agreement in the international community of states that torture is always prohibited. While verbal practice certainly supports the

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141. *Id.* ¶ 33; van Schaak, *supra* note 130, at 162.

142. *See Norman*, Case No. SCSL-2004-14-AR72(E), ¶ 39 (“The prohibition of child recruitment constitutes a fundamental guarantee and although it is not enumerated in the ICTR and ICTY Statutes, it shares the same character and is of the same gravity as the violations that are explicitly listed in those Statutes.”).

143. *See, e.g.*, Richard Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT’L & COMP. L. 1, 4 (1990) (describing the conclusion of the United States that the prohibition on torture is customary law).

144. *See* JUTTA BRUNNÉE & STEPHEN J. TOOPE, *LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW* 269 (2010) (arguing torture prohibition “does not truly shape the behavior of scores, perhaps the majority, of states”). Brunnée & Toope are outliers who conclude that due to insufficient congruence between practice and rhetoric, the prohibition on torture is “close-to-moribund.” *Id.* at 270.



existence of such consensus, physical practice suggests that torture can sometimes be used. On what basis is verbal practice prioritized?

In *Filartiga v. Pena-Irala*,<sup>145</sup> plaintiffs claimed the defendant violated the law of nations by engaging in torture. To determine whether U.S. courts had jurisdiction, the U.S. Court of Appeals for the Second Circuit evaluated whether the torture of an individual within government custody constituted a violation of customary law.<sup>146</sup> In answering the question in the affirmative, the court relies upon (1) inclusion of a prohibition on torture in the Universal Declaration of Human Rights (UDHR) and in other UN General Assembly resolutions;<sup>147</sup> (2) human rights treaties that prohibit torture;<sup>148</sup> and (3) municipal laws prohibiting the use of torture.<sup>149</sup>

While such verbal practice certainly demonstrates a rhetorical commitment to the prohibition on torture, the existence of systemic agreement on the prohibition is undercut by the widespread violation of the norm in practice.<sup>150</sup> However, the court dismisses such practice as merely a violation of customary law, as opposed to evidence cutting against the existence of a prohibition.<sup>151</sup> If the goal of the court's analysis is to establish the content of the international community's systemic agreement, then this approach is curious. While it is of course true that the existence of violations is part and parcel of the law, in the area of customary law, it is practice—verbal and physical—that determines whether a norm exists in the first place.<sup>152</sup> The fact that physical practice has never supported the existence of a prohibition on torture would appear relevant to the existence of systemic agreement.

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

146. *See Alien's Action for Tort*, 28 U.S.C. § 1350 (2012) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

147. *See Filartiga*, 630 F.2d at 882–83 (ascribing to General Assembly resolutions authority to specify legal obligations found in the Charter).

148. *See id.* at 883–84 (citing to the International Covenant on Civil and Political Rights, the European Court of Human Rights, and other treaties).

149. *See id.* at 884 (stating torture is prohibited in the constitutions of fifty-five nations).

150. *See id.* at 884 n.15 (describing norm as “often honored in the breach”).

151. *See id.* (arguing that law exists because no state has defended torture as consistent with the law). Such an approach is the same as the approach of the ICJ, described above, in which contrary practice is viewed as confirmation that a rule of international law exists if it is defended as consistent with the rule. *See supra* text accompanying note 38; *see also MERON*, *supra* note 127, at 123 (equating the Second Circuit's approach to the subsequent approach taken by the ICJ in *Military and Paramilitary Activities in and Against Nicaragua*).

152. *See Simma & Alston*, *supra* note 35, at 97 (arguing that it makes more sense to treat contrary practice as a violation of customary law where the custom is already established).

Moral obligation may explain what is missing. Those interpreting whether the torture prohibition is customary are faced with conflicting evidence on the views of states, but interpreters, such as the Second Circuit, plausibly believe that states have a moral obligation not to torture. Moral obligation provides grounds upon which to decide how to interpret conflicting evidence regarding the views of the international community of states.

The role of morality in validating customary law is best seen in situations when there are competing moral views. Some scholars have described the duty to prosecute those who commit serious violations of human rights law as customary,<sup>153</sup> despite the regularity with which states have granted amnesties to those who commit such crimes.<sup>154</sup> Diane Orentlicher was a lead actor in this arena, making the claim that there is a customary international legal duty to prosecute crimes against humanity<sup>155</sup> and at least an emerging duty to do the same with respect to forced disappearances, extrajudicial execution, and torture.<sup>156</sup> In locating a duty to prosecute crimes against humanity, Orentlicher cites primarily to a single UN General Assembly Resolution proclaiming this duty.<sup>157</sup> With respect to a duty to prosecute forced disappearances, extrajudicial execution, and torture, she bases her conclusion on more robust evidence, using the Restatement on Foreign Affairs,<sup>158</sup> statements by UN officials;<sup>159</sup>

153. See, e.g., Carla Edelenbos, *Human Rights Violations: A Duty to Prosecute?*, 7 LEIDEN J. INT'L L. 5, 15–16 (1994) (arguing there is a customary duty to prosecute war crimes and crimes against humanity and a developing custom with respect to human rights violations); Naomi Roht-Arriaza, Comment, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CALIF. L. REV. 449, 489 (1990) (describing an “emerging” customary duty to prosecute).

154. See Charles P. Trumbull IV, *Giving Amnesties a Second Chance*, 25 BERKELEY J. INT'L L. 283, 295–99 (2007) (marshaling significant evidence of states’ practices that are inconsistent with the existence of a customary duty).

155. See Orentlicher, *supra* note 13, at 2593 (“[T]he law is fairly interpreted to require . . . States to punish crimes against humanity when committed in their own jurisdiction.”).

156. See *id.* at 2585 (“[T]he duty is—or is emerging as—a customary norm.”).

157. See G.A. Res. 3074 (XXVIII), ¶ 1, U.N. GAOR, 28th Sess., Supp. No. 30, U.N. Doc. A/9030, at 79 (Dec. 3, 1973) (including principle that states investigate and prosecute those who commit crimes against humanity). Orentlicher also cites to two human rights treaties disallowing statutes of limitation on crimes against humanity. Orentlicher, *supra* note 13, at 2594.

158. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702, cmt. b (explaining that states violate international law by condoning serious human rights violations, including by failing to punish perpetrators).

159. Orentlicher cites to numerous reports by country and thematic mandate holders criticizing the decision of states not to prosecute those who committed the human rights violations in question. See Orentlicher, *supra* note 13, 2583–84 (citing to reports by Special Rapporteurs for Chile and El Salvador, and the Special Rapporteur for Enforced Disappearance). Of course, those UN officials are criticizing state practice that directly contradicts the existence of a duty to prosecute.

international treaty text,<sup>160</sup> and a UN General Assembly resolution.<sup>161</sup> Subsequent to Orentlicher's article, the establishment of the International Criminal Court is another significant piece of evidence in favor of a duty to prosecute.

By contrast, other writers stress contrary physical practice to arrive at the opposite conclusion. Charles Trumbull, for example, cites to the fact that the United Nations has supported amnesties in certain circumstances<sup>162</sup> and that frequent and widespread amnesties have followed serious violations of international human rights law.<sup>163</sup> African states have recently taken to rhetorically challenging the existence of a duty to prosecute, arguing such a steadfast rule threatens to impede the establishment of peace in transitional societies.<sup>164</sup>

Disagreements about the moral obligations of states may explain why these actors arrive at contrary conclusions about whether a customary duty exists. Scholars like Orentlicher and some states may believe states ought to prosecute those who commit serious violations of international law—avoiding impunity is a moral obligation.<sup>165</sup> Conforming law to morality leads such actors to emphasize practice as supporting a customary duty to prosecute. By contrast, other scholars and states disagree about relevant moral imperative. They believe states ought not prosecute when there is risk that such prosecutions will prolong conflicts and thereby continue human rights

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160. Orentlicher cites to just one convention in force at the time she was writing, the Inter-American Convention to Prevent and Punish Torture, which has an express provision on a duty to prosecute those who commit torture. *See generally* Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, O.A.S.T.S. No. 67, (creating an extradite or prosecute regime for torture). She also cites to other draft agreements that create similar regimes. *See* Orentlicher, *supra* note 13, 2584–85.

161. *See* MANUAL ON THE EFFECTIVE PREVENTION AND INVESTIGATION OF EXTRA-LEGAL, ARBITRARY AND SUMMARY EXECUTIONS 45, U.N. Doc. ST/CSDHA/12, U.N. Sales No. E.91.IV.1 (1991) (endorsing an extradite or prosecute regime for those suspected of committing such crimes).

162. *See* Trumbull, *supra* note 154, at 293–94 (describing UN support for amnesties in South Africa and Haiti). These examples took place after Orentlicher's article was written.

163. *See id.* at 295–97 (cataloging amnesties in at least 14 states between 1987 and 2007).

164. *See* Vijay M. Padmanabhan, *From Rome to Kampala: The U.S. Approach to the 2010 International Criminal Court Review Conference*, 55 COUNCIL SPEC. REP. 3, 18 (describing concerns of African states at the 2010 ICC Review Conference).

165. *See, e.g.,* Charis Kamphuis, *Foreign Investment and the Prioritization of Coercion: A Case Study of the Forza Security Company in Peru*, 37 BROOKLYN J. INT'L L. 529, 556 (2012) ("To the extent that systems of international and national law fail to bring the perpetrators of human rights violations to justice, impunity becomes a legal and moral issue.").

violations.<sup>166</sup> As a consequence, they emphasize the practice suggesting amnesties are possible.<sup>167</sup>

#### D. Treaty Law

International human rights treaty practice is also difficult to explain fully using the rule of recognition described in Part II, which posits that state consent alone validates a treaty obligation as law. Consent alone does not provide a plausible account of when human rights actors believe treaty obligations exist. Rather, moral obligation appears to play a role in the validation of treaty norms as law.

Human rights practice with respect to reservations is a prime example. States use reservations to modify the content of a treaty obligation to match the set of international legal obligations they wish to undertake.<sup>168</sup> Reservations are impermissible, however, when they are “incompatible with the object and purpose of the treaty.”<sup>169</sup> Other States Party to a treaty have a responsibility to determine the effect of impermissible reservations. States can choose not to permit the treaty to come into force between them and a party with an invalid reservation,<sup>170</sup> or they can choose not to have the provision that is subject to the invalid reservation in effect.<sup>171</sup> Either way, the reserving state is only bound by provisions to which it agreed, consistent with the rule that consent validates treaty norms as law.<sup>172</sup>

However, human rights practice has developed an alternative rule. A variety of human rights actors have concluded that where reservations are inconsistent with the object and purpose of the treaty, they are severed, leaving the state bound by the original treaty provision without the reservation. This rule has been adopted

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166. See, e.g., Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principles and Pragmatism in Strategies of International Justice*, 28 INT'L SEC. 5, 43–44 (2003–04) (arguing amnesties are more effective than prosecution at ending conflicts that create human rights violations); Max Boot, *When 'Justice' and 'Peace' Do Not Mix*, WALL ST. J., Oct. 2, 2000, at A36 (arguing that amnesties are essential to removing spoilers who prevent transition to post-emergency life).

167. See, e.g., Trumbull, *supra* note 154, at 295–99 (arguing that there is no customary duty to prosecute).

168. VCLT, *supra* note 21, at art. 1(d) (defining *reservation*).

169. *Id.* at art. 19(c).

170. See *id.* at art. 20(4)(b) (“An objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State . . .”).

171. See *id.* at art. 21(3) (“[T]he provisions to which the reservations relates do not apply as between the two States to the extent of the reservation.”).

172. See Padmanabhan, *supra* note 123, at 106–07 (describing the protection to the consent principle made by the VCLT rules on reservations).

by the European Court of Human Rights (ECtHR),<sup>173</sup> the IACtHR,<sup>174</sup> the UN Human Rights Committee (HRC),<sup>175</sup> and the treaty monitoring body for the International Covenant on Civil and Political Rights (ICCPR). Numerous European states favor this rule as well, including, among others, Austria,<sup>176</sup> Denmark,<sup>177</sup> Finland,<sup>178</sup> Greece,<sup>179</sup> Latvia,<sup>180</sup> Norway,<sup>181</sup> Slovakia,<sup>182</sup> and Sweden.<sup>183</sup> Only a small number of states have expressly challenged the severability position.<sup>184</sup>

Severance of invalid reservations raises the question as to what validates the originally drafted treaty obligation as law, given the apparent failure of the reserving state to consent to the treaty provision as drafted. Many scholars argue severance creates

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173. See *Belilos v. Switzerland*, 132 Eur. Ct. H.R. (ser. A) ¶ 60 (1988) (holding that an invalid reservation will be severed, leaving the treaty as a whole in place for the party).

174. See generally *Hilaire v. Trinidad & Tobago*, Preliminary Objections, Judgment, Inter-Amer. Ct. H.R. (ser. C) No. 94 (June 21, 2002) (concluding that Trinidad and Tobago's reservation is severed, leaving it bound to the American Convention on Human Rights as originally drafted).

175. See General Comment No. 24 (52): General Comment on Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant, Human Rights Comm., Rep. on Its 52nd Sess., Nov. 2, 1994, U.N. Doc. CCPR/C/21/Rev.1/Add.6, ¶ 18 (Nov. 11, 1994) (claiming the right to sever invalid reservations while leaving states bound to the original treaty provision).

176. Kasey L. McCall-Smith, *Severing Reservations*, 63:3 INT'L & COMP. L.Q. (forthcoming July 2014) (manuscript at 29–30) (on file with author) (highlighting Austria's objections to the reservations of Pakistan and Lebanon to the Convention on the Elimination of all forms of Discrimination Against Women as examples of the country's recent move toward a policy of severance as opposed to permissibility) (citing 1979 U.N.T.S. 439 (1997), 2005 U.N.T.S. 524 (1998)).

177. See *id.* at 31 (noting that Denmark moved toward a severability approach in 2001 when it responded to Botswana's reservation to the ICCPR) (citing 2163 U.N.T.S. 178 (2001)).

178. See *id.* (explaining that Finland utilized a policy of severability against the Maldives reservation to the ICCPR) (citing 2427 U.N.T.S. 128 (2007)).

179. See *id.* (objecting to Turkey's reservation to the ICCPR in 2004 and opting for severance) (citing 2283 U.N.T.S. 242 (2004)).

180. See *id.* (objecting to Mauritania's reservations to the ICCPR in 2005 and opting for severance) (citing 2346 U.N.T.S. 215 (2005)).

181. See *id.* (objecting, like Denmark, to Botswana's reservation to the ICCPR in 2001) (citing 2163 U.N.T.S. 185 (2001)).

182. See *id.* (objecting to Pakistan's reservation to the ICCPR in 2011) (citing *Status*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/pages/view\\_details.aspx?src=treaty&mtdsg\\_no=iv-4&chapter=4&lang=en](https://treaties.un.org/pages/view_details.aspx?src=treaty&mtdsg_no=iv-4&chapter=4&lang=en) (last updated Apr. 14, 2014)).

183. See *id.* at 29 (offering "Sweden's objection to reservations to the Vienna Convention by Peru" as an example of Sweden's use of severance) (citing 2155 U.N.T.S. 150 (1998)).

184. See *id.* (citing to opposition of the United States, United Kingdom, and France to General Comment 24).

nonconsensual legal obligations because the reserving state never agreed to be bound by the provision as drafted.<sup>185</sup>

Ryan Goodman argues that states with an invalid reservation sometimes prefer to remain bound to the treaty as drafted as opposed to having its ratification voided, creating a form of indirect consent to the original treaty provision.<sup>186</sup> In *Beilos* for example, Switzerland indicated a preference to remain parties to the European Convention on Human Rights without the reservation the ECtHR found invalid, rather than having its membership in the ECHR voided.<sup>187</sup>

However, in other cases states have been clear that they did not wish to remain bound if their reservation was invalid. When Trinidad and Tobago accepted the compulsory jurisdiction of the IACtHR, it included a reservation limiting its acceptance of the court's jurisdiction to the extent it did not "infringe, create or abolish any existing rights or duties of any private citizen."<sup>188</sup> When the IACtHR took up a case challenging the death penalty in which the reservation would be at issue, Trinidad and Tobago explained that it viewed its acceptance of the court's jurisdiction as void if the court found the reservation invalid.<sup>189</sup> In this case, there is no question that Trinidad and Tobago did not consent to severance; it was clear that its acceptance of the court's jurisdiction was dependent upon the validity of its reservation. Nevertheless, the court severed the reservation and adjudicated the case as if no reservation was made, without clearly addressing Trinidad and Tobago's consent argument.

This practice with respect to reservations suggests that the conventional rule of recognition for treaties—the consent principle—is an insufficient description of when human rights actors believe treaty norms are law.

A role for moral obligation in the rule of recognition provides an improved explanation of this practice. The IACtHR plausibly concluded that it had a moral obligation to review petitions made by those on death row in Trinidad and Tobago, given the gravity of claims in the death context. In effect, the IACtHR's perception of its

185. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 436–37 (2000) (arguing severability is inconsistent with state consent); Laurence R. Helfer, *Nonconsensual International Lawmaking*, 2008 U. ILL. L. REV. 71, 77 (viewing the HRC approach to severance of reservations as an example of nonconsensual lawmaking).

186. See Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 AM. J. INT'L L. 531, 536–37 (2002) (arguing state consent may be better protected in certain circumstances through severance).

187. See McCall-Smith, *supra* note 176 (noting that Switzerland made this point during oral arguments).

188. *Hilaire*, Inter-Amer. Ct. H.R., ¶ 2 n.3.

189. See *id.* ¶ 52 ("[I]t is clear that the State never intended to accept, in its totality, the jurisdiction of the Court. If the 'reservation' is invalid, then the declaration was invalid, and the State never made a declaration.")

moral obligations validated its legal authority to hear the case. The IACHR makes this point clearly, stating it believed the reservation was severable because not severing the reservation would harm the protection of human rights by denying the petitioner access to the court.<sup>190</sup>

Moral obligation may also explain the interpretation of Article 2 of the ICCPR made by the HRC. Article 2 of the ICCPR requires States Party “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . . .”<sup>191</sup> The choice of the word *and* within Article 2 suggests a conjunctive jurisdictional requirement: the ICCPR applies only with respect to individuals both within a state’s territory and subject to its jurisdiction.<sup>192</sup> This meaning is confirmed within the *travaux préparatoires*, which demonstrate that the United States chose the word *and* in Article 2 to avoid extraterritorial obligations and that states rejected a proposal to substitute *or for and*.<sup>193</sup>

In General Comment 31, however, the HRC interprets Article 2 to impose a disjunctive obligation: states are bound to provide the protections of the ICCPR to those who are either within their territory or subject to their jurisdiction. The HRC explains, “[A] State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.”<sup>194</sup> To

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190. *Id.* ¶ 66–67.

191. International Covenant on Civil and Political Rights art. 2(1), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

192. While Legal Adviser to the State Department, Harold Koh issued a memorandum arguing that the phrase “within its territory and subject to its jurisdiction” modifies only the obligation “to ensure” ICCPR rights, whereas the obligation to respect rights extends globally. Harold H. Koh, Legal Adviser, U.S. Dep’t of State, *Memorandum Opinion on the Geographic Scope of the International Covenant on Civil and Political Rights* (Oct. 19, 2010) [hereinafter Koh Memo]. This opinion was not adopted by the State Department as the official U.S. government position on the territorial reach of the ICCPR on the grounds that the past U.S. interpretation was well supported. Charlie Savage, *U.S. Seems Unlikely to Accept that Rights Treaty Applies to Its Action Abroad*, N.Y. TIMES (Mar. 6, 2014), [http://www.nytimes.com/2014/03/07/world/us-seems-unlikely-to-accept-that-rights-treaty-applies-to-its-actions-abroad.html?\\_r=0](http://www.nytimes.com/2014/03/07/world/us-seems-unlikely-to-accept-that-rights-treaty-applies-to-its-actions-abroad.html?_r=0). The Koh Memo at most suggests that this text is susceptible to multiple meanings, and the main contention of this Article remains: moral obligation drives which interpretation is accepted. Koh Memo, *supra*.

193. See Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially to Detention of Combatants and Security Internees: Fuzzy Thinking All Around?*, 12 ILSA J. INT’L & COMP. L. 459, 463–64 (2006) (providing ICCPR negotiating history on this point). *But see* Koh Memo, *supra* note 192 (arguing that negotiating history merely supports the view that the obligation to ensure rights does not extend extraterritorially).

194. Human Rights Comm., General Comment No. 31 [80], Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13, ¶ 10 (2004).

support this construction, the HRC explains it is inconsistent with the protection of human rights to deny rights protection to anyone based upon their nationality.<sup>195</sup> Manfred Nowak argues that the HRC “sought to correct the wording” of Article 2 consistent with “the object and purpose of the Covenant.”<sup>196</sup>

Moral obligation provides a better explanation of this practice than consent. It is plausible that the HRC concluded that there is a moral obligation for states to provide the ICCPR’s protections to those outside its territory, given that it issued General Comment 31 at a time when the extraterritorial detention practices of the United States were the subject of significant international criticism. The HRC’s conviction that it is morally prohibited to abuse those in a state’s custody outside their territory validated the extraterritorial reach for the ICCPR.<sup>197</sup> Such an explanation would justify “correcting the wording” of the ICCPR, as it would align the text of the covenant with the moral obligations of states.

#### IV. INCLUSIVE POSITIVISM

Parts II and III establish that the conventional positivist account of international lawmaking excludes moral criteria from the validation of law and that this absence results in a failure to account for significant aspects of human rights legal practice. The question is what follows from these observations.

This Part argues that the best way to deal with these failures is to adopt an inclusive-positivist understanding of human rights lawmaking. As described in Part II, inclusive positivism retains a commitment to the social fact thesis: law is identified through application of rules of recognition and criteria of validity that are social facts. When this practice reveals that moral criteria play a role in the validation of law, as is true in human rights legal practice, then such criteria are part of the rule of recognition. Part V will develop how the rules of recognition in human rights law might be modified to take into account the role moral values play in the validation of law.

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195. *See id.* (“[T]he enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to individuals, regardless of nationality of statelessness . . .”).

196. MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 43–44 (2d rev. ed. 2005).

197. *See id.* at 43–44 (defending the Committee decision on grounds it appropriately corrected an error in the original text).



First, however, the choice of inclusive positivism requires defending its premises against critics.<sup>198</sup> In some senses, the call for an inclusive-positivist approach to human rights lawmaking splits the difference between the dominant exclusive positivist and process theory approaches to international lawmaking. As a consequence the proposal here will create points of agreement and difference with these rival camps.

Process theorists believe that moral criteria are an inherent part of law as a decision-making process,<sup>199</sup> and they will not challenge the arguments made here that morality is part of human rights law.<sup>200</sup> However, they reject the social fact thesis because they disagree that law is a set of rules and principles derived through application of the rule of recognition and criteria of validity.<sup>201</sup> This Part defends the importance of the social fact thesis to international human rights law. Conceiving of human rights law as a discrete, albeit evolving, set of protections respects the self-determination of peoples in a manner process theory cannot.

Exclusive positivists, by contrast, will agree with the application of the social fact thesis; acceptance of this thesis is the glue that holds positivism together.<sup>202</sup> However, they will reject the claim that Part III demonstrated that moral criteria validates law. Rather, they will argue that the resort to morality merely reflects the use of extralegal sources where the law runs out. This Part rejects this argument as inconsistent with the social fact thesis. An account of human rights lawmaking that does not provide for moral criteria in the validation of law is too incomplete to be useful.

### *A. Defending the Social Fact Thesis in Human Rights Law*

New Haven School process theorists reject the positivist effort to separate law and morality as a foolhardy effort. Rosalyn Higgins, for

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198. There are of course general philosophical criticisms of inclusive positivism made both by exclusive positivists and natural law or law as integrity theorists. It is beyond the scope of this paper to address these broad philosophical critiques; those critiques have been comprehensively and persuasively addressed by the work of Jules Coleman and W.J. Waluchow, among others. This Article limits itself to addressing concerns about the application of inclusive positivism to international human rights law.

199. See *supra* notes 79–86 and accompanying text (describing the core tenets of process theory).

200. See, e.g., HIGGINS, *supra* note 75, at 5 (arguing that determining the content of international law cannot escape application of values, whether expressly stated or not).

201. See *id.* at 2 (rejecting the positivist conception of law).

202. See Jules Coleman, *Incorporationism, Conventionality and the Practical Difference Thesis*, in HART'S POSTSCRIPT 99, 115–16 (Jules Coleman ed., 2001) (describing social fact thesis as the “most important” commitment of positivism).

example, argues that the commitment to the separation thesis among international legal positivists is rooted in a desire to maintain the neutrality of law.<sup>203</sup> Neutrality helps avoid the manipulation of law by powerful actors. But, she explains, such an effort fails because determining what the law requires always involves “consideration for the humanitarian, moral and social purposes of the law.”<sup>204</sup> Law cannot be neutral as to its purposes.<sup>205</sup>

Much of the argument provided in Part III as to why moral criteria play a role in the validation of human rights law is in conformity with the analysis of Higgins and other process theorists. The inherently moral nature of human rights makes morality a natural reference point when ascertaining what is law.

Where inclusive positivism veers away from process theory, however, is with respect to its understanding of law and consequently how morality influences law. Inclusive positivists, like all positivists, believe that law is a discrete body of rules and standards that are derived through application of the rules of recognition and criteria of validity. The markers validating law are established through social practice.<sup>206</sup> Morality can validate particular rules or interpretations of standards as law if the social practice of the community recognizes such a role for moral criteria. Regardless, law is the discrete object produced through application of these rules.

Process theorists, by contrast, view law in functional terms.<sup>207</sup> They see international law as the procedure that guides and coordinates the decisions of states and other international actors. This process contains all of the voices of the international community engaged in a continual dialogue about how individual states, nonstate actors, and the community as a whole should respond to particular problems.<sup>208</sup> The effectiveness of any message is conditioned upon fealty to procedural values that imbue the message with the authority of law and the values of the international system, such as

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203. See HIGGINS, *supra* note 75, at 3 (describing international law as more than just the mere application of rules).

204. *Id.* at 5.

205. See *id.* (noting the inevitable consideration of policy factors as well as her desire that they be dealt with openly).

206. See Coleman, *supra* note 202, at 115–16 (describing privilege of place for social fact thesis in positivism).

207. See Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 644–48 (1958) (emphasizing that achieving a good working legal order requires flexibility to turn what the law is into what society says the law should be).

208. See W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 AM. SOC'Y INT'L L. PROC. 101, 106 (1981) (describing the proliferation of actors communicating international legal prescriptions).

the desire to promote peace or respect human rights.<sup>209</sup> Law that is unfaithful to these values is no guide to the behavior of states and, thus, does not serve the function of law.

While the differences between these approaches might seem obscure when described theoretically, they have important normative consequences in an international community characterized by different value commitments and different amounts of power. The right to self-determination, a core commitment of human rights, grants all peoples a continuing right to "freely determine their political status and freely pursue their economic, social and cultural development."<sup>210</sup> Self-determination reflects the intrinsic value communities that share a common life place on collective decision making to protect shared undertakings.<sup>211</sup> Because human rights law touches on the allocation of rights and responsibilities within society, I have argued previously that effective exercise of self-determination by communities requires ownership over the content of international human rights obligations.<sup>212</sup>

The conception of law as process threatens the self-determination of weaker communities. Process theory defines law as the continuous dialogue among human rights actors on what the law requires.<sup>213</sup> The most powerful voices—Western and corporate interests—drive this dialogue by virtue of their position of power.<sup>214</sup> These actors will use their control over the conversation to drive law to mean what their values determine it should mean. Such an approach will override the views of weaker cultures. The result is

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209. See *supra* notes 79–86 and accompanying text (describing the procedural and substantive role of values in process theory).

210. ICCPR, *supra* note 191, at art. 1, ¶ 1; International Covenant on Economic, Social and Cultural Rights art. 1, ¶ 1, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) (containing the same language as appears in Article 1(1) of the ICCPR).

211. See Padmanabhan, *supra* note 123, at 136 (describing philosophical underpinnings of self-determination).

212. *Id.* at 104.

213. See Reisman, *supra* note 208, at 105–08 (describing lawmaking as a process of communication); Harold Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183–84, 196–200 (1994) (describing lawmaking as a process involving dialogue between all international actors).

214. Process theorists will sometimes debate this point. For example, Michael Reisman argued that international legal process mandated unilateral humanitarian intervention over the objections, or perhaps disinterest, of powerful states. See W. Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 EUR. J. INT'L L. 3, 16–17 (2000) (using NATO intervention in Kosovo as an example). Reisman's analysis misses the fact that the actors promoting humanitarian intervention in places like Kosovo are still predominantly western, even if they are not being led by the U.S. government. Western NGOs, media, and scholars like Reisman resolve moral questions surrounding intervention consonant with western values, which may of course differ from those of less powerful cultures elsewhere.

that law cannot protect the views of dissenting cultures as mandated by self-determination.<sup>215</sup>

By contrast, inclusive positivists describe the dialogue about human rights law as a struggle about the meaning of law, as opposed to law itself. Even if powerful states agree that the law means X, that does not mean the law is X. Rather, the law is what the rule of recognition produces, and states can disagree as to what that is.<sup>216</sup>

The question of whether international human rights law prohibits states from criminalizing homosexuality and homosexual conduct illustrates this difference. The conventional positivist account suggests that there is nothing within customary law that prohibits such laws. Modern customary law is validated by the systemic agreement of the international community of states. Roughly 40 percent of states criminally sanction homosexuality or homosexual conduct today.<sup>217</sup> Nor is there a robust history of international resolutions against criminal sanctions on homosexuality.

Major international human rights treaties, like the ICCPR, are notable for their failure to expressly reference sexual orientation or gender identity as grounds upon which discrimination is prohibited.<sup>218</sup> There are rights provisions not expressly related to homosexuality that arguably prohibit laws that criminalize homosexuality or homosexual conduct.<sup>219</sup> But such an interpretation would run counter to the understanding many states had and have of the provision. Many states that have laws criminalizing homosexuality consented to these provisions without reservation, suggesting they did not understand the ICCPR to prohibit such laws.<sup>220</sup>

215. See HATHAWAY, *supra* note 72, at 20 (describing domination by hegemonic interests that results from process approach to international law).

216. The absence of a decider on most human rights law questions eliminates a source of significant controversy in U.S. legal scholarship as to the appropriateness of a court deciding moral questions. See, e.g., Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006); Mark Tushnet, *Shut Up, He Explained*, 95 NW. U. L. REV. 907 (2001).

217. INT'L LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASS'N, STATE SPONSORED HOMOPHOBIA 5 (2013).

218. See ICCPR, *supra* note 191, at art. 2(1) ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."). The inclusion of the phrase "other status" suggests that the drafters of the ICCPR recognized that additional grounds upon which to prohibit discrimination might be recognized in the future.

219. See *id.* at art. 17(1) ("No one shall be subjected to arbitrary or unlawful interference with his privacy . . .").

220. See, e.g., U.N. *Issues First Resolution Condemning Discrimination Against Gay People*, THE GUARDIAN (June 17, 2011), <http://www.theguardian.com/world/2011/jun/17/un-resolution-discrimination-gay-people> [<http://perma.cc/C2T9-WG3J>] (archived

The inclusive-positivist approach,, which will be developed further in Part V, argues that moral obligation can validate a particular conception of a treaty concept as law irrespective of consent. In the case of laws criminalizing homosexuality and homosexual conduct, the result is that the underlying moral question—Ought states tolerate gay and lesbian relationships and conduct—may define the answer as to whether such laws are permitted under international law. Of course, many actors disagree on this moral question. As a consequence, application of the rule of recognition for treaty law results in a dialogue of disagreement as to whether international law prohibits criminalizing homosexuality, But the answer to what the law requires is determined by reference to moral obligation, not by the answer the most powerful voices provide to the moral question..<sup>221</sup>

By contrast, process theorists view the transnational dialogue itself as the law. While all actors participate in that dialogue, their voices do not carry the same weight.<sup>222</sup> The law will reflect the views of the most powerful, with weaker voices fading to the background.<sup>223</sup> Allowing the most powerful actors to decide what the law requires, poses an existential challenge to the promise of self-determination.<sup>224</sup>

Such an approach might result in rejection of the human right to development, the obligation to subsidize modifications for climate change, or the obligation to respect patents on drugs that could save many lives in the developing world, when a positivist approach could be used to support the existence of such a right.

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Feb. 20, 2014) (quoting Organization of the Islamic Conference (OIC) and the African Union officials arguing that gay rights have “no legal foundation” because it seeks to “to replace the natural rights of a human being with an unnatural right”).

221. The obvious exceptions are institutions like the ECtHR, which are empowered to make binding interpretations of law for their relevant instrument.

222. See Reisman, *supra* note 208, at 109–10 (1981) (discussing the complexities of authority signals).

223. African states have been consistent, for example, in rejecting the idea that gay rights are human rights consistent with the views of their people. See Rick Gladstone, *Nigerian President Signs Ban on Same-Sex Relationships*, N.Y. TIMES, Jan. 14, 2013, at A3 (describing a June 2013 survey which showed 98 percent of Nigerians opposed “accepting” homosexuality). Despite the firmness of this conviction, Nigeria was publicly silent when it enacted into law sweeping legislation criminalizing homosexual relationships. See *id.* (noting silence by Nigerian President Goodluck Jonathan after signing bill into law). Under the law as process view, the overwhelming international condemnation of Nigeria after the news broke signals the law violates human rights, regardless of Nigeria’s views. By contrast, inclusive positivism views the law as a product of the rules of recognition in international law. Nigeria and international actors may disagree about what the rule of recognition requires, but neither decides the question for the other.

224. See HATHAWAY, *supra* note 72, at 21 (“The policy-oriented school of international law has thus spawned a new version of natural law thinking under which the will of powerful States is simply substituted for that of God or nature.”).

Thus, even if one accepts that moral obligation plays a role in the validation of human rights law, as this Article contends, positivism as a model of law retains a powerful normative appeal.

*B. Defending Inclusion of Moral Criteria in Rules of Recognition in Human Rights Law*

By contrast, exclusive legal positivists embrace the social fact thesis; it is this commitment that unites all positivists. However, they reject the claim that moral obligation plays a role in the validation of law. Exclusive positivists define law as an authoritative and determinative set of reasons for action created by social convention that require no further analysis or evaluation by those governed by the law.<sup>225</sup>

Repeating the example from Part II, the passage of a bill by both houses of the Tennessee legislature and the signature of the bill by the governor create an authoritative reason for people in Tennessee to limit their speed to sixty-five miles per hour. This reason for action only exists as a consequence of the satisfaction of the rule of recognition in Tennessee. The reason for action is complete because it preempts the need for those subject to law to weigh the reasons for action by providing a clear directive as to how to act.<sup>226</sup>

Moral reasons for action are not created by social convention; they are reasons for action that exist independent of social convention. Nor are they complete because they demand further inquiry and analysis for application. In order to apply moral criteria, the law's subjects must weigh the reasons for action themselves, meaning the directive produced does not preempt further individual inquiry.<sup>227</sup> Thus, an exclusive positivist would argue, moral reasons are by definition not legal reasons.<sup>228</sup>

This critique can be illustrated using the torture prohibition. Applying the conventional rule of recognition for treaty law reveals that torture is prohibited in all circumstances for most states by virtue of their treaty commitments. The treaty commitments provide a reason for action that exists solely because of state consent.

225. See Marmor, *supra* note 9, at 106 (describing the "constitutive nature" of the conventional foundation of law).

226. See Joseph Raz, *Authority, Law, and Morality*, in *ETHICS IN THE PUBLIC DOMAIN* 194, 212–13 (1994) (noting that "the content of an authoritative directive is confined to what the authority which lends the directive its binding force can be said to have held . . . [i]t does not extend to what it would have directed").

227. See *id.* at 219 (noting that legal positivists believe the function of law is to provide a set of standards of conduct which cannot be questioned by some official's conception of policy or morality).

228. See Marmor, *supra* note 9, at 108 ("[O]nce we admit the conventional foundation of law, it no longer makes sense to say that the law can be identified as such on the basis of moral or political considerations alone.").

International treaty law provides a sufficient and complete directive on behavior that does not permit states to inquire further on the reasons for action.

By contrast, if moral criteria are applied, this is untrue. Many treaties are unclear as to whether the torture prohibition includes nonrefoulement protection. If the content of law ascertained by reference to morality—perhaps that states ought to respect the bodily integrity of its citizens—the reason for action exists irrespective of international law. Moreover, applying this rule to nonrefoulement requires evaluating the moral case for providing or not providing nonrefoulement protection, meaning it is not complete on its face.

This does not mean that exclusive positivists reject the relevance of moral reasons to political and social decision making. Positivists acknowledge that there are limits to the extent to which law will provide answers to concrete questions.<sup>229</sup> If treaty law produces no answer on the question of whether the torture prohibition mandates provision of nonrefoulement protection, resort to moral reasoning might be appropriate. But exclusive positivists argue that inclusive positivists and nonpositivists err in assuming that moral reasons thus become legal reasons.<sup>230</sup> Rather, they argue there is simply no law on questions when conventional sources fail to produce answers. Those who make social or political decisions resort to extralegal reasons to decide on action.

The problem with such a view is that it posits law as a metaphysical concept with an enduring and unchangeable essential commitment to conventionalism. Such an approach to law is in fundamental tension with the social fact thesis, which provides that law is what a community believes it is. The social fact thesis allows positivism to avoid the fruitless task of separating real legal claims and nonlegal claims that masquerade as law to gain the benefits associated with law. Rather, law is socially determined and therefore fluid, which obviates the need to cross-check a social definition of law against ontological theories of law. In legal communities, such as the human rights community, where actors understand moral criteria as validating law, they do.

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229. HART, *supra* note 10, at 118 (providing examples of situations in which the law fails to provide answers to concrete questions).

230. See *id.* at 112–15 (arguing against the view that there are “gaps” in the law).

## V. INCORPORATING MORAL OBLIGATION INTO A POSITIVIST ACCOUNT OF HUMAN RIGHTS LAW

Part IV made the case that inclusive legal positivism is the appropriate model for understanding international human rights law. This Part hypothesizes as to how the rules of recognition for *jus cogens*, custom, and treaty obligation in human rights law might be modified to account for moral obligation. In undertaking this task four important caveats must be made.

First, this Part does not attempt to prove the specific content of new rules of recognition for human rights lawmaking. The social fact thesis provides that the rules of recognition in a particular legal community are observed through the practice of its officials. Proof that the human rights legal community agrees on a particular rule of recognition requires a collection of practice that is by necessity beyond the scope of this Article. Rather, the point here is to use examples to provide a theory as to what the rules of recognition are, which can be proven subsequently through further study of practice.<sup>231</sup>

Second, in employing examples this Article takes a broad approach to the question of whose practice is relevant to determining the content of the rule of recognition in human rights law. Determining who qualifies as a legal official for purposes of international law is more difficult than in the context of municipal law. Hart envisioned that it was possible to distinguish between legal officials, whose practice determines the rule of recognition, and private citizens, who need not accept and understand secondary rules, although whose acceptance of such rules is beneficial.<sup>232</sup> However, neither the concept of legal officials nor its companion concept of private citizens has a clear analog in international law.<sup>233</sup> International law—and human rights law in particular—conflates the governors and governed. States are both the traditional legislators and the subjects of international law. A large number of other actors, such as states, international organizations, and a large

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231. Most scholars using the social fact thesis use this approach, providing examples to illustrate a theory as to the content of the rule of recognition that could then be proven through further sociological investigation. See, e.g., Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621 (1987) (explaining that while he makes hypotheses about the rules of recognition, he does not “undertake the extensive historical or legal research that would be required to make a fully considered judgment about every troublesome question”).

232. See HART, *supra* note 10, at 101–02, 116–17 (contrasting the importance of legal officials and private citizens in the location of the secondary rules of a legal system).

233. See BRIAN TAMANAHA, *A GENERAL JURISPRUDENCE OF LAW AND SOCIETY* 134 (2001) (arguing that municipal law is too narrow a base from which to abstract a general theory of jurisprudence).



range of nonstate actors, regularly describe and apply putative international legal obligations, while at the same time being the subject of human rights law.

This Part opts to consider the practice of all actors who participate in the international dialogue on the content and application of human rights law as contributing practice relevant to the formulation of the rules of recognition. This includes states, including different branches of national governments; international organizations and their officials; and nonstate actors, including advocacy organizations and scholars. This broad approach reflects the artificiality of excluding any particular set of actors.<sup>234</sup>

Third, the rules of recognition described here should be tested against practice to determine whether there is a “shared feeling” among those engaging in human rights practice that these tests define law.<sup>235</sup> Hart explains that a rule of recognition is marked by “unified or shared official acceptance of the rule of recognition containing the system’s criteria of validity.”<sup>236</sup> However, the practice of as diverse a group of actors as those involved in applying international human rights law will never display unanimity with respect to a rule of recognition. Thus, examples will surely be found of actors who disagree with the role of moral obligations described here. In this sort of diffuse community, it is more reasonable to search for a shared feeling regarding the rule of recognition, which exists despite minor disagreements and misunderstandings about the rule.<sup>237</sup>

Fourth, Hart predicted that a rule of recognition would often be unstated within a community and therefore would have to be inferred

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234. This is not to say that all actors carry the same clout with respect to their views. See HART, *supra* note 10, at 102 (arguing that, in the context of municipal legal systems, opinions of the courts on the rule of recognition are of outsized importance, given their role in resolving disputes about the content of law). International courts are not empowered to say what the law is except in carefully circumscribed situations, making them a poor analog. See *id.* at 227 (dismissing arguments that the ICJ can play the same role as municipal courts because of its voluntary jurisdiction). In human rights law, we might imagine that the opinions of states and international institutions that are renowned for their technical expertise on human rights, such as treaty monitoring bodies and international courts, are the most important. Cf. Reisman, *supra* note 208, at 109–10 (arguing different communicators carry different “authority signals” based upon the audience’s perception of the communicator’s authority to make legal claims).

235. D’ASPREMONT, *supra* note 30, at 201.

236. HART, *supra* note 10, at 115.

237. d’Aspremont explains that even “moderate misunderstandings” are likely to persist about the exact terms of a rule of recognition even where all involved believe they are speaking the same legal language. D’ASPREMONT, *supra* note 30, at 201. This is so because international actors can only cross-check their respective understandings of the rules of recognition against that of others through sporadic exchanges on what constitutes law. *Id.* at 202. Such a reality increases the likelihood that those engaged in human rights practice actually have slightly different understandings about the rule of recognition even where they believe there is a shared understanding.

from the practice of its officials. Any role for moral obligation in human rights lawmaking is likely to exist *sub silentio*. The reason is that human rights actors have a strong incentive to use the language of consent and systemic agreement when describing their reasons for locating legal obligation even when moral criteria are actually validating law. It is openly accepted among human rights actors that claims that sound in state consent and systemic agreement are legal claims. By contrast, moral claims have been formally excluded from law creation in the positivist account of international lawmaking. As a consequence, human rights actors have every incentive to mask morally based legal claims in the language of consent and systemic agreement in an effort to gain legal effect from openly recognized sources of legal obligation.<sup>238</sup> A role for moral obligation in human rights lawmaking is often inferred from practice that is implausibly justified consistently with the conventional rules of recognition.

### A. Jus Cogens

With respect to *jus cogens*, there is a significant amount of practice catalogued in Part III supporting a rule of recognition in which moral criteria validate the superior status of norms in lieu of the systemic agreement of the international community of states. As discussed in the previous Part, actors within the human rights community declare norms to be peremptory without evidence that there is general agreement among the international community of states that a norm is such. This practice suggests a shared feeling that norms are peremptory if the norms are of such fundamental importance that derogation, limitation, or other transgressions are impermissible.

This role for moral obligation helps explain the deep fragmentation that exists among human rights actors regarding the content of *jus cogens*. There is no agreement globally on the methodology to be used to determine the moral obligations of states. While historically religion or reason was accepted as a source of natural law, today no such consensus exists either between societies or within societies. As a consequence, while there may be consensus that the moral importance of a norm determines whether it is peremptory, there may be no agreement regarding how to determine which norms are of paramount moral importance.

But the practice presented in Part III leaves open an important question: Is the use of moral criteria in the validation of *jus cogens* sufficiently widespread that there is a shared feeling supporting its use? States sometimes reject efforts to label norms peremptory when

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238. Cf. Kahn, *supra* note 104, at 11 (“[T]he nature of international institutions has made it difficult to formulate alternative grounds.”).

the conventional rule for peremptory norms is not met. As described in Part III, the Court of First Instance of the European Union concluded in *Kadi* that the right not be deprived of property arbitrarily and the right to access judicial remedies were *jus cogens*, providing no evidence to back this claim. However, France, the United Kingdom, the Netherlands, and the European Commission all objected to this decision on grounds that these rights are subject to limitation and exception in the practice of many states.<sup>239</sup> This objection suggests that they believe that rights cannot acquire *jus cogens* status without consensus in the international community of states. A smaller number of scholars chastise those who locate *jus cogens* without a demonstration of systemic agreement as inappropriately conflating *lex lata* and *lex ferenda*.<sup>240</sup> They do so out of an apparent view that only the conventional test can define peremptory norms.

Counterevidence of this sort does not defeat the conclusion there is consensus that moral obligation can validate *jus cogens*. Given that only the VCLT definition of peremptory norms has been formally codified in international law, any actor opposed to the conclusion that a peremptory norm exists will have an incentive to invoke that test until international consensus around a new test has been demonstrated. International law has no rules of settlement, leaving it particularly prone to claims of convenience that a rule of recognition does not exist. The real test is whether actors like France, the United Kingdom, and the Netherlands ever rely upon moral obligation, even implicitly, to validate claims of *jus cogens*, which requires further investigation.

But these counterclaims might suggest there is no rule of recognition for *jus cogens*. Peremptory norms as a category are often criticized for lacking agreed content or purpose.<sup>241</sup> Under such circumstances, it would not be surprising if there was no rule of recognition for *jus cogens* in human rights law because human rights actors do not agree on a test. If this were so, the practice identified in this Article would simply point to the conceptual confusion in this area, as opposed to pointing to a new rule. This points to the need to collect significantly more practice in order to make the sort of sociological claims positivism demands.

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239. Joined Cases C-402 & C-415/05 P, *Kadi v. Council*, 2008 EUR-Lex CELEX LEXIS I-06351, ¶ 266 (Sept. 3, 2008), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005CJ0402:EN:HTML> [<http://perma.cc/KH9L-5RYA>] (archived Feb. 20, 2014).

240. See, e.g., Shelton, *supra* note 27, at 303–04 (worrying about the trend to “abuse” *jus cogens*).

241. *Id.* at 297.

### B. Customary Law

The rule of recognition for modern custom is that states are legally obligated to behave as the international community of states systematically agrees they ought to behave.<sup>242</sup> Human rights practice, chronicled in Part III, suggests that this rule is incomplete. The rule of recognition might be modified in two ways. First, states are legally obligated to behave as they ought to behave if there is at least minimal evidence of systemic agreement they ought to behave that way. Such a rule seeks to capture the fact that human rights actors will describe norms as customary with little or no evidence to support the point.

Such a rule of recognition is consistent with the claims Frederick Kirgis made about modern custom. Kirgis argues that where custom is morally important, the volume of state practice and *opinio juris* required to support the claim is reduced. It may be that practice reveals a still more significant shift than imagined by Kirgis. In situations where exceedingly little practice is relied upon to prove the existence of custom, it may be that moral obligation has entirely substituted for systemic agreement of states in validating customary law.

Second, when the raw data of state practice and *opinio juris* support multiple interpretations as to whether customary law exists, the interpretation that is compatible with moral obligation is law.<sup>243</sup> Such an approach is generally consistent with the views of Anthea Roberts, described in Part II. Practice produces plausible accounts of the content of customary law. Moral obligation validates one of these plausible accounts as law.

This role for moral obligation explains the fragmentation that exists regarding the content of human rights customary law. There is no agreement globally on the methodology to be used to determine the moral obligations of states. While historically religion or reason was accepted as a source of natural law, today no such consensus exists either between societies or within societies. As a consequence, while there may be consensus that compatibility of a human rights custom with morality modifies proof of practice, how this rule applies differs across actors because of disagreements about the content of morality.

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242. See generally Roberts, *supra* note 33 (describing the shift in validation of modern custom from traditional custom).

243. Both Roberts and Tasoulis have identified this role for morality in customary law. See *id.* at 776 (arguing substance influences which of several competing interpretations of practice and *opinio juris* constitutes customary law); Tasoulis, *supra* note 44, at 325 ("The dimension of substance stipulates . . . where more than one interpretation satisfies . . . fit, [the] interpretation . . . to be selected . . . makes the practice appear in its best light.").

The evidence presented in Part III does not address fully whether there is a shared feeling supporting these revised rules of recognition. There are actors who at least formally reject modifications in approach to how customary law is located. The United States, for example, is a prominent critic of evolution in the identification of customary law, holding up the traditional test of custom as the only method by which customary norms are validated.<sup>244</sup> Further practice must be collected to determine whether counterexamples render the hypothesis proffered here implausible.

But the human rights practices of the United States suggest that it too sometimes validates customary law in a manner designed to match legal obligation with its views of the moral obligations of states. The United States has asserted in numerous fora that torture is a violation of customary law, despite the mixed evidence just discussed on this point.<sup>245</sup> A plausible explanation of this claim is that the U.S. government, like its courts, believes that states are morally prohibited from torturing. It then reads the mixed state practice on the question to support a legal prohibition on torture because morality determines law.

In 2011 then-Secretary of State Hillary Rodham Clinton gave a speech in which she cataloged ways in which human rights law prohibits certain forms of discrimination on the basis of sexual orientation and gender identity.<sup>246</sup> She argued, for example, that state laws criminalizing homosexuality violate human rights law.<sup>247</sup> However, Clinton's description of customary law was made in the face of significant contrary state practice, as described in Part III. A significant number of states criminalize homosexuality and homosexual conduct. States repudiate openly the claim that international human rights law protects sexual minorities.<sup>248</sup> Such

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244. See John B. Bellinger, III & William J. Haynes, *A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, 89 INT'L REV. RED CROSS 443, 444–47 (2007) (criticizing the ICRC for departing from the traditional rules for locating customary law in its study).

245. See Lillich, *supra* note 143, at 4 (describing U.S. use of modern custom to arrive at the conclusion that the prohibition on torture is customary law).

246. See Hillary R. Clinton, U.S. Sec'y of State, Remarks in Recognition of International Human Rights Day (Dec. 6, 2011), available at <http://www.state.gov/secretary/20092013clinton/rm/2011/12/178368.htm> [<http://perma.cc/UH7U-3RGE>] (archived Feb. 20, 2014) (describing various acts of violence and discrimination against homosexuals that violate international human rights law). These claims are presumably about customary law because her comments suggest that she is describing the rights of people in all states. Treaty obligations, by contrast, exist only for state parties to a treaty.

247. *Id.*

248. States within the Organisation of the Islamic Conference and the African Union argue that protection for homosexual rights within international human rights law has “no legal foundation” because it seeks to “to replace the natural rights of a human being with an unnatural right.” See *U.N. Issues First Resolution Condemning*

practice belies the claim that there is systemic agreement in the international community of states that such laws are prohibited.

A plausible explanation of the Clinton statement is that U.S. officials believe that states ought not discriminate in the most serious ways against gays and lesbians, and this moral obligation validates custom. Moral obligation has in effect substituted for consensus in the international community of states to validate customary law.

### C. Treaty Law

The rule of recognition for treaty law provides that states are legally obligated to behave as they have consented to behave.<sup>249</sup> Human rights practice chronicled in Part III suggests that this rule of recognition is incomplete. Interpreters determining the content of treaty obligations will in distinct circumstances use their respective sense of the moral obligations of states to validate legal obligations. This fact suggests that the rule of recognition should be modified to provide that a state is legally bound by the interpretation of its consent that best accords with its moral obligations.

Such a rule explains the practice described in Part III. Those interpreting human rights treaties choose to interpret consent in a manner that best protects the moral obligations of the state. This approach permits interpretations that have a tenuous connection to consent. The IACtHR interpreted Trinidad and Tobago's reservation to its jurisdiction as severable because the court viewed its review of death penalty claims as morally obligatory. The HRC did the same in locating extraterritorial reach to the ICCPR's provisions. It rewrote Article 2 of the ICCPR to prevent extraterritorial legal black holes, which it viewed as inconsistent with the moral obligations of states.

Still more work needs to be done to demonstrate that there is a shared feeling supporting the change. There are actors that are critical of efforts to modify the primacy of consent in validating treaty law. The United States, for example, criticizes treaty interpretations that it believes deviate from the content of its consent without paying much heed to the moral claims that might underlie such an interpretation.<sup>250</sup> It has also made deliberately narrow

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*Discrimination Against Gay People*, *supra* note 220 (quoting diplomats from Pakistan and Mauritania rejecting the Human Rights Council resolution recognizing gay rights as human rights).

249. See *supra* notes 25–36 and accompanying text (describing rule of recognition for treaty law).

250. See U.N. Comm. Against Torture, Considerations of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture, 36th Sess., May 1–19, 2006, ¶ 22, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006) (interpreting the Convention Against Torture's prohibition on cruel, inhuman, and degrading treatment as requiring closure of the

interpretations of human rights obligations that would appear to run counter to most understandings of the moral obligations of states in order to further its aims in the conflict with al Qaida.<sup>251</sup> Further practice must be collected to determine whether these counterexamples render the hypothesis proffered here implausible.

Nevertheless, it is worth noting the United States also appears to employ moral obligations when determining the content of treaty law. For example, consider the annual Country Reports on Human Rights Practices issued by the U.S. State Department. The 2012 Report on Russia criticizes Russia for violating freedom of expression and association by, among other things, prosecuting a government critic for spitting on a portrait of President Putin; granting the government wide latitude to shut down media outlets linked to "extremism"; restricting the size of opposition gatherings; and requiring nongovernmental organizations that receive foreign funding to register as "foreign agents."<sup>252</sup> However, it is uncertain whether Russia's activities violate any treaty obligations to which it has consented.<sup>253</sup>

Russia is party to the ICCPR, and Articles 19–22 of the ICCPR recognize freedom of expression, association, and peaceful assembly as legally protected human rights.<sup>254</sup> However, those same articles also carry an important limitation: states may restrict those rights if "prescribed by law" when "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of

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U.S. detention facility at Guantanamo Bay). The then-Legal Adviser to the U.S. Department of State, John Bellinger, rejected this recommendation because it moved well beyond what was agreed to by the United States. See Colum Lynch, *Military Prison's Closure Is Urged; U.N. Panel Faults Detention Policies*, WASH. POST, May 20, 2006, at A1 (quoting Bellinger stating recommendation is "skewed and reaches well beyond the scope and mandate of the committee").

251. See John Bellinger, III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AM. J. INT'L L. 201, 204 (critiquing the United States for seeking to exploit gaps in the law to mistreat detainees in a manner inconsistent with the aims of international law).

252. Bureau of Democracy, Human Rights and Labor, *Country Reports for Human Rights Practices for 2012, Russia*, U.S. DEP'T OF STATE (Feb. 20, 2014), <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dld=204331> (last visited Feb. 20, 2014).

253. Nor is it reasonable to conclude that such conduct violates customary law as defined pursuant to the conventional rule of recognition for modern custom. There is widespread and extensive practice of states restricting speech in a manner similar to that used by Russia to prevent threats to public order as characterized by the government.

254. See ICCPR, *supra* note 191, at art. 19(2) ("Everyone shall have the right to freedom of expression."); *id.* at art. 21 ("The right of peaceful assembly shall be recognized."); *id.* at art 22(1) ("Everyone shall have the right to freedom of association with others . . .").

others.”<sup>255</sup> This limitation grants states the prerogative to restrict freedom of expression, association, and assembly provided the restrictions are enshrined in the law and are “proportionate” to the need that supports the restriction.<sup>256</sup>

The Russian government has a plausible argument that its restrictions fall within the broad exceptions recognized by the ICCPR. Russia defends its media law as consistent with the ICCPR, for example, because the law protects public order from discord that might arise where the media “tak[es] advantage of its rights” to sow discord, defame public officials, promote terrorist activity, or otherwise seek to undermine the integrity of the state.<sup>257</sup> In criticizing Russia, the United States certainly does not undertake the work required to demonstrate that Russia has violated the terms of its consent.

A more plausible explanation of the Country Reports is that U.S. officials believe that states have a moral obligation not to restrict political expression and political gatherings. Such protections reflect a core commitment of the U.S. political system.<sup>258</sup> Rather than focusing on the details of Russian consent to human rights treaties, the United States uses its understanding of the moral obligations of states to validate the conclusion that Russia is legally obligated to protect political expression. The American perception of the moral obligation of states has in effect substituted for Russian consent in the U.S. assessment of the content of Russia’s human rights obligations.

## VI. CONCLUSION

This Article has examined the role of moral obligations in one discipline of international law: human rights law. Human rights law, unlike many areas of international law, emerges from a tradition in which humans believe there may be legal sources that exist outside of

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255. *Id.* at arts. 19(3), 21, 22(2). Russia is also party to the ECHR, which also protects free expression and peaceful assembly. ECHR, *supra* note 67, at arts. 10–11. However, these provisions also are limited, as they recognize the right of states to restrict expression and assembly as “necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.” *Id.* at art. 21.

256. See MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS CCPR COMMENTARY 462–67 (2d rev. ed. 2005) (describing application of limitation provisions).

257. Human Rights Comm., Consideration of State Reports Submitted by State Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Russian Federation, 97th Sess., Oct. 12–30, 2009 ¶ 156–58, U.N. Doc. CCPR/C/RUS/6 (Nov. 24, 2009).

258. U.S. CONST. amend. I.



positive, state-created law. Such an environment invites moral criteria to validate law. However, other areas of international law govern quintessentially moral questions as well and may also include moral criteria within their rule of recognition.

International humanitarian law (IHL) is an example. It regulates the conduct of combatants and civilians during armed conflict. A marked trend within IHL has been the increased “humanization of humanitarian law,” in which human rights principles have increased the protections granted to civilians and combatants in armed conflict.<sup>259</sup> This trend is suggestive that considerations other than state consent and customary behavior are driving legal development. Examination of the role of moral obligation in IHL lawmaking must wrestle with the impact such developments have on the ability of states to use force to achieve legitimate military objectives, a consideration not present in human rights law.<sup>260</sup>

This potential fragmentation of the rule of recognition across international law raises the question of the extent to which international law remains a cohesive discipline. The rule of recognition per Hart’s model is the shibboleth that lawyers within a community use to identify others speaking of law. The greater the fragmentation within the rule of recognition, the harder it is to speak of different bodies of international law as part of one legal community. Further scholarly investigation must be made of the consequences for international law of further divisions between subdisciplines with respect to their understanding of what constitutes law.<sup>261</sup>

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259. See generally Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239 (2000) (arguing that human rights protections and humanitarian law protections are gradually converging); Vijay M. Padmanabhan, *Legacy of 9/11: Continuing the Humanization of Humanitarian Law*, 2011 J. INT’L HUMANITARIAN L. 419 (Michael N. Schmitt & Louise Ariamatsu eds., 2012) (arguing that post 9/11 conflicts have sped up this process).

260. See generally Geoffrey Corn, *Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict*, 1 J. INT’L HUMANITARIAN LEGAL STUD. 52 (2010) (arguing human rights rules are not relevant to regulating war fighting).

261. See Cohen, *supra* note 90, at 1090–97 (beginning such an inquiry by arguing that a conflicts of law approach might be required to sort through competing international legal regulations).