metadata, citation and similar papers at core.ac.uk
brought to you by
provided by Duke Law Scholarship R

CUSTOMARY INTERNATIONAL LAW AND WITHDRAWAL RIGHTS IN AN AGE OF TREATIES

CURTIS A. BRADLEY* AND MITU GULATI**

INTRODUCTION

The conventional wisdom among international law scholars is that, once a rule of customary international law ("CIL") becomes established, nations never have the unilateral right to withdraw from it. Instead, if they want to act in a way that is contrary to the rule, they must either violate it and hope that other nations acquiesce in the violation, or they must persuade other nations to enter into a treaty that overrides the CIL rule. In *Withdrawing from International Custom,* we termed this conventional wisdom the "Mandatory View" of CIL.[1]

As we explained in *Withdrawing*, the Mandatory View of CIL can be contrasted with the withdrawal rights that frequently exist under treaties. When nations expressly negotiate the creation of treaty obligations, they often include within the treaty a right of withdrawal, sometimes conditioned upon a period of notice. Even when they do not make such an agreement expressly, the subject matter of the treaty will sometimes itself suggest an implicit right of withdrawal. Moreover, even when there is no general right of withdrawal from a treaty, nations typically will have some right of withdrawal for situations in which there has been a fundamental change of circumstances. Finally, nations often have the ability to remain a party to a treaty while avoiding the application of particular provisions within the treaty through the use of reservations or the invocation of derogation clauses.[2]

This dichotomy between no exit rights under CIL and frequent and variegated exit rights under treaties is puzzling, for several reasons. Treaties and CIL are the two major sources of international law, and their

---

* Richard A. Horvitz Professor, Duke Law School.
** Professor, Duke Law School.

1. *See* Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 205 (2010).
2. For discussion of these various exit options under treaties, see *id.* at 270-71.

substantive content frequently overlaps. Moreover, it is in many ways more difficult to create international law through treaty than through custom, since a treaty requires an express act of ratification. As a result, one might expect that, if anything, it would be more difficult to exit from treaties than from CIL, rather than the opposite.

We searched in the literature and found almost no explanation for the Mandatory View, and what little we did find was brief and conclusory. We attempted to trace the intellectual roots of the Mandatory View, but this produced only additional puzzles. We found, for example, that a number of the classic international law commentators of the eighteenth and nineteenth centuries thought that nations could unilaterally exit from at least some CIL rules.[3] In addition, we found that the intellectual shift to the Mandatory View began to take place in the late nineteenth and early twentieth centuries and may have been part of an effort to ensure that "uncivilized" nations would be bound to the CIL worked out by a handful of powerful Western countries, something that raises questions about the normative underpinnings of the Mandatory View. Furthermore, we found that the one exception under the Mandatory View to the ban on unilateral exit—the so-called "persistent objector doctrine"—is a modern creation that did not become established until well after World War II and appears to have been in part a response to continuing uncertainties about how the Mandatory View would operate in practice.

After reviewing this history, we considered the Mandatory View from the perspective of institutional design. Because there was so little theoretical defense of the Mandatory View in the literature, we were compelled to speculate about what might be the best arguments in favor of that View. To gain traction on this issue, we drew from theoretical work that has been done concerning exit rights in the areas of contract law, constitutional design, and voting rights. We found that, although there are arguments that can be made to defend the Mandatory View, these arguments at best apply to only a subset of CIL, most notably where CIL is designed to address externality or agency problems. We also found that allowing exit rights under CIL could enhance the usefulness of CIL, by

---

3. *See id.* at 215. For a similar account of this history, *see* William S. Dodge, *Customary International Law in US Courts: Origins of the Later-in-Time Rule*, *in* MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY: ESSAYS IN HONOUR OF DETLEV VAGTS 531-59 (Pieter H.F. Bekker, Rudolf Dolzer & Michael Waibel eds., forthcoming 2010). We did not make any claim in *Withdrawing* that this history should control the present, and any such claim would need to resolve a number of difficult "translation" problems in light of changes in international law and the international system. Our claim about the history was "simply that it shows that the Mandatory View is not the only possible approach to CIL and that an international legal system could potentially operate despite the allowance of some CIL withdrawal rights." Bradley & Gulati, *supra* note 1, at 225-26.

making it more transparent and efficient, and by encouraging broader experimentation. We concluded with some thoughts about how a typology might be developed to allow for variability in exit rights.

In this symposium issue of the *Duke Journal of Comparative and International Law*, a number of leading scholars engage with our project. Some of these scholars offer critiques of the analysis in *Withdrawing*, while others raise practical questions about how our ideas might be implemented. At minimum, this symposium fills a gap in the literature in terms of setting forth a sustained assessment of the Mandatory View. We are hopeful that it will also serve as a platform for additional work concerning withdrawal rights under CIL. Regardless, we owe an immense debt to the scholars who took part in the symposium, both for their willingness to consider our ideas and for their insightful comments.[4]

In this essay, we seek to advance the analysis set forth in *Withdrawing* by addressing four topics: the current state of CIL; the proper way to conceive of CIL and its relationship to treaties; how a shift away from the Mandatory View might occur in practice; and whether a shift to a Default View would make a meaningful difference in state practice. Most of the criticisms directed at *Withdrawing* are encompassed within these topics. We conclude the essay with some observations about additional research that might be useful.

I. THE CURRENT STATE OF CIL

In this Part, we briefly review the current state of CIL, from the perspective of both theory and practice. If CIL is currently operating well along these dimensions, this should increase the burden on those arguing for a change in the way that CIL is conceived. On the other hand, if CIL is not operating well along these dimensions, some of the objections to a new conception of CIL—such as concerns about creating uncertainty and inefficiencies—are reduced.[5]

A. CIL in Theory

Far from being well understood and accepted, the theory of CIL today is riddled with uncertainty. While commentators often recite that CIL is based on some combination of state practice and *opinio juris*, even a

---

4. We are also grateful to Brad Clark, Eugene Kontorovich, John McGinnis, Francesco Parisi, Andreas Paulus, and Amanda Perreau-Saussine, all of whom made valuable contributions to the in-person symposium held at Duke in January 2010 but did not contribute papers to this written symposium.

5. *Cf.* Rachel Brewster, *Withdrawing from Custom through Treaty: Choosing Between Default Rules*, 21 DUKE J. COMP. & INT'L L. 47, 54 (2010).

gentle probing of this definition reveals fundamental puzzles and debates. It is not clear, for example, what counts as state practice. Should a nation's treaty practice count? Can evidence of *opinio juris*, such as positions taken in international institutions, also constitute state practice? How much state practice must there be, and for how long? Similar questions abound for *opinio juris*. For example, to what extent do the views expressed by a state with respect to international resolutions or treaty norms count as evidence of *opinio juris* for CIL? To what extent can *opinio juris* be inferred from practice? More fundamentally, if CIL requires that nations believe that they are legally obligated, how does that belief arise in the first place? There is no settled answer to any of these (and numerous other) questions about CIL.[6]

Many of these uncertainties are longstanding, but they are now more pressing because the proliferation of multilateral treaties has raised new questions about the need for CIL as a distinct source of international law. Most of the major issue areas that were historically regulated by CIL are now regulated, to one degree or another, by treaties. Treaties have a variety of attractions as compared with CIL, in that they provide more direct evidence of state preferences (since they are the product of express negotiation), they can provide for greater specificity (since they are typically in writing), and they can establish institutional mechanisms to promote monitoring, adjudication, and enforcement of the norms. Moreover, the development of the United Nations system and other international institutions after World War II, along with developments in travel and communications, have greatly facilitated the development of international law in this form. The possible result, as Joel Trachtman notes, is the "increasing marginalization of custom."[7]

There is an even more fundamental uncertainty surrounding CIL, which concerns its connection to state consent. Although many international law commentators dismiss consent as the touchstone for the legitimacy of international law, there is nothing approaching agreement on any other theory. Moreover, the explanation that is often given for why consent is not a requirement is that current international law doctrine, especially doctrine relating to CIL, is difficult to reconcile with such a requirement.[8] But this is just circular reasoning: international law does not require consent because it does not require consent. The inclusion of the

---

6. *See* Bradley & Gulati, *supra* note 1, at 210-11.

7. Joel P. Trachtman, *Persistent Objectors, Cooperation, and the Utility of Customary International Law*, 21 DUKE J. COMP. & INT'L L. 221, 232 (2010).

8. *See* Bradley & Gulati, *supra* note 1, at 213-14.

persistent objector doctrine in the standard contemporary account of CIL only confuses matters further, since most explanations of the doctrine ground it in the need for state consent.[9] If that is true, however, it is not clear why CIL doctrine categorically rules out the possibility of a subsequent objector doctrine.

Not surprisingly, these theoretical uncertatainties have made CIL ripe for critics. Some have questioned whether CIL operates as law.[10] Others have questioned its usefulness and legitimacy.[11] Still others have questioned its normative attractiveness—from the perspective, for example, of efficiency,[12] or democratic accountability.[13] As David Bederman notes, this is a "time when customary international law is coming under attack by both extreme positivists (who suggest that its processes are illegitimate and non-transparent) and by those of a naturalist bent (who regard it as merely pandering to state interests)."[14] This growing skepticism has in turn prompted one scholar to attempt to "save" CIL,[15] although most defenders of CIL have responded by simply ignoring the critiques.

B. CIL in Practice

It is more difficult to ascertain the state of CIL in practice, but there are a variety of reasons to believe that it is less than ideal. As Paul Stephan discusses, although international law commentators frequently write as if there were a single body of CIL, this does not describe actual practice.[16] There is instead an ever growing cacophony of claims about the content of CIL, with no identifiable hierarchy among these voices. The "CIL" invoked

---

9. *See id.* at 233; *see also* Patrick Dumberry, *The Last Citadel! Can a State Claim the Status of Persistent Objector to Prevent the Application of a Rule of Customary International Law in Investor-State Arbitration?*, 23 LEIDEN J. INT'L L. 379, 389-391 (2010).

10. *See*, *e.g.*, JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 23-43 (2005).

11. *See, e.g.*, J. Patrick Kelly, *The Twilight of Customary International Law,* 40 VA. J. INT'L L. 449 (2000).

12. *See, e.g.*, Eugene Kontorovich, *Inefficient Customs in International Law*, 48 WM. & MARY L. REV. 859, 889-94 (2006).

13. *See, e.g.*, John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175 (2007).

14. David J. Bederman, *Acquiescence, Objection and the Death of Customary International Law*, 21 DUKE J. COMP. & INT'L L. 31, 43 (2010); *see also* Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 116, 117 (2005) (noting that "CIL is under attack from all sides" and that "virtually everyone agrees that the theory and doctrine of CIL is a mess"); George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT'L L. 541, 541 (2005) ("[CIL] is under attack as behaviorally epiphenomenal and doctrinally incoherent.").

15. *See generally* Guzman, *supra* note 14.

16. *See* Paul B. Stephan, *Disaggregating Customary International Law*, 21 DUKE J. COMP. & INT'L L. 191 (2010).

by international institutions differs as between these institutions, and it also differs from the "CIL" invoked by NGOs, domestic courts, executive spokespersons, and other actors. There is consequently a danger that CIL is simply becoming, to use Sam Estreicher's term, a form of "law-speak."[17]

The nature of the claims about CIL also appear to have fundamentally changed in recent years. When actors make claims about CIL, they often fail to tie the claims to empirical assessments of state practice. Instead, these actors cite treaties, the resolutions of international bodies, claims by scholars, or normative arguments. When state practice is cited, the citations are often selective and partial. Moreover, when state practice contradicts a purported CIL norm (as it frequently does for issues relating to human rights and the use of force, for example), the contrary practice is dismissed as mere violations of the norm. In some instances, the label "CIL" is simply used to avoid international or domestic restrictions that are associated with treaties.

CIL is also sufficiently vague, and the mechanisms of its enforcement are sufficiently limited, that nations almost certainly "exit" from it regularly without saying so. Instead of invoking a formal withdrawal right, nations dissemble about the content of CIL or attempt to conceal their violations.[18] The end result is uncertainty and unpredictability in the content of CIL, and a diminishment of its legitimacy.[19] Moreover, as we discussed in *Withdrawing*, these de facto exit rights vary substantially depending on a nation's power and resources, thereby exacerbating normative concerns that already exist about the structure of CIL.[20] These concerns include, among other things, the possibility that the Mandatory View of CIL was developed as part of an effort to maintain colonial domination.[21]

Some commentators have suggested that all would be well if the system limited itself to "old" rather than "new" CIL.[22] Old CIL is developed inductively from widespread and longstanding patterns of state

---

17. *See* Samuel Estreicher, *A Post-Formation Right of Withdrawal from Customary Interntaional Law?: Some Cautionary Notes*, 21 DUKE J. COMP. & INT'L L. 57, 59 (2010); *see also* Kelly, *supra* note 11, at 453 ("The 'custom-speak' used in international legal discourse is an indeterminate, normative discourse that varies from writer to writer and state to state.").

18. Hans Morgenthau famously described this problem with CIL more than sixty years ago. *See* HANS J. MORGENTHAU, POLITICS AMONG NATIONS 214 (1948).

19. *See* C.L. Lim & Olufemi Elias, *Withdrawing from Custom and the Paradox of Consensualism in International Law*, 21 DUKE J. COMP. & INT'L L. 143 (2010).

20. *See* Bradley & Gulati, *supra* note 1, at 261-62.

21. *See id.* at 230.

22. *See* Estreicher, *supra* note 17, at 62; Edward T. Swaine, *Bespoke Custom*, 21 DUKE J. COMP. & INT'L L. 207 (2010).

behavior. New CIL, by contrast, is more deductive and is characterized by reliance on international resolutions, treaties, scholarly opinion, and similar materials to establish the content of CIL, and by the influence of non-state actors such as NGOs.[23]

This nostalgia for the old CIL highlights the fact that the current CIL system has not succeeded in generating consensus. In any event, the nostalgia is unrealistic because international and domestic adjudicators routinely rely on (and create) new CIL materials, and there is no reason to believe that this practice will change.[24] Moreover, the new CIL has significant support in both the NGO community and the legal academy because (among other things), it gives those constituencies a greater voice in CIL creation.[25] The nostalgia for the old CIL is also inattentive to history. As discussed in *Withdrawing,* CIL was historically dictated by a handful of Western powers, and restrictions on exit from the old CIL were likely adopted as a way for the Western powers to impose their rules on the new entrants to the system.[26]

The old CIL is also now less relevant in light of the rise of treaties, and it is structurally ill suited for addressing many contemporary problems. Indeed, as nations have sought to address the leading international problems of the twenty-first century, such as terrorism, the proliferation of nuclear weapons, global warning, and international financial regulation, they have looked to treaties and written soft law instruments rather than trying to create old-style CIL. By contrast, the new CIL gives greater voice to a wider set of interests,[27] and it has the potential to address a larger set of problems than the old CIL.[28] Our objection in *Withdrawing* was not to the new CIL, but rather to the failure to adapt exit rights to the new system.

---

23. *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position,* 110 HARV. L. REV. 815, 838-42 (1997); Anthea E. Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 759 (2006).

24. *See, e.g.*, Roozbeh (Rudy) B. Baker, *Customary International Law in the 21st Century: Old Challenges and New Debates,* 21 EUR. J. INT'L L. 173 (2010).

25. *See* Roberts, *supra* note 23, at 775 (noting the increased importance of non-state actors such as NGOs in CIL creation).

26. *Cf.* Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT'L L. 639, 667 (2000) (arguing that the old CIL, like the new CIL, was not grounded heavily in state practice or consent).

27. *See* Roberts, *supra* note 23, at 768.

28. *See, e.g.*, Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 546-47 (1993). At the same time, the new CIL may entail the need for additional caution with respect to domestic implementation. *See* Bradley & Goldsmith, *supra* note 23; McGinnis & Somin, *supra* note 13.

III. PROPER CONCEPTION OF CIL

In *Withdrawing*, our argument for a Default View of CIL drew in part on an analogy to withdrawal rights under treaties. Some of our respondents have challenged this analogy on the ground that CIL and treaties are conceptually different in ways that might be relevant to withdrawal rights. In particular, these commentators have put forward three conceptions of CIL that might distinguish it from treaties: CIL as a safety net, CIL as akin to mandatory domestic public law, and CIL as a social contract.

As we will explain, while the advocates of these conceptions purport to be defending the status quo, none of the conceptions fits with current understandings of the structure and content of CIL. Nor have the advocates of these conceptions explained why the CIL system should be changed so that it would operate in the way that they envision.

A. CIL as Safety Net

One argument for distinguishing CIL from treaties is to conceive of CIL as a safety net that ensures that states remain bound by certain basic rules of international law regardless of whether they stay out of, or withdraw from, treaties. Thus, for example, Anthea Roberts contends that the reason that CIL does not allow for a right of withdrawal is that it "sets the ground rules for the international system by imposing a minimum core of binding obligations on all states."[29] She also posits that "[t]reaties may well commonly permit exit precisely because custom, which does not allow for withdrawal, exists to protect key interests."[30]

This conception is simply asserted, and it differs in a number of respects from standard modern accounts of CIL. Most accounts of international law view treaties and CIL as separate and equal "sources" that can be drawn from for various purposes, including international adjudication and arbitration.[31] Under this standard account, sometimes CIL will exist in the absence of a treaty, sometimes treaties will exist in the absence of relevant CIL, and sometimes the two will overlap. Moreover, treaties will sometimes codify CIL, and at other times treaties will

---

29. Anthea Roberts, *Who Killed Article 38(1)(b)? A Reply to Bradley and Gulati,* 21 DUKE J. COMP. & INT'L L. 173, 173 (2010).

30. *Id.* at 176. For a similar suggestion, *see* Dino Kritsiotis, *On the Possibilities of and for Persistent Objection*, 21 DUKE J. COMP. & INT'L L. 121, 121 (2010).

31. *See, e.g.*, J.L. BRIERLY, THE LAW OF NATIONS 57-62 (6th ed. 1963) (discussing treaties and custom as separate sources of international law); 1 OPPENHEIM'S INTERNATIONAL LAW 24 (Robert Jennings & Arthur Watts eds., 9th ed. 1996) (describing treaties and custom as "the principal and regular sources of international law"); I.A. SHEARER, STARKE'S INTERNATIONAL LAW 27-28 (11th ed. 1994) (listing custom and treaties among the sources of international law).

influence the content of CIL. This landscape is much more complicated and nuanced than suggested by the safety net conception.

The structure of modern CIL formation, which advocates of the safety conception have not challenged, also seems inconsistent with this conception. The weight of commentary appears to accept a persistent objector doctrine, but that doctrine would make no sense if CIL is a safety net that no state should be able to exempt itself from. In addition, it is accepted that nations may eliminate CIL obligations as between themselves by entering into a treaty to that effect, but it is not clear why this would make sense if CIL were a minimum core that is needed in order for the international society to operate.

The foregoing inconsistency becomes more evident if one inquires into the possible rationale behind the safety net. Typically, legal safety nets, particularly those that provide for minimal standards in agreements, are designed to protect weaker parties against opportunistic overreaching by their stronger counterparts.[32] As we have explained, however, the current system of CIL actually seems structured in a way that favors stronger rather than weaker countries, and the Mandatory View may have been adopted for precisely that purpose.[33] In any event, the safety net rationale is undermined by the allowance under the Mandatory View of treaty overrides, a mechanism through which strong nations can bypass the purported CIL safety net by entering into individual treaties with weaker countries. These treaty override situations are where a safety net would be most warranted because the strong nation can take advantage of factors such as bargaining leverage, the ability to coerce leaders of the weaker nation, superior information, and greater legal sophistication, and yet we do not find any protection for the weaker country in this situation under the prevailing conception of CIL.

Finally, the safety net conception suggests a non-robust role for CIL, whereby it would regulate only certain minimum standards considered essential for the functioning of the international system. In *Withdrawing*, we acknowledged that it might be sensible for a core "constitutional law" of the international system to be treated as mandatory,[34] but this core is typically considered to be only a small portion of modern CIL. In fact, as

---

32. *See, e.g.*, Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALASKA L. REV. 73, 77-90 (2006).

33. *See* Bradley & Gulati, *supra* note 1, at 230.

34. *See id.* at 274.

Louis Henkin suggested, it might not even be proper to call it CIL.[35] It is unlikely that advocates of this safety net idea are willing to accept the non-robust role for CIL that it implies. Indeed, many modern arguments about the content of CIL (such as arguments about a CIL of human rights) depend on it operating in a manner that is broader and more comprehensive than treaties—in effect, the opposite of a safety net.

B. Analogy to Mandatory Domestic Public Law

Another way that CIL might be distinguished from treaties is to analogize to the distinction in domestic law between mandatory public law and contract law. The argument might go as follows: Treaties are voluntary and contractual, akin to contracts in a domestic legal system. CIL, by contrast, is more akin to mandatory domestic public law, such as criminal law. Although individuals can move in and out of contractual relationships, we would not expect them to be able to withdraw from the rules of mandatory domestic public law.[36] Thus, for example, individuals cannot unilaterally or through private contract opt out of domestic law prohibitions on murder, or prostitution, or tax liability. Thus, the argument goes, nations should not be able to opt out of CIL rules.

There are a number of problems with this analogy. Mandatory domestic public law emanates from a central sovereign that has authority to act on behalf of the community being regulated, whereas CIL is not developed in that way. Indeed, to the extent there have been modest developments towards having a central sovereign in the international community, they have all been accomplished by treaty, not through CIL, and yet withdrawal rights are still common in the treaty area.

The structure of CIL, as it is commonly described today, is also inconsistent with the analogy to mandatory domestic public law. For example, it is well accepted that nations can contract out of rules of CIL, as between themselves, by entering into treaties. Such contractual flexibility is not available, however, for mandatory domestic public law, because this law reflects a decision that private arrangements will undermine the public interest. In addition, most accounts of modern CIL assume that nations have a right to opt out of it before it develops by being a persistent objector. Again, mandatory domestic public law does not work in that fashion.

---

35. *See* LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 32 (1995) ("Such inter-state constitutional law is not 'customary law' in any meaningful sense relevant to an appreciation and understanding of the 'sources' of international law today.").

36. *See* Roberts, *supra* note 29, at 178.

Nor does the substance of CIL seem to match up with a mandatory domestic public law conception. Mandatory domestic public law covers particular subject areas, such as criminal law, and leaves many other issues to private ordering. As currently conceived, however, CIL covers all issues of potential inter-state interactions. Moreover, whereas criminal law is the paradigm example of mandatory domestic public law, it is rare for a breach of CIL to implicate international criminal responsibility. Instead, breaches almost always trigger (at most) a right to a private civil remedy, similar to a breach of contract remedy in a domestic legal system, and international adjudication of such claims is typically consensual. Furthermore, the substance of CIL today often overlaps with treaties that contain withdrawal clauses, and these clauses provide at least some evidence that nations do not view the subject matter of these treaties as analogous to mandatory domestic public law.

If anything, treaty law today looks much more analogous to domestic public law than to CIL. As we explained in *Withdrawing*, CIL has great difficulty regulating problems for which there are significant externalities or free rider problems, such as global warming.[37] As a result, international public regulation of such topics is generally accomplished either by treaty, or not at all. Nevertheless, we often find withdrawal clauses even in the most foundational public law treaties, such as in the Nuclear Non-Proliferation Treaty.

There is a small body of international law, which is sometimes described as a sub-category of CIL, for which the analogy to mandatory domestic public law seems like a closer fit. It is the body of law known as *jus cogens,* or "peremptory norms." For the small number of international law norms that are said to fall into this category, such as the prohibition on genocide, nations are not allowed to contract out of them, even between themselves, and there is no right of persistent objection.[38] Moreover, international criminal law has been centered around these norms. As we suggested in *Withdrawing*, therefore, *jus cogens* norms are probably a prime candidate for the Mandatory View.[39] The majority of CIL rules, however, do not fall within this category.

C. CIL as Social Contract

A third conception of CIL that might distinguish it from treaties is more philosophical, although it overlaps with the mandatory public law

37. *See* Bradley & Gulati, *supra* note 1, at 264.

38. *See* Mark W. Janis, *The Nature of Jus Cogens*, 3 CONN. J. INT'L L. 359, 359 (1988).

39. *See id*.

analogy discussed above. The idea is that whereas treaties stem from individual national consent, CIL represents a more communitarian social contract. Christiana Ochoa argues, for example, that "[b]y participating in CIL formation, each state places itself and its otherwise free exercise of sovereign will under the direction of the collective will."[40]

Social contract theory was historically developed to explain the authority exercised by sovereign governments over individuals. The most obvious problem with transposing this theory to the international setting is that there is no international sovereign. Ochoa refers to the "collective will," but this is a fiction. Moreover, the collective in this case includes authoritarian, repressive regimes, and there is no reason to think that democracies like the United States have given themselves over to the will of such regimes, or that it would be normatively desirable for them to do so.

In any event, to say that there is an implied social contract does not tell us the content of this contract. In particular, it does not explain why the implicit social contract is to disallow any exit from CIL rules. Classic international law commentators like Vattel subscribed to the social contract theory of the state, even though they also thought nations could sometimes withdraw from rules of CIL.[41] Ultimately, this claim of a social contract boils down to a normative claim that it would be undesirable to allow any exit rights, but those who have made the social contract claim have not explained why disallowing opt out rights would be normatively desirable.

Some of our respondents have suggested that a disallowance of unilateral withdrawal follows from principles of symmetry.[42] That is, they argue that there should be a presumption that rules for terminating law should mirror the rules for creating law.[43] Applying that presumption to CIL, they contend that because CIL is formed only through the practices and beliefs of many nations, a single nation should not have the right to

40. Christiana Ochoa, *Disintegrating Customary International Law: Reactions to Withdrawing from International Custom*, 21 DUKE J. COMP. & INT'L L. 157, 159 (2010); *see also* Roberts, *supra* note 29, at 178 (suggesting analogy between CIL and social contract theory).

41. *See, e.g.*, Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 922 (1991) ("Vattel explained the creation of the state as the product of an act of association, or social contract . . . ."); Andrew L. Strauss, *Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts,* 36 HARV. INT'L L.J. 373, 403 n.109 (1995) ("Vattel saw the state as primarily an act of association or social contract."); *see also* Matthew Lister, *The Legitimating Role of Consent in International Law* (July 8, 2010), *available at* http://www.law.upenn.edu/academics/institutes/ilp/intl_law_papers/Lister_LegitimatingRoleofConsent.pdf (defending withdrawal rights from the perspective of social contract theory).

42. *See* Ochoa, *supra* note 40, at 167-71. Roberts, *supra* note 29, at 188.

43. *See* Ochoa, *supra* note 40, at 169-70 (relying on John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 418 (2003)).

unilaterally withdraw from it. The issue, however, is not whether an individual nation should have the unilateral ability to *terminate* a rule of CIL. Rather, the issue is whether a nation should in some instances have the unilateral right to *withdraw* from the rule. Such a right would not offend any presumption of symmetry: just as under the persistent objector doctrine a nation can affirmatively opt out of a CIL rule before it forms, it would now have the ability to object and remove itself from the CIL rule after it is created. Similarly, for multilateral treaties, the issue is not whether an individual nation can terminate the treaty. Rather, the issue is whether, just as the nation can decide whether or not to join the treaty, it can decide later to remove itself from the treaty.

Finally, some of the respondents have argued that, even if CIL were more analogous to a private contract than to a social contract, the analogy would not support the allowance of exit rights because parties to a private contract never have the legal right to withdraw from the contract unilaterally without committing a breach.[44] In fact, many contractual relationships may be terminated unilaterally, at least with notice. Thus, for example, only "reasonable notification" is required for unilateral termination of an indefinite-duration commercial contract.[45] Similarly, individual employees typically have the right to withdraw unilaterally from an indefinite-duration employment contract (otherwise they would in effect be indentured servants). It is in fact difficult to think of any indefinite-duration contractual relationships that do not allow for unilateral withdrawal, and contract law in fact generally forbids, as a matter of public policy, obligations of indefinite duration. Even marriage, which can be viewed as a relational contract that is expected to last for the life of the parties, allows (under modern laws) for unilateral withdrawal through divorce.

III. IMPLEMENTATION OF A DEFAULT VIEW

In *Withdrawing*, we focused on the historical and functional case for allowing withdrawal rights and did not address issues of implementation. Understandably, therefore, a number of our respondents have raised questions about how the international system might move towards a Default View. This is a topic that deserves more consideration than we can give it here, but we nevertheless sketch out some preliminary thoughts in

44. *See* Ochoa, *supra* note 40, at 160-61; *see also* Trachtman, *supra* note 7, at 221 (suggesting that international law is analogous to domestic contract law and that this analogy supports the Mandatory View).

45. *See* U.C.C., § 2-309(3) (1977).

Section A. We then address specific concerns about implementation of withdrawal rights in Sections B and C.

A. Developing Secondary Rules for CIL

Ultimately, the implementation questions raised by our respondents concern how the secondary rules of CIL develop and change. There is little guidance on this issue in the CIL literature. Most literature on CIL appears to assume that the secondary rules of CIL creation and alteration have always been the way that they are now. We know from the historical analysis in *Withdrawing*, however, that that is not the case with respect to elements of the Mandatory View, including the persistent objector doctrine. More dramatically, the Mandatory View itself appears to have been a change from an earlier view under which there were exit rights for at least some rules of CIL. The secondary rules of CIL in fact continue to change—for example, with the rise of the "new CIL," as discussed above in Part I. Despite the fact that there have been these changes, there does not appear to be any clear understanding of, or even significant theorizing about, how this process of change works.

If we look specifically at the persistent objector doctrine, the secondary rule whose evolution we know the most about, it appears to owe both its origins and development largely to a discourse in academic treatises and journal articles (ironically, many of which were quite critical of the idea).[46] Roughly fifty years after the doctrine was first articulated by Humphrey Waldock, the evidence of state practice or *opinio juris* in support of the doctrine is still modest.[47] Nevertheless, it is now a well accepted doctrine. This example might suggest that secondary rules of CIL can be created via academic discourse, independent of any state practice or opinion. If so, then *Withdrawing* and the responsive commentary in this volume might themselves be part of the implementation process.

We should be clear that this technique of CIL creation is not what we are proposing. Even if academic opinion has had a significant influence on changes in the secondary rules of CIL, this influence raises normative considerations relating to accountability and representativeness.[48] It also creates a danger of undermining CIL by further divorcing it from the way in which the international system actually operates. That said, we do believe that academic debate can play a legitimate role in the process of

46. *See* Bradley & Gulati, *supra* note 1, at 235-39.

47. *See, e.g.*, Patrick Dumberrry, *Incoherent and Ineffective: The Concept of the Persistent Objector Doctrine Revisited,* 59 INT'L & COMP. L. Q. 779 (2010).

48. *See* McGinnis & Somin, *supra* note 13, at 1217-18.

secondary rule creation. Asking whether existing legal rules operate effectively and examining how they might be improved are standard topics in academic discourse, and this discourse can help develop the arguments for and against various approaches.

Increased academic attention to the topic can in turn lead to more governmental discussion and ultimately a shift in state practice and *opinio juris*. One potential vehicle for such a shift would be a codification project, under the auspices of an organization such as the International Law Commission. This is what happened with the secondary rules governing treaties. Efforts to achieve a codification of the rules began with an academic drafting project—the 1935 Harvard Law School research project on international law—which produced an extensive draft convention on the law of treaties and accompanying commentary.[49] Subsequently, starting in 1949, the International Law Commission engaged in a twenty-year drafting process that resulted in the Vienna Convention on the Law of Treaties. A number of leading international law scholars served as the rapporteurs in this drafting effort, and academics were heavily engaged in debating the proper contours of the proposed treaty. Ultimately, nations were able to agree on a wide-ranging treaty that addresses numerous issues relating to the formation, interpretation, and termination of treaties.[50] Over 110 nations are now parties to the Vienna Convention, and even the nations that have not ratified it (such as the United States) accept much of it as reflecting binding CIL.

This is just one possible avenue for change. A different model would be something like the Princeton Project on Universal Jurisdiction, in which a group of scholars and jurists from around the world composed a set of guidelines for the exercise of the CIL principle of universal jurisdiction.[51] Alternatively, instead of being part of a comprehensive law reform or codification package, change could also arise on an ad hoc basis stemming from state positions on particular issues of CIL. It bears repeating that the process for evolution and change in the secondary rules of CIL remains under-studied. If all that our article does is to prompt more attention to this

---

49. *See* Harvard Research in Int'l Law, *Draft Convention on Law of Treaties*, 29 AM. J. INT'L L. 653 (Supp. 1935); *see also* SHABTAI ROSENNE, THE LAW OF TREATIES 31-32 (1970) ("[I]t would not be an exaggeration to state that the Harvard draft constitutes the point of departure for all modern research into the law of treaties, including the work of the International Law Commission.").

50. The Vienna Convention reflects both codification of preexisting CIL and progressive development of new principles. *See* IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 12-13 (2d ed. 1984). Many of the secondary rules set forth in the Vienna Convention serve as defaults—that is, they apply unless altered by express agreement.

51. *See* PRINCETON UNIVERSITY PROGRAM IN LAW AND PUBLIC AFFAIRS, http://lapa.princeton.edu/publications.php (last visited October 3, 2010), for a description of this project.

issue, that itself will be a benefit. What we do know is that the secondary rules of CIL do and can change, and that academic discussion and debate can play a role in such change. Ultimately, change will likely depend on whether the relevant actors in the system become persuaded that modifications to CIL exit rights are beneficial. That issue is of course what much of the analysis in *Withdrawing* was focused on.

B. Transition Costs

A different set of objections to *Withdrawing* concerns transition costs. The basic argument is that, even assuming that the Default View is in theory superior to the status quo, the costs of moving to it might be too high and the benefits too small.

In *Withdrawing*, we considered in detail the costs associated with the Mandatory View and the benefits of allowing some unilateral exit from rules of CIL. We explained, for example, that an across-the-board denial of exit is likely to make CIL unduly sticky and inefficient and vulnerable to holdout problems. We also explained how a shift to the Default View would likely increase innovation and experimentation in the development of international law because the cost of developing new CIL rules would be lessened and states that invoked the exit option would have an incentive to articulate alternative rules. Furthermore, we explained how an exit option is likely to facilitate the enforcement of international law, both by making CIL rules clearer and by making violations of CIL rules (as opposed to withdrawals) a more reliable indicator of bad state behavior. Finally, we explained that, in light of the substantial overlap that exists today between the substantive content of CIL and treaties, a shift to a Default View would likely increase treatymaking, since nations would no longer need to worry that establishing a treaty would create CIL that would lack an exit option.[52]

Some of our respondents nevertheless suggest that the benefits of a shift to the Default View will be small. There are two versions of this "small benefits" argument. The first is that the Mandatory View, while the officially articulated position regarding CIL exit rights, is honored more in the breach. The claim is that the current system of CIL is so amorphous and uncertain that nations can stay within the system and still, via arguments about exceptions or what the relevant rule really requires, exit or alter rules that they dislike.[53] As a result, the argument goes, any benefits from a Default View are already being achieved through de facto exit mechanisms.

52. *See* Bradley & Gulati, *supra* note 1, at 245, 250, 259-60, 262-63.

53. *See, e.g.,* Estreicher, *supra* note 17, at 59; Lim & Elias, *supra* note 19, at 151-52; Swaine, *supra* note 22, at 215.

As we explained in *Withdrawing,* even if this de facto exit argument were correct, there are still benefits to shifting from a system of de facto exit to de jure exit.[54] Among other things, a system of de jure exit is more consonant with rule of law values than a system of de facto exit and thereby has the potential to enhance CIL's legitimacy. A de jure exit system would also enhance the availability of information because exits would be express and public, whereas nations are likely to attempt to conceal information in a system of de facto exits. More information in turn would make it easier for nations to make appropriate adjustments in their international relationships.

In any event, a system in which a nation's ability to exit is a function of it making arguments to manipulate the extant vague rule is unlikely to benefit all nations equally. As with any manipulable legal system, the higher the degree of manipulability, the bigger the advantage for those who have better lawyers and greater control over the legal institutions. They are not only better situated to create exit opportunities for themselves, but also to block the exit of their weaker counterparts. In effect, we end up with a system that operates as more of a default system for the rich and powerful nations and more of a mandatory system for the others. A formal shift to acknowledging the Default View would put the differently situated nations on more of an even footing.

Even for powerful nations, however, the vagueness and manipulability of CIL will not always provide a feasible exit mechanism. A nation attempting to persuade others of a previously unknown CIL rule or an exception to an existing CIL rule must still marshal evidence of state practice and *opinio juris*. While there is undoubtedly extensive room to argue about the implications of historical materials, the very vagueness and manipulability of the materials also allows others to contest these arguments, using the same kinds of techniques. Moreover, there remain limits to what can be found in historical evidence, and sometimes there simply will not be any such evidence to invoke in support of a new rule or an exception to the old rule.[55] In any event, as discussed below in Section C, powerful nations would derive benefits from a shift to the Default View even if their own exit ability were not enhanced.

---

54. *See* Bradley & Gulati, *supra* note 1, at 262.

55. The modern proponents of a doctrine of Odious Debts, which would expand the set of exceptions to the strict rule of governmental successor liability for state debts, found exactly that in their attempts to construct a historical case for their doctrine out of the writings of a Russian jurist, Alexander Sack. *See* Sarah Ludington & Mitu Gulati, *A Convenient Untruth, Fact and Fantasy in the Doctrine of Odious Debt*, 48 VA. J. INT'L L. 595 (2008); Sarah Ludington et al., *Applied Legal History: Demystifying the Doctrine of Odious Debt*, 11 THEORETICAL INQUIRIES L., 247, 249-50 (2010).

A different version of the small benefits argument infers from the fact that no one (apart from the two of us, and perhaps also Andrew Guzman) appears to be complaining about the current system that the current system cannot be all that bad.[56] This is a Chicago School-type efficient markets argument: if the current system were really inefficient, there would be more actors clamoring to alter it. The flaw in this argument is that, even if the Mandatory View were sub-optimal, there are a multitude of reasons why it might not be challenged. There is a literature on the stickiness of standards in the context of private contracts, and the basic question that is asked there is why sophisticated actors (including nations) often adhere to suboptimal standards even though the system as a whole would be better off with a shift to a new standard.[57] Among the reasons for this divergence between individual incentives and social incentives can be first-mover costs, loss aversion, status quo biases, network externalities, and negative signals.[58] Many of these same factors are likely relevant to the secondary rules of CIL.

In any event, developing countries have in fact long complained about aspects of the Mandatory View, as we discussed in *Withdrawing*.[59] While it is true that powerful Western countries have not explicitly challenged the Mandatory View, this is probably due in part to the fact that they have the resources to work around some of the inefficiencies that it creates. It is also unrealistic to expect foreign ministries, even in the most developed countries, to operate at the level of legal theory, as opposed to arguing about specific outcomes. While one should expect legal scholars to operate at this level, there has been a widespread assumption in the academy that the current mandatory system has always been in place, an assumption that makes it less likely that there will be challenges. One driving force for our writing *Withdrawing* was the finding that the Mandatory View might not have had the long historical pedigree that it is implicitly assumed to have, and that its adoption in the literature may have rested on normatively unattractive premises. Furthermore, as explained above in Part I, there is hardly contentment in the legal academy with the currently prevailing conception of CIL. Indeed, this conception is increasingly being challenged

---

56. *See* Roberts, *supra* note 29, at 188-89.

57. As Omri Ben-Shahar and John Pottow explain: "It is by now recognized that factors beyond drafting costs might also cause parties to stick with an undesirable default rule; *that is, parties might choose not to opt out of a legal default even when a better provision can easily be identified and articulated at a negligible drafting cost*." Omri Ben-Shahar & John A.E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651, 651 (2006) (emphasis added).

58. *See id.* at 652-60.

59. *See* Bradley & Gulati, *supra* note 1, at 230.

on a variety of fronts, and new questions are being raised about the role of CIL in a world of multilateral treatymaking.

A different cost-benefit critique of our proposal concerns the costs of shifting from the Mandatory View to the Default View. One version of this critique is that the transition process will involve a period of uncertainty during which some nations might act opportunistically—for example, by exiting when they ordinarily would not be permitted to do so even under a fully-developed Default View.[60] A second version is that misbehaving nations might take advantage of the period of uncertainty to shape the Default View in a fashion that allows them to act even more opportunistically in the future—perhaps by adopting a version of the Default View that does not contain the various limitations that we suggest.

In considering these arguments, it is important to bear in mind that the current system does not appear to be operating at a level of clarity and certainty. Moreover, as we have explained, the possibility of exit is likely to enhance clarity, since nations would have to explain what they were opting out of (and, likely, what they were opting into), and the threat of exit could also give nations additional incentives to create treaties to settle contested issues.[61]

Even assuming for the sake of argument that the process of shifting to a new standard would inject additional uncertainty into the system, the question to ask is which nations are likely to take advantage of this uncertainty to exit. The more powerful nations presumably are the most comfortable with the general corpus of existing CIL, since they have had predominant influence over its creation. Perhaps, however, our respondents are imagining a different set of nations, nations that are not influential within the international system and are looking for opportunities to exit their legal obligations so as to be able to impose externalities on neighbors or harm their own people. The question is not whether these rogue nations might misbehave—they presumably already do that under the current system. Rather, the issue is whether the possibility of formal exit from CIL rules will encourage additional misbehavior. As explained in *Withdrawing*, we think this is unlikely, since these actors are the least likely to want to articulate their position and absorb the reputational and reciprocity consequences associated with that position.[62]

Another concern expressed by some of our respondents is that the type of Default View that finally gets adopted will not be the one with the

---

60. *See* Roberts, *supra* note 29, at 185.

61. *See* Bradley & Gulati, *supra* note 1, at 271-72.

62. *See id.* at 260-61.

various limitations that we have suggested, such as notice requirements to protect reliance interests, and restrictions on exit for CIL rules addressing significant agency and externality problems. This concern, however, suggests that the actors with the most influence on the development of the CIL system will favor unrestricted exit rights, which seems highly unlikely. If anything, the richer and more powerful nations, which will have the most influence on any shift of the CIL system, are more concerned about reliance interests, externalities, and agency problems than their less developed brethren. Moreover, as CIL has changed in the past, it has developed limitations to restrain state misbehavior, and there is no reason to think that this will not be true of future changes to CIL, including potentially a shift to the Default View.

The possible limitations we discussed in *Withdrawing* would likely address many of the concerns that have been expressed about the costs of implementation. One of our respondents expresses the concern, for example, that an opt out right from CIL could destabilize existing treaties because nations might claim new CIL interpretive views vis-à-vis the treaties they previously entered into (for example, about whether treaties are binding on sub-national governments).[63] It is likely, however, that an adjudicator would hold the parties to their mutual understanding *at the time of ratification*, not after the fact. Consistent with that idea, the Default View that we have proposed (and which was articulated by a number of nineteenth century commentators) would operate only prospectively. In any event, states will have a strong incentive *not* to withdraw from the usual rules of CIL of treaty interpretation, even prospectively, because doing so would raise the cost of entering into new treaties.

C. Feasibility

The next set of objections concerns feasibility or practicality. Even if the Default View is superior to the Mandatory View, it is claimed, certain structural features of the current system will render a shift infeasible. The first objection is that even if it is clear that the Default View is superior to the Mandatory View, powerful nations within the system have incentives to block such a move.[64] The second objection is that the creation process for CIL is so amorphous that it does not lend itself to tailored exit rules for different types of CIL.[65]

---

63. Brewster, *supra* note 5, at 50-51.
64. Estreicher, *supra* note 17, at 58-59.
65. *Id.* at 59.

The most potent objection against the Default View is a pragmatic one concerning incentives. If the Mandatory View benefits the strong states more than the weaker states (or at least disadvantages them less), as it probably does, then efforts to shift to a Default View may be doomed to failure. What little we know about the processes by which international standards and norms shift suggests that certain key states—often big players with the most at stake—need to take the lead in inducing the shift.[66] To be sure, powerful states should have an incentive to take the lead in improving the CIL system, since they typically have the largest number of interstate relationships and therefore the most to gain from improvements in the legal system that governs those relationships. But in a suboptimal system that allows the powerful states to derive excess gains from opportunistic behavior at the expense of the smaller and weaker states, these powerful states may decide not to invest resources in producing a shift toward a better standard. In the worst case scenario, the powerful states may even use resources to block any attempted shift by the other nations.

While this is a significant objection, it probably had more validity when CIL was inductively derived from longstanding state practice, because powerful states have greater opportunity to create and influence this practice. As we discussed in *Withdrawing,* however, there have been increasing efforts to base CIL on the declarations of international bodies, where the weaker countries have more voice, and on treaties that might not have been ratified by all the powerful nations.[67] These changes in the way that CIL is understood, which are still very much in a state of flux, may mean that powerful nations will increasingly have more to gain from a shift in approach to CIL, or at least that these nations may have less reason to resist a shift.

In any event, we acknowledge that it may be difficult to move to a better system if we simply wait for the current system to evolve over time. From a Coasean bargaining perspective, though, this is a familiar problem. When the total social gains from a shift to a new system are significant and positive, the solution is to find a mechanism that will reduce transaction costs and enable the different sides to come together to figure out a new way to share the gains from an improved system (since, left to their own devices, they may not evolve towards this new system). Once again, the

66. *See, e.g.,* Stephen J. Choi & Mitu Gulati, *Innovation in Boilerplate Contracts*, 53 EMORY L.J. 929 (2004) (describing Mexico's leadership in leading a shift in international contractual standards); Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INDUS. ORG. 887, 901 (1998).

67. *See* Bradley & Gulati, *supra* note 1, at 213.

treaty analogy can help here. A treatymaking process similar to the one that was used to address secondary rules relating to treaties (which resulted in the Vienna Convention on the Law of Treaties) could be used to address the secondary rules of CIL, including withdrawal rights. This process would both help solve the coordination and bargaining problems, and also go a long way towards reducing any negative signal that might be associated with an effort to relax the Mandatory View.

A different pragmatic objection is that the structure of CIL simply does not allow for the kind of tailoring of CIL exit rules that we suggest at the conclusion of *Withdrawing*.[68] In other words, it is not clear how the vague evolutionary process of CIL generation can produce exit rules that discriminate between those situations in which the Mandatory View is appropriate and those situations in which the Default View is appropriate.

This argument appears to be overstated in that current CIL theory already has some variation in exit rights—most notably between ordinary CIL, which allows for persistent objection and treaty override, and *jus cogens* norms, which do not.[69] In addition, other areas of CIL have developed variegated limitations on state behavior that are thought to be meaningful, including limitations on rights of exit. Consider, for example, the CIL of countermeasures. Under certain circumstances, states are permitted to take measures that would otherwise violate international law as a countermeasure in response to another state's breach.[70] In other words, the law of countermeasures allows states to temporarily exit from their international obligations vis-à-vis particular breaching states. There are restrictions, however, on this exit right. For example, as a matter of CIL, countermeasures are not allowed if they would violate international restrictions on the use or threat of force or if they would undermine fundamental human rights protections, and they must be proportional to the injury suffered.[71] If CIL can develop restrictions like these, it is not clear why it cannot develop similar restrictions on exit rights under a Default View of CIL.

---

68. *See, e.g.*, Trachtman, *supra* note 7.

69. *See, e.g.,* Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291, 298-301 (2006); Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Jus Cogens* 34 YALE J. INT'L L. 331, 336-37 (2009).

70. *See* INTERNATIONAL LAW COMMISSION, ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, arts. 4-11 (James Crawford, ed., Cambridge Univ. Press 2002).

71. *See id.* at arts. 50, 51. Other areas of CIL similarly have uncodified limitations designed to ensure that nations act reasonably. For example, the CIL governing the use of defensive military force requires that the use of force be both necessary and proportional.

In any event, it is possible that not much tailoring would be needed in order to move to a Default View. There could be a regime, for example, in which exit would be allowed unless it would undermine reliance interests or impose substantial externalities.[72] Alternatively, given the substantial overlap that now exists between CIL and treaties, one could imagine CIL exit rights that would largely track the exit rights under the corresponding treaties.[73] Reasonableness requirements that are thought already to exist under CIL could also play a useful role.[74]

IV. WILL IT MAKE A DIFFERENCE?

A final objection to our project is that allowing for withdrawal rights under CIL will make no difference in state behavior and thus is not worth even a modest cost of transition. Even if nations formally have a right to exit from CIL rules, the argument goes, they will not utilize this right and will instead do what they already do: argue about the content of CIL, engage in surreptitious violations, and the like.[75] Commentators who raise this objection point to the experience with the persistent objector doctrine, which is almost never invoked.[76] They also note that withdrawing from a rule of CIL will be costly for a state because it requires a public acknowledgement that the state is an outlier.[77]

The underutilization argument is in obvious tension with arguments by some of our other respondents, who fear that a shift to the Default View will be too effective and thus will create uncertainty and opportunism and prompt an excessive number of withdrawals from CIL rules.[78] In any event, the lack of use of the persistent objector doctrine is likely explained by structural features that would not exist for subsequent exit rights. Moreover, experience with a variety of exit rights under treaties suggests that, although nations are not likely to invoke CIL exit rights with great

---

72. Trachtman appears to agree with us that exit rights would be appropriate in the absence of reliance or externality problems, although he questions whether international law is needed in those situations. *See* Trachtman, *supra* note 7, at 231.

73. *See* Laurence R. Helfer, *Exiting Custom: Analogies to Treaty Withdrawals*, 21 DUKE J. COMP. & INT'L L. 65 (2010).

74. *See, e.g.*, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 420 (Nov. 26) (disallowing withdrawal from jurisdiction because notice was given only a few days before the case was brought).

75. *See* Estreicher, *supra* note 17, at 61-62.

76. *Id.* at 61 (citing sources making this point); *see also* Dumberry, *supra* note 9, at 381 (noting that "there is no actual state practice supporting" the persistent objector doctrine).

77. *See* Estreicher, *supra* note 17; *see also* Dumberry, *supra* note 9, at 388 (making the point that the persistent objector doctrine is not used very often because its use would show a "state's isolation from the rest of the international community").

78. *See* Ochoa, *supra* note 40; Roberts, *supra* note 29.

frequency, there will be situations in which they will find that the benefits of doing so will outweigh the costs. In addition, there are a number of reasons to believe that an increased availability of exit from CIL will improve the quality of CIL and help revitalize this body of international law.

A. Persistent Objector Doctrine

While it is true that nations have made little use of the persistent objector doctrine, this is probably due to several structural limitations that are built into the doctrine. First, to successfully invoke the doctrine, a nation must object to the CIL rule before it forms. The process of CIL formation is highly uncertain, however, so a nation is unlikely to know precisely when a custom has evolved into a binding norm. Moreover, a nation might not have any interest in the issue covered by the CIL rule until after a binding norm is formed, and yet by that point, according to the Mandatory View, it is too late to object. Second, a nation must repeatedly and prominently object to the rule on the international stage.[79] This means that, instead of engaging in quiet diplomacy, the nation must self-consciously generate a substantial amount of friction with the nations that are seeking to solidify the custom, and this friction is likely to be costly in terms of possible retaliation and loss of opportunities for cooperation. Third, given the inevitable uncertainty over whether a particular CIL rule has formed, a nation that does not wish to be bound by such a rule might not wish to object to it, let alone do so repeatedly and prominently, for fear that such objections will be used by others as evidence that the rule already exists, which, in turn, could produce the argument that the objecting nation is bound.

These structural limitations are all removed under the Default View. A nation would not need to know precisely when the CIL rule had formed, since it could opt out, with adequate notice, even after the rule formed. Nor would there be a requirement of repeated and continued objection. A single clear objection would suffice, diminishing the amount of friction that has to be created. And a nation desiring exit would not need to be concerned that by announcing its desire to exit, it was inadvertently helping to create a rule that others might then argue that it was restricted from leaving.

One might still ask why a nation would invoke subsequent opt out rights when doing so reveals that this nation is an outlier on a particular issue. While providing this information can entail a cost, such a cost is likely to be lower in at least some instances than the cost of either violating

---

79. MARK VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 14 (1985).

the CIL rule or continuing to acquiesce in it. For example, if a nation is relatively weak and violations of the rule are easily detected, exit from a suboptimal CIL rule may be a more attractive option than a breach.[80] Moreover, the cost of being an outlier will vary depending on the particular issue area and the extent to which the nation has a reputation for opportunism. A nation can also take a variety of steps to reduce the reputational cost of exit, such as enacting domestic legislation that ties its hands in a way that demonstrates that it is not exiting for opportunistic reasons, or proposing and unilaterally following a superior alternative to the CIL rule. That is one reason, as we explained in *Withdrawing,* why "good" states are more likely to use the exit option than "bad" states.[81]

Importantly, experience with a variety of exit rights under treaties shows that states often provide this sort of outlier information even when it might seem contrary to their interests to do so. Nations have invoked treaty withdrawal clauses in an appreciable number of instances, even though such invocation is a highly public act.[82] They also have frequently invoked derogation clauses in human rights treaties, even though this requires providing information about their deviations and exposing themselves to scrutiny and criticism.[83] Similarly, nations often have attached reservations to their ratification of treaties, even though this, too, has an information-forcing effect.[84]

---

80. A possible example would be exit from the CIL rule of strict governmental succession to debt obligations, including debts that are "odious." *Cf.* Ludington et al., *supra* note 55. To avoid reliance problems, a nation would presumably need to announce the exit prior to incurring the debt obligation. In that situation, creditors, recognizing a new risk, would likely demand that the borrower provide credible assurances that it was not incurring odious debt. A "good" government might be able to provide such assurances by harnessing external monitors—either international organizations such as the World Bank or the IMF, or NGOs like Transparency International—which could certify the character of the government and its use of proceeds. In effect, the opt-out mechanism might allow the governments of countries that previously had weak democratic institutions to both credibly signal their intentions to behave well and to harness external forces to police those intentions. For discussion of how ex ante or continuing certification might work, see, for example, Seema Jayachandran & Michael Kremer, *Odious Debt*, 96 AM. ECON. REV. 82 (2006), and Omri Ben-Shahar & Mitu Gulati, *Partially Odious Debts*, 70 LAW & CONTEMP. PROBS. 47, 73-75 (2007).

81. *See* Bradley & Gulati, *supra* note 1, at 260. Allowing lawful exit as an alternative to surreptitious violation may also increase the likelihood that nations will be socialized towards law compliance. *Cf.* Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 667-69 (2004) (discussing this possibility in connection with derogation clauses in human rights treaties).

82. *See* Helfer, *supra* note 73, at 69-70.

83. *See* Emile Hafner-Burton, Laurence R. Helfer, and Christopher J. Fariss, *Emergency and Escape: Explaining Why States Derogate from Human Rights Treaties During National Emergencies*, http://papers.ssrn.com/sol3/papers.cfm?abstract _id=1622732.

84. *See* Edward T. Swaine, *Reserving*, 31 YALE J. INT'L L. 307, 335-38 (2006).

B. Revitalizing CIL

Not only will subsequent opt out rights be used more often than the persistent objector doctrine, such rights will also better serve one of the central purposes of the persistent objector doctrine. As explained in *Withdrawing*, the persistent objector doctrine was adopted in part to facilitate the creation of CIL.[85] There had been a concern in the post-World War II era that CIL rules might not be able to develop if one or a small number of nations objected. The persistent objector doctrine was viewed as helping the international system avoid this veto problem, by allowing CIL to develop in the face of objection.[86] Because of the way it is structured, however, the persistent objector doctrine is almost a nullity in international law.

As Estreicher notes, allowing subsequent opt out rights, by contrast, is likely to facilitate the creation of CIL.[87] Such opt out rights provide nations with a form of insurance, in case they find after supporting a rule of CIL that it does not serve their interests.[88] This insurance is likely to make nations more willing to support new developments in CIL. This helps explain why withdrawal clauses are so common in treaties—they facilitate treatymaking by providing a form of insurance. To take one example, consider efforts to abolish the death penalty through CIL. Nations that are uncertain about whether it is in their interest to shift away from the current CIL rule allowing capital punishment may not want to support a change in this rule of CIL because, once the new CIL rule forms, they will be unable to exit from it. Such a nation might reasonably be concerned that if their public later demanded the death penalty, or they came to the conclusion that they needed it for criminal deterrence, their options would be unduly restricted. If they knew in advance that they could later withdraw from the CIL rule, however, these concerns would be reduced, making them more likely to support the change in the CIL rule. Implicitly, the United Nations has recognized this possibility when it has supported resolutions calling on nations to adhere to a moratorium on the death penalty, a step that would be

---

85. Bradley & Gulati, *supra* note 1, at 233.

86. *Id.*

87. Estreicher views this potential increase in the volume of CIL as a flaw in the Default View, but his concern appears to reflect some general hostility to CIL. By contrast, we see the Default View as a means of revitalizing CIL, a source of international law that has increasingly become the subject of criticism for its incoherence, inefficiency, and lack of utility for addressing modern problems.

88. *See, e.g.*, Timothy Meyer, *Power, Exit Costs, and Renegotiation in International Law* at 8 (Oct. 2009) (draft), http://works.bepress.com/cgi/viewcontent.cgi?article=1006&context=timothy_meyer; Laurence R. Helfer, *Exiting Treaties,* 91 VA. L. REV. 1579, 1599-1601 (2005); Alan O. Sykes, *Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations*, 58 U. CHI. L. REV. 255 (1991).

reversible if a nation later decided to re-impose that form of punishment.[89] It is only the Mandatory View that seems oblivious to the ex ante effects of disallowing withdrawal.

Allowing subsequent exit rights will also likely improve the quality of CIL. As we explained in *Withdrawing*, the option to exit can serve as an effective signaling device for nations seeking to communicate with each other about the need to reform existing laws.[90] By contrast, the current system under the Mandatory View does not provide for effective signaling. Signals work best when they can send a clear and reliable message about some underlying complex reality and they are credible in that they would be too costly to send if the underlying message was not real.[91] As Estreicher notes, however, the current system facilitates a body of vague and amorphous CIL that allows nations to purport to stay within the system (that is, face little risk of being called a law violator) while arguing about what the CIL rule really requires.[92] In such a system, nations engage in a form of cheap talk, or what Estreicher calls "law-speak." Cheap talk is a form of communication, but not a very effective type because the talk is neither clear nor credible.

The Default View also has the potential to improve the substantive content of CIL rules. Under the Default View, a nation would have the opportunity to evaluate the operation of the rule for some period of time before deciding whether to continue to be bound by the rule or whether to exit and perhaps propose an alternative rule. This possibility of opting out after the rule has formed will increase the opportunities for exit, thereby increasing the utilization rate of the exit option under the Default View. As Guzman recognizes in his proposal to reform the persistent objector doctrine, many nations might not have a significant interest in a CIL rule when it is forming, but may develop such an interest later.[93] Under the Default view, these nations, which previously had little ability to object to a

---

89. *See* Press Release, General Assembly, General Assembly Adopts Landmark Text Calling for Moratorium on Death Penalty, U.N. Press Release GA/10678 (Dec. 18, 2007).

90. *See* Bradley & Gulati, *supra* note 1, at 260; *see also* Meyer, *supra* note 88, at 17 (making the point, in the treaty exit context, that the use of the exit option can send a credible signal that the exiting nation is serious about the need to renegotiate the existing regime).

91. On the question of what kinds of communications work as effective signals, *see* Patrick Shin & Mitu Gulati, *Showcasing Diversity*, 89 N.C. L. REV. (forthcoming 2011). For a general discussion of signaling, *see* ERIC A. POSNER, LAW AND SOCIAL NORMS 18-27 (2000).

92. *See* Estreicher, *supra* note 17, at 59.

93. Recognizing this limitation in the persistent objector doctrine, Guzman has suggested that nations should be allowed to exit from CIL rules after they form. However, his proposal would allow exit only when the nation first develops an interest in the issue. The problem with this approach is that it does not allow for the possibility that the interests of nations can change beyond the initial development of an interest. *See* Guzman, *supra* note 14, at 169-71.

rule, will now be able to do so. Further, because nations will likely exit at the points in time when their interests are implicated (as opposed to when the law forms), the quality of their reasons for exiting will be higher. That, in turn, should help produce higher quality alternative rules for nations to exit to. To be sure, allowing exit rights would not eliminate all of the conceptual and practical difficulties associated with modern CIL, but it would at least create the possibility of incremental improvement to this important body of international law.

V. FURTHER RESEARCH

Our respondents raise a number of good questions with respect to the arguments in *Withdrawing*. Where possible, we have attempted to answer those questions. Nevertheless, there remain a variety of gaps in our knowledge, and any effort to improve the secondary rules of CIL would benefit from additional research that addresses those gaps. In this final section, we identify some of the potential research projects that could advance our understanding of exit from CIL.

First, while we believe we have come close to estimating when the shift to the Mandatory View occurred in the literature, we still have not pinpointed this development precisely. If this could be done, it might improve our analysis of why the shift occurred. We hypothesized that the shift to the Mandatory View had to do with the changing balance in power between the Western powers and the newly independent states. However, the historical evidence we cited in support of this hypothesis in *Withdrawing* was limited.

Second, our unearthing of an original Default View for at least some rules of CIL is largely derived from the writings of scholars such as Vattel.[94] We have relatively little concrete evidence of state practice at the time, let alone its evolution over time.[95] Similarly, we have relatively little information concerning modern state practice under the Mandatory View. Among other things, it would be useful to know whether and to what extent there has been a disjunction over the years between the actual practices of nations with respect to exit and the articulations of the Default or Mandatory views in the treatises.

Third, even our review of the scholarly record only scratched the surface. Most of the scholarly writing we considered after the eighteenth century was from the United States and Great Britain, and it would be

94. *See* Swaine, *supra* note 22.

95. The need for more evidence of actual state practice is emphasized by Lim & Elias, *supra* note 19.

useful to know more about the views of continental European scholars about exit rights under CIL. It would also be useful to understand in more detail the connections between the "voluntarist" school of international law, which was popular in the early to mid-twentieth century, and both the Default and Mandatory Views.[96]

Fourth, although we explored in detail the development of the persistent objector doctrine, we did not study other developments in CIL doctrine in the twentieth century, such as the increased emphasis on the *opinio juris* requirement and the *jus cogens* category. It is quite possible that a study of these and other modern developments would yield additional insights about the shift from the Default View to the Mandatory View and about how the Mandatory View has operated in practice.

Fifth, while Larry Helfer's work on exit rights under treaties has been an invaluable source of insights,[97] more work in that area is needed. As mentioned in *Withdrawing*, we know relatively little about the design and use of exit clauses in different types of treaties and how patterns may have evolved over time.[98] We also know little about the conditions under which exit rights are invoked and the characteristics of the nations involved. It would be useful to have this empirical information in thinking about how to design exit rights under CIL.

Finally, although we considered a variety of theoretical arguments relating to the efficiency of CIL under the Mandatory View, we did not analyze the efficiency of specific CIL rules.[99] We believe our assumptions about how CIL works are reasonable for purposes of the arguments we make, but it would be useful to have a detailed analysis of CIL in at least a handful of areas that considers whether the relevant customary rules in those areas work optimally. The area of environmental law, for example, strikes us particularly likely to yield insights, given that the external conditions have changed so rapidly in that area. It would also be useful to study whether inefficient CIL rules are indeed sticky, as we suggest they are likely to be.

CONCLUSION

The Mandatory View of CIL, by disallowing unilateral exit under all circumstances, stands in stark contrast to the approach that nations have

---

96. *See* Bradley & Gulati, *supra* note 1, at 228.

97. *See* Helfer, *supra* note 88.

98. For some helpful recent work relating to the design of exit clauses, see Barbara Koremenos & Allison Nau, *Exit, No Exit*, 21 DUKE J. COMP. & INT'L L. 81 (2010).

99. *See* Brewster, *supra* note 5.

followed when negotiating treaties, even though CIL and treaties frequently overlap and treaties are often the principal evidence cited in support of CIL. The categorical disallowance of exit under the Mandatory View is also anomalous when considered from the perspective of scholarship on exit rights in areas such as contract law, constitutional design, and voting rights. Despite these anomalies, the international law academy has taken the Mandatory View for granted, perhaps because of a mistaken historical assumption that unilateral exit has always been disallowed for CIL. This is a particularly appropriate time for a reexamination of the Mandatory View, as CIL has come under increasing challenge on a variety of fronts and multilateral treatymaking has displaced some of the traditional functions of CIL. We hope to have contributed to that reexamination both in our initial article and in this symposium.