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A State Preferences Account of Customary International Law Adjudication

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The standard account today of customary international law (CIL) is that it arises from the widespread and consistent practice of states followed out of a sense of legal obligation. Although commonly recited, this account is plagued by evidentiary, normative, and conceptual difficulties, and it has been subjected to increasing criticism in recent years. This paper posits a different account of CIL, considered from the perspective of international adjudication. The application of CIL by an international adjudicator is best understood, this paper contends, as an effort to determine the preferences of the relevant community of states concerning the norms that should apply in the absence of a controlling treaty. Unlike the standard view of CIL, this state preferences account recognizes an element of judgment and creativity in determining the content of CIL, somewhat akin to the judicial development of Anglo-American common law. Understanding the adjudication of CIL in this way, the paper contends, avoids many of the difficulties surrounding the standard account of CIL.

Problems with the Standard Account of CIL

The generally accepted view among international lawyers and scholars today is that CIL consists of the widespread and consistent practices of states that are followed out of a

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sense of legal obligation,¹ an account that this paper will refer to as the “standard view.” Under this standard view, CIL is conceived of as having two components: an objective, state practice component, and a subjective, sense of legal obligation component. The second component is sometimes referred to by the Latin phrase *opinio juris sive necessitatis*, which translates as “a belief that something is required by law or necessity,” although commentators and courts often shorten the phrase simply to “*opinio juris*.” This account of CIL has been endorsed by international tribunals, including the International Court of Justice,² and it is often recited by representatives of states.³

Despite its general acceptance, the standard view of CIL suffers from a variety of difficulties. Some of these difficulties are evidentiary. While it is accepted that one must show state practice and *opinio juris* to establish a rule of CIL, there is no consensus about what evidence establishes either of these two elements. It is not clear, for example, how much state practice is required, or how longstanding it needs to be. Nor is it clear how the beliefs of nation-states about the content of CIL are to be determined when, as is often the case, the states fail to articulate a position. In addition, although adjudicators frequently point to treaties as evidence of CIL, the extent to which treaties constitute valid evidence of CIL is mysterious and controversial.⁴

¹ See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987); SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 92-93 (2d ed. 2012); 1 OPPENHEIM’S INTERNATIONAL LAW (Robert Jennings & Arthur Watts eds., 9th ed. 1996).

² See, e.g., Jurisdictional Immunities of the State (Germany v. Italy) ¶ 55 (ICJ Feb. 3, 2012) (Judgment); North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark), 1969 I.C.J. Rep. 3, 44 (ICJ Feb. 20, 1969) (Judgment).

³ See Michael Wood, Special Rapporteur, International Law Commission, *Second Report on Identification of Customary International Law* 9-11 (May 2014), at [http://legal.un.org/ilc/sessions/66/a_cn4_672\(advance\).pdf](http://legal.un.org/ilc/sessions/66/a_cn4_672(advance).pdf).

⁴ See Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 213 (2010); see also Curtis A. Bradley & Mitu Gulati, *Customary International Law and Withdrawal Rights in an Age of Treaties*, 21 DUKE J. COMP. & INT’L L. 1 (2010).

Other difficulties are practical. There are over 190 nations in the world today, and, for many issues, it is challenging, if not impossible, for interpreters to determine the practices and beliefs of these nations. Sometimes this is because language and other barriers make it difficult to access the relevant materials. More often, it is because there simply is no relevant evidence in most of the countries. Even though the standard conception of CIL purports to require widespread and consistent state practice, for contested issues there is often little state practice directly on point, and what practice there is arises from a small number of states.⁵ Indeed, actions by states often become points of controversy precisely because they involve new situations not specifically covered by past practice, and yet the standard conception of CIL seems to have little to offer in that scenario.⁶

These practical difficulties may in turn help explain an empirical difficulty. While adjudicatory institutions often recite the standard conception of CIL, they do not actually seem to follow it. The ICJ, for example, often cites relatively little state practice in support of its claims about the content of CIL.⁷ International criminal tribunals, too, seem to find rules of CIL through means other than the standard account.⁸ And the decisions of these

⁵ Even in *Germany v. Italy*, which had an unusually extensive discussion of state practice, the ICJ looked to legislation in only ten states and judicial decisions from only about a dozen states.

⁶ For similar observations, see, for example, DANIEL BODANSKY, *THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW* 198 (2010) (“[A]lthough writers claim to the traditional account of customary international law, they do not base their assertions about customary international law on systematic surveys of state practice.”), and Niels Peterson, *Customary Law Without Custom?: Rules, Principles, and the Role of State Practice in International Norm Creation*, 23 *AM. U. INT’L L. REV.* 275, 277 (2008) (“[A] survey of customary international law is often highly selective and takes into account only major powers and the most affected states.”).

⁷ See, e.g., Jonathan I. Charney, *Universal International Law*, 83 *AM. J. INT’L L.* 529, 537 (1993) (noting that 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”); Richard H. Geiger, *Customary International Law in the Jurisprudence of the International Court of Justice: A Critical Appraisal*, in *FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF BRUNO SIMMA* 673, 692 (Ulrich Fastenrath et al. eds., 2011) (“In general the [ICJ] does not follow its self-proclaimed method of finding customary international law.”).

⁸ See, e.g., William Schabas, *Customary Law or “Judge Made” Law: Judicial Creativity at the UN Criminal Tribunals*, in *THE LEGAL REGIME OF THE INTERNATIONAL CRIMINAL COURT* 100 (Jose Doria et al. eds., 2009) (“[O]verall, customary international law [as applied by the international criminal tribunals] mainly

international adjudicatory institutions are in turn cited as themselves evidence of the content of CIL.⁹

There are also serious and growing questions about the usefulness of CIL. CIL seems structurally unable to address many of the world's most pressing issues, such as (to name a few examples) climate change, international financial stability, nuclear proliferation, and terrorism. For problems like these, a requirement that a substantial number of nations already act in accordance with the desired norm, out of a sense that such behavior is legally required, seems to require the impossible.¹⁰ Relatedly, 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 advantages over CIL, in that they provide more direct evidence of what states want (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. In addition to multilateral treaties, nations are also increasingly resorting to the creation of “soft law”—that is, non-binding international agreements. As with treaties, but unlike with CIL, soft law agreements are typically committed to writing and involve express negotiation. The possible result of these

seems to provide a convenient license for judicial law-making, a process similar in many respects to the creation of judge-made rules of the English common law.”).

⁹ See Roozbeh (Rudy) B. Baker, *Customary International Law in the 21st Century: Old Challenges and New Debates*, 21 EUR. J. INT'L L. 173 (2010).

¹⁰ These issues may also require a level of specificity and administrative structure that CIL cannot provide. For an observation along these lines a half-century ago, see WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 122 (1964) (“[C]ustom is an unsuitable vehicle for international ‘welfare’ or ‘co-operative’ law. The latter demands positive regulation of economic, social, cultural, and administrative matters, a regulation that can only be effective by specific formulation and enactment.”).

developments, as Joel Trachtman has observed, may be the “increasing marginalization of custom.”¹¹

Finally, there are conceptual difficulties with the standard conception of CIL. Many of these difficulties relate to the concept of *opinio juris*. As Professor Hugh Thirlway memorably noted:

The precise definition of the *opinio juris*, the psychological element in the formation of custom, the philosophers’ stone which transmutes the inert mass of accumulated usage into the gold of binding legal rules, has probably caused more academic controversy than all the actual contested claims made by States on the basis of alleged custom, put together.¹²

Some scholars question whether it is even possible to find *opinio juris* in the pure sense that seems to be contemplated by the standard view.¹³

A related conceptual problem is that, even though one of the purported virtues of CIL is that it can evolve in response to changing circumstances, the standard view does not seem well structured to allow for such evolution. The principal account of how it occurs is that individual nations are supposed to violate rules of CIL and then hope that other nations will acquiesce in the violation.¹⁴ Since the violating state by definition would not be acting

¹¹ Joel P. Trachtman, *Persistent Objectors, Cooperation, and the Utility of Customary International Law*, 21 DUKE J. COMP. & INT’L L. 221, 232 (2010); see also Joel P. Trachtman, *Reports of the Death of Treaty Are Premature, but Customary International Law May Have Outlived Its Usefulness*, AJIL UNBOUND (Apr. 29, 2014) (“CIL is increasingly ill-fitted to respond to the needs for [an] international law of cooperation.”), at <http://www.asil.org/blogs/reports-death-treaty-are-premature-customary-international-law-may-have-outlived>.

¹² H.W.A. THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION 47 (1972); see also, e.g., Jorg Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems*, 15 EUR. J. INT’L L. 523, 532 (2004) (“[*Opinio Juris*] is the most disputed, least comprehended component of the workings of customary international law.”).

¹³ See, e.g., J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT’L L. 449, 475 (2000) (“[T]here is no methodology that has the capacity to determine whether states have, in fact, accepted a norm as law.”).

¹⁴ See, e.g., Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT’L L. 1, 21 (1985) (“Nations forge new law by breaking existing law, thereby leading the way for other nations to follow.”); Anthony D’Amato, *The President and International*

with *opinio juris*,¹⁵ this account appears to require a sufficiently large number of violations to cause the CIL rule to collapse due to lack of supportive state practice.¹⁶ Even assuming this is realistic, however, basing a central feature of a legal regime on widespread violations of the law is normatively questionable.¹⁷

These difficulties have made CIL ripe for criticism and rethinking. Some commentators have questioned CIL's continued usefulness and legitimacy.¹⁸ Others have criticized CIL for being insufficiently consensual and, relatedly, undemocratic.¹⁹ Still others have argued that CIL is structured in such a way that it is unlikely to produce efficient rules for the international system.²⁰ As Andrew Guzman has observed, CIL is "under attack from all sides."²¹

These criticisms have prompted various efforts to reconceptualize CIL in a manner that would put it on a sounder footing. Some scholars have suggested a focus primarily on

Law: A Missing Dimension, 81 AM. J. INT'L L. 375, 377 (1987) ("Existing customary law, then, contains the seeds of its own violation; otherwise it could never change itself."); Michael J. Glennon, *How International Rules Die*, 93 GEO. L.J. 939, 957 (2005) ("[C]ustomary international law is thought to be altered by acts that initially constitute violations of old rules; that is how it changes.").

¹⁵ See Committee on the Formation of Customary (General) International Law, International Law Association, Statement of Principles Applicable to the Formation of General Customary International Law 33 (2000) [hereinafter ILA Report] ("[I]t is hard to see how a State, if properly advised, could entertain the belief that its conduct is permitted (or required) by existing law when that conduct is, by definition, a departure from it.").

¹⁶ See Kammerhofer, *supra* note 12, at 530-31.

¹⁷ See, e.g., G.J.H. VAN HOOF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* 99 (1983) ("It must be quite an extraordinary system of law which incorporates as its main, if not the only, vehicle for change the violation of its own provisions."); Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1, 8 (1974-75) ("There is no doubt that customary rules can be changed in this way, but the process is hardly one to be recommended by anyone who wishes to strengthen the rule of law in international relations.").

¹⁸ See Kelly, *supra* note 13.

¹⁹ See, e.g., John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175 (2007).

²⁰ See Eugene Kontorovich, *Inefficient Customs in International Law*, 48 WM. & MARY L. REV. 859, 889-94 (2006).

²¹ Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 116 (2005); see also David J. Bederman, *Acquiescence, Objection and the Death of Customary International Law*, 21 DUKE J. COMP. & INT'L L. 31, 43 (2010) (noting that 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)"); 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.").

state practice rather than *opinio juris*,²² whereas others have suggested precisely the opposite.²³ Some of the scholars who emphasize the state practice element seek to limit CIL to “old-style” CIL induced from longstanding patterns of behavior rather than “new-style” CIL deduced from materials such as international resolutions, treaties, advocacy by NGOs, and academic opinion.²⁴ Other scholars, by contrast, have sought to reconcile and unify these two types of CIL reasoning.²⁵ Still others have proposed explanations of CIL that are grounded in state interests and rational decisionmaking rather than in legal doctrine, while reaching different conclusions about whether CIL affects state behavior.²⁶

The Chronological Paradox

One of the conceptual difficulties surrounding the standard view of CIL, which is referred to in the literature as the “chronological paradox,” merits special attention. The paradox is as follows: If state practices do not become binding as CIL until the states involved act out of a sense of legal obligation, how do the states develop that sense of legal obligation in the first place? In other words, the standard conception of CIL paradoxically seems to require that CIL develop before it can develop, in which case we would never have

²² See, e.g., Maurice H. Mendelson, *The Formation of Customary International Law*, 272 RECUEIL DES COURS 155 (1999).

²³ Most notably, claims relating to CIL concerning human rights have tended to deemphasize state practice in favor of other materials. 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) (describing this “New CIL”). For a critique of this phenomenon, see Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUST’L Y.B. INT’L L. 82 (1989).

²⁴ See, e.g., Samuel Estreicher, *A Post-Formation Right of Withdrawal from Customary International Law?: Some Cautionary Notes*, 21 DUKE J. COMP. & INT’L L. 57 (2010); Edward T. Swaine, *Bespoke Custom*, 21 DUKE J. COMP. & INT’L L. 207 (2010).

²⁵ See, e.g., Frederic L. Kirgis, Jr., *Custom on a Sliding Scale*, 81 AM. J. INT’L L. 146 (1987); Anthea E. Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757 (2001).

²⁶ Compare JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 43 (2005) (arguing that CIL “is not an exogenous influence on state behavior”), with Guzman, *supra* note 21, at 130 (“As a matter of theory, then, CIL may be effective.”).

CIL. As one scholar describes the paradox, “Nothing can be a source of new customary international law if *opinio juris* requires that any action must be in accordance with the existing law.”²⁷

Some commentators who articulate the standard view of CIL either ignore the paradox or treat it as if it were a mere rhetorical question that need not be answered. The *Restatement (Third) of the Foreign Relations Law of the United States*, for example, simply notes:

There have been philosophical debates about the very basis of the definition: how can practice build law? Most troublesome conceptually has been the circularity in the suggestion that law is built by practice based on a sense of legal obligation: how, it is asked, can there be a sense of legal obligation before the law from which the legal obligation derives has matured? Such conceptual difficulties, however, have not prevented acceptance of customary law essentially as here defined.²⁸

The Special Rapporteur for the International Law Commission’s project on the identification of customary international law has similarly taken note of the paradox (along with other conceptual problems associated with the *opinio juris* concept) and then simply observed that “the theoretical torment which may accompany [the concept of *opinio juris*] in the books has rarely impeded its application in practice.”²⁹

²⁷ Olufemi Elias, *The Nature of the Subjective Element in Customary International Law*, 44 INT’L & COMP. L.Q. 501, 504 (1995). See also, e.g., Raphael M. Walden, *The Subjective Element in the Formation of Customary International Law*, 12 ISR. L. REV. 344, 363 (1977) (“It is not possible consistently to maintain at one and the same time both that custom is creative of new law and not declaratory of existing law, and also that it always requires to be accompanied by a belief that the conduct in question is already law.”).

²⁸ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 1, § 102, reporters’ note 2. See also, e.g., Hugh Thirlway, *The Sources of International Law as a Consensual Bond*, in INTERNATIONAL LAW 125 (Malcolm Evans, ed., 2006) (“The process by which customary rules change and develop thus presents theoretical difficulties; but it is a process which does occur.”).

²⁹ Wood, *supra* note 3, at 47.

The paradox, however, is not merely of academic interest: it suggests that the standard view of CIL, although often recited, *does not accurately account for how CIL is actually discerned and applied in practice*. Therefore, as John Tasioulas has observed, for legitimacy and other reasons, the paradox must be confronted “head-on.”³⁰

A variety of theories have been proposed to resolve the chronological paradox, while retaining the standard view of CIL, but none of them seems to work.³¹ The most common theory for how CIL develops despite the requirement of *opinio juris* is that states initially make a mistake and believe themselves to be under a legal obligation even though they are not.³² There are at least two problems with this “mistake theory.” First, according to most accounts of CIL, in order for CIL to arise, a large number of states need to believe that a practice is legally binding. But, unless there is some reason to think that states (many of which are sophisticated actors) regularly make mistakes and, moreover, make the same mistakes en masse, CIL would rarely, if ever, develop and evolve.³³ Second, if one assumes that the subset of states that makes mistakes is the least sophisticated, that means that

³⁰ John Tasioulas, *Customary International Law and the Global Quest for Justice*, in *THE NATURE OF CUSTOMARY LAW: LEGAL, HISTORICAL AND PHILOSOPHICAL PERSPECTIVES* 322 (Amanda Perreau-Saussine & James Bernard Murphy eds., 2007); see also MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* 420 (2005) (orig. 1989) (noting that the paradox “is not merely an academic’s pet dilemma”).

³¹ See, e.g., Hilary Charlesworth, *Customary International Law and the Nicaragua Case*, 11 *AUST’L Y.B. INT’L L.* 1, 9 (1984-87) (noting that the “paradox of the traditional theory of customary international law has never been persuasively resolved”); Josef L. Kunz, *The Nature of Customary International Law*, 47 *AM. J. INT’L L.* 662, 667 (1953) (“There is here, certainly, a challenging theoretical problem which, as far as this writer can see, has not yet found a satisfactory solution.”).

³² See, e.g., VAN HOOFF, *supra* note 17, at 99. Geny suggested something along these lines. See MICHAEL BYERS, *CUSTOM, POWER AND THE POWER OF RULES* 131 (1999).

³³ See, e.g., BYERS, *CUSTOM*, *supra* note 32, at 131 (“This [mistake] approach is unsatisfactory because it is inconceivable that an entire legal process . . . could be based on a persistent misconception.”); Michael Akehurst, *Custom as a Source of International Law*, 47 *BRIT. Y.B. INT’L L.* 1, 32 (1974-75) (“It is stretching credulity to suggest that all the many rules of customary law existing today originating on the basis of such mistakes.”); Hiroshi Taki, *Opinio Juris and the Formation of Customary International Law: A Theoretical Analysis*, 51 *GERMAN Y.B. INT’L L.* 447, 449 (2008) (“[I]t is strange and unreasonable to consider that a mistake by the acting individuals in relation to the existence of the law is indispensable in order to establish customary international law.”).

changes in the law would be driven by the least sophisticated actors, which hardly seems like a recipe for effective and desirable law making.

Another theory that has been suggested could be called the “fiat theory.” The idea is that one or a small number of states purposely assert the existence of a customary rule, even though they do not believe that it is required by preexisting custom, and other states accept the claim and act accordingly. To the extent that other states accept the claim out of a mistaken belief that it correctly reflects preexisting custom, this theory tends to merge into the mistake theory, and it has similar problems. Another possibility is that states accept the claim because they are coerced into doing so by virtue of the power of the states asserting the claim (Imagine Britain in the nineteenth century, for example imposing CIL rules of admiralty law when it had the most powerful navy.) While such a scenario is easy to imagine, it does not genuinely involve practice followed out of a sense of legal obligation. Moreover, a legal system in which a small number of states in effect impose law on the rest of the international community, although perhaps an accurate description of how CIL worked in the past, may be even more normatively problematic than the mistake theory.

In addition to the mistake and fiat theories, there are a variety of other theories about how a custom that is not initially perceived as legally binding might come to be understood that way, after passing through certain stages of development.³⁴ The actual mechanism of this transformation, however, is not specified, so the chronological paradox is left unresolved.³⁵ Other efforts to resolve the paradox involve alterations to the standard view of

³⁴ See, e.g., VAN HOOFF, *supra* note 17, at 92-93; Herman Meijers, *How is International Law Made? The Stages of Growth of International Law and the Use of its Customary Rules*, 9 NETH. Y.B. INT’L L. 1 (1978).

³⁵ See KOSKENNIEMI, *supra* note 30, at 421 (noting that the gradual ripening theory “brings in nothing to solve the problem” because “[w]e are still unable to reveal how the transformation from a political *opinio necessitatis* into a legally motivated *opinio juris* was possible”); HUGH THIRLWAY, *THE SOURCES OF INTERNATIONAL LAW* 77 (2014) (“The riddle remains, however, as to how this transition occurs: if for it to occur requires the presence of a justified belief that it has already occurred, it can in fact never occur.”).

CIL. For example, Hans Kelsen argued—contrary to the standard view—that it need not be established that states perceive that a practice is *legally* obligatory, as long as they perceive that it as *normatively* required.³⁶

Reference to Custom in the ICJ Statute

Before considering an alternative account of CIL, it is important to understand that the standard conception of CIL was not always the prevailing view, and, in fact, does not precisely accord with the reference to custom in the ICJ's governing statute. Article 38(1) of the ICJ Statute lists the sources of law to be applied by the ICJ, and it includes in the list “international custom, as evidence of a general practice accepted as law.” Instead of saying that CIL is based on practices and *opinio juris*, this article says that international custom is *evidence* of practices and *opinio juris*. Moreover, the phrasing seems to entail only one component—“international custom”—rather than two components as under the standard view. Some commentators ignore these differences and simply assert that the phrasing articulates the standard view.³⁷ Other commentators acknowledge the differences but attribute them to poor drafting.³⁸

In fact, Article 38(1) does not articulate the standard view, and it is not the product of poor drafting. Rather, it articulates a different conception of CIL than the one that is now

³⁶ See Kelsen, *supra* note 46, at 307 (“They must believe that they apply a norm, but they need not believe that it is a legal norm which they apply.”).

³⁷ See, e.g., Lori F. Damrosch et al., *INTERNATIONAL LAW: CASES AND MATERIALS* 58 (5th ed. 2009) (contending that “the order of words [in Article 38] makes little difference”); David J. Bederman, *INTERNATIONAL LAW FRAMEWORKS* 15 (2001) (“There are two key elements in the formation of a customary international law rule. They are elegantly and succinctly expressed in Article 38 of the ICJ Statute.”).

³⁸ See, e.g., James Crawford, *Brownlie's Principles of Public International Law* 23 (8th ed. 2012) (describing the phrasing in Article 38 as “prima facie defective”); Van Hoof, *supra* note 17, at 87 (noting that “this much criticized formulation has probably contributed to the confusion surrounding custom”); Josef L. Kunz, *The Nature of Customary International Law*, 47 *AM. J. INT'L L.* 662, 664 (1953) (referring to the “extremely bad drafting of article 38(1)” of the ICJ Statute).

widely recited, including by the ICJ itself. To understand this point, it is necessary to trace the origins of the *opinio juris* component of the standard view of CIL.

A number of scholars have traced the *opinio juris* component to a French jurist, Francois Geny.³⁹ In a treatise first published in 1899, entitled *Methode d'Interpretation et Sources en Droit Prive Positif (Method of Interpretation and Sources of Positive Private Law)*, Geny attempted to distinguish between legally binding custom and mere social usage, and for the former he suggested that one look for “a feeling among the persons who practice it that they act on basis of an unexpressed rule which is binding for them as a rule of law.”⁴⁰ Although Geny was writing about domestic private law, the subjective element of his formulation is similar to the *opinio juris* requirement under what is now the standard view of CIL.

Although suggestions are sometimes made that *opinio juris* has deeper intellectual roots, David Bederman’s book-length survey of the role of custom suggests otherwise. As he explained:

[C]ontemporary public international law’s doctrine of *opinio juris* bears no real resemblance to antecedents in Roman law, canon law, the *ius commune*,

³⁹ See, e.g., ANTHONY A. D’AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 49 (1971); DAVID J. BEDERMAN, CUSTOM AS A SOURCE OF LAW 142 (2010); V.D. DEGAN, SOURCES OF INTERNATIONAL LAW 144 (1997); MALCOLM N. SHAW, INTERNATIONAL LAW 75 (6th ed. 2008); see also Peter E. Benson, Notes and Comments, *Francois Geny’s Doctrine of Customary Law*, 20 CAN. Y.B. INT’L L. 267 (1982) (“Historians single out Francois Geny as the writer whose work crowned the nineteenth century’s analysis of custom and whose ideas were directly incorporated into our approach towards international custom.”). Some writers, however, connect the standard view of CIL either to the German scholar Franz von Liszt (who was a cousin of the famous composer), or the Swiss scholar Alphonse Rivier. See, e.g., STEPHEN C. NEFF, JUSTICE AMONG NATIONS: A HISTORY OF INTERNATIONAL LAW 253 (2014) (“Alphonse Rivier has been credited with being the first to clearly articulate this twofold picture of custom (albeit without using the actual express *opinio juris*.”).

⁴⁰ FRANCOIS GENY, METHODE D’INTERPRETATION ET SOURCES EN DROIT PRIVE POSITIF 248 (2d ed. 1954) (transl. Louisiana State Law Institute 1963).

or English common law. . . . It sits as an oddity in the law of nations, and, perhaps is the only thing that distinguishes the exceptional character of CIL.⁴¹

For example, some commentators have suggested that the *opinio juris* concept finds support in Blackstone's treatise on the laws of England,⁴² but in fact Blackstone merely argued that customs needed to have a mandatory rather than discretionary character in order to qualify as law, not that they had to be shown to be followed out of a sense of legal obligation.⁴³

Importantly, the phrasing of the ICJ Statute appears to have intellectual roots that are distinct from the roots of the modern concept of *opinio juris*. The language of Article 38(1) was carried over from what had been Article 38 of the Statute of the Permanent Court of International Justice (PCIJ). The initial drafting of the PCIJ statute was delegated to an advisory committee of jurists working in 1920, which was chaired by Baron Descamps of Belgium. The committee specifically rejected a proposal by Descamps that would have referred to "international custom, being practice between nations accepted by them as law."⁴⁴ In other words, the committee rejected a description of CIL that would, like the standard view today, have set forth a separate *opinio juris* requirement.⁴⁵

The phrasing of the PCIJ Statute's reference to custom was apparently influenced by the "historical school" of jurisprudence of the nineteenth century, which is generally traced

⁴¹ DAVID J. BEDERMAN, CUSTOM AS A SOURCE OF LAW 173 (2010); *see also* Gerald J. Postema, *Custom in International Law: A Normative Practice Account*, in THE NATURE OF CUSTOMARY LAW: LEGAL, HISTORICAL AND PHILOSOPHICAL PERSPECTIVES 279, 280 (Amanda Perreau-Saussine & James Bernard Murphy eds., 2007) (noting that the "additive understanding" of CIL, whereby *opinio juris* is required in addition to practice, "is of relatively recent vintage").

⁴² *See, e.g.*, CLIVE PARRY, THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW 61 (1965).

⁴³ *See* I WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 78 (1765) (arguing that customs "must be (when established) *compulsory*; and not let to the option of every man, whether he will use them or no").

⁴⁴ *See* Permanent Court of International Justice, Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, June 16—July 24 1920, at 306; *see also* BRIAN D. LEPARD, CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS 129 (2010).

⁴⁵ *See also* Alain Pellet, *Article 38*, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 813 (Andreas Zimmermann et al. eds., 2d ed. 2012) (noting that "the Committee of Jurists in 1920 clearly did not have in mind a splitting-up of the definition of custom into two distinct elements").

to (among others) the German jurist Friedrich Carl von Savigny.⁴⁶ This school hypothesized that customary law emanated from a collective spirit or will of the people—a “*Volksgeist*.”⁴⁷ Importantly, Francois Geny—whose writings are said to be the intellectual genesis of *opinio juris* for CIL—expressly disagreed with the *Volksgeist* concept.⁴⁸

The *Volksgeist* concept has a natural law character that is probably not viable in today’s more positivistic legal culture.⁴⁹ It also became associated to some extent with Nazi ideology.⁵⁰ Not surprisingly, therefore, it has generally been rejected in the post-World War II custom literature.⁵¹ The *Volksgeist* approach did, however, have one significant advantage over what is now the standard view: it had an answer to the famous chronological paradox that has plagued the standard view of CIL.

The approach of the historical school to CIL avoided the chronological paradox by hypothesizing that custom was evidence of something deeper and preexisting. Under that approach, the development of a customary obligation did not depend on nations following a practice out of a sense of legal obligation. Rather, the obligation would exist, and the custom would then arise to reflect it. Savigny specifically recognized the need to avoid the

⁴⁶ See HANS Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 308-09 (1952).

⁴⁷ See ILA Report, *supra* note 48, at 32; see also Walden, *supra* note 27, at 358 (“As originally formulated by the adherents of the historical school, the theory of *opinio juris* was intimately connected with their doctrine which saw law as an expression of the *Volksgeist*.”). French legal theorists developed a somewhat analogous idea that custom was evidence of an underlying social solidarity (*solidarite sociale*). See Kelsen, *supra* note 46, at 309.

⁴⁸ See GENY, *METHODE D’INTERPRETATION*, *supra* note 40, at 248; see also Walden, *supra* note 27, at 358-59 (noting that the modern doctrine of *opinio juris* is not connected to the *Volksgeist* concept).

⁴⁹ See Kelsen, *supra* note 46, at 310-11; Koskeniemi, *supra* note 30, at 415-16.

⁵⁰ See, e.g., C.K. ALLEN, *LAW IN THE MAKING* (7th ed. 1964) (“Without disrespect for their scholarly genius, it is difficult not to feel that unconsciously (for they could hardly guess what would be built upon the foundations which they laid) Savigny and his followers were National Socialists before the National Socialists.”); CHRISTOPHER ROEDERER & DARREL MOELLENDORF, *JURISPRUDENCE* 127 (2004; reprinted 2007) (noting that the historical school “appealed to the apologetic lawyers of Nazi Germany”).

⁵¹ See Kunz, *The Nature of Customary International Law*, *supra* note 38, at 664; Alan Watson, *An Approach to Customary Law*, 1984 ILL. L. REV. 561, 566. See also Robert E. Rodes, Jr., *On the Historical School of Jurisprudence*, 49 AM. J. JURIS. 165 (2004) (presenting a more sympathetic account of the historical school but noting that “[e]veryone is polite to [the historical school], and no one explicitly disowns it, but no one really takes it seriously”).

chronological paradox, in critiquing what is referred to above as the mistake theory of *opinio juris*:

[A]ccording to [this idea], the first act must have been induced by the *necessitates opinio*; consequently if it rests upon an error it must not be of any account at all as to the origination of customary law. The same is true of the second act which now becomes the first and of the third and every following one. The formation of a customary law is hence, unless one of those conditions is given up, wholly impossible.⁵²

The approach of the historical school avoided this problem, Savigny explained, because “the rule of law was merely manifested by the custom, not generated by it; consequently in the first demonstrable act the *necessitatis opinio*, free of all error, might and must have been present.”⁵³

There is another important respect in which some of the earlier theories of CIL differed from today’s standard view. Instead of requiring that states believe that a practice was already legally required, some of the earlier theories hypothesized that it was sufficient if states believed that a legal rule in support of the practice was *necessary*. Alphonse Rivier, for example, wrote that “the custom or the usage of the nations is the manifestation of the international juridical consciousness operated by the facts that are continuously repeated *with the sense of their necessity*.”⁵⁴ Such an approach appears to be consistent with the

⁵² 1 FRIEDRICH CARL VON SAVIGNY, SYSTEM OF THE MODERN ROMAN LAW 141 (William Holloway transl., 1867).

⁵³ *Id.*

⁵⁴ ALPHONSE RIVIER, PRINCIPLES DU DROIT DES GENS 35 (1896).

broader phrase *opinio juris sive necessitatis*, the latter portion of which is often omitted in modern discussions of CIL.⁵⁵

In sum, the standard, two-part conception of CIL has not always been the dominant view, and it is not fully reflected in the ICJ's governing statute.⁵⁶ A key reason why some of the earlier approaches died away was the shift towards positivism. Instead of hypothesizing that custom is a reflection of some underlying spirit, will, or consciousness, the standard view today attempts to ground CIL in the actual practices and beliefs of states. In doing so, however, the standard view has difficulty resolving a host of evidentiary, normative, and conceptual problems associated with deriving law in this fashion.

State Preferences Account

A fundamental problem with much of the theorizing about CIL, this paper contends, is that it fails to identify which decisionmaker it has in mind. Instead, the discussion proceeds as if CIL existed in the abstract without any particular human entity to interpret and apply it. As will be seen, once a decisionmaker is hypothesized, it becomes easier to gain traction on some of the difficulties surrounding CIL.

The remainder of this paper sketches an alternate account of CIL that addresses the chronological paradox as well as other well-known problems with the standard view of CIL.

⁵⁵ See THIRLWAY, *supra* note 35, at 78 (“[T]he phrase in its entirety signifies that it is or may be sufficient if there is an *opinio* to the effect that the action (or refraining from it, as the case may be) is required as being, in some sense, necessary.”).

⁵⁶ For another indication that the standard, two-part conception of CIL that is prevalent today was not always the prevailing view, consider the fact that in attempting in 1950 to summarize the requirements for CIL, Manley Hudson (after having served as a judge on the Permanent Court of International Justice) identified four rather than two components: “(a) concordant practice by a number of States with reference to a type of situation falling within the domain of international relations; (b) continuation or repetition of the practice over a considerable period of time; (c) conception that the practice is required by, or consistent with, prevailing international law; and (d) general acquiescence in the practice by other States.” Working Paper by Special Rapporteur Manley O. Hudson on Article 24 of the Statute of the International Law Commission, 2 Y.B. INT’L L. COMM’N 26 (1950).

Under this “state preferences” approach, the application of CIL by an international adjudicator should be understood as an effort to determine the preferences of the relevant community of states concerning the norms that should apply in the absence of a controlling treaty. The paradigm adjudicatory institution considered here is the ICJ, although the analysis potentially applies to other institutions as well and might also apply (probably with modifications) to domestic courts applying CIL.

Under this account, adjudicators look to state practice as well as to the articulated views of states in ascertaining state preferences, but they are able to recognize rules of CIL through reasoning that does not conform to the standard view. To be clear, the claim is not that this is always what happens, or that adjudicators perform this task consistently or perfectly. Nor is it a claim that adjudicative institutions all have the same amount of discretion; they clearly do not. Rather, the claim is that the state preferences account describes much of what one sees in international adjudication with respect to CIL and that it is a useful way of understanding what is meant by CIL in that context.

The chronological paradox and first violators. The state preferences account does not require proof that states are already following a practice out of a sense of legal obligation before a CIL rule can be recognized. Rather, a CIL rule can be recognized when it is evident—from state practices, statements, and other evidence—that the rule is something that the relevant community of states wishes to have as a binding norm going forward.⁵⁷ To be sure, the past practices of states are still highly relevant under this account,

⁵⁷ For a somewhat similar perspective, see LEPARD, *supra* note 44, at 98-99 (arguing that “*opinio juris* be interpreted as a requirement that *states generally believe that it is desirable now or in the near future to have an authoritative legal principle or rule prescribing, permitting, or prohibiting certain state conduct*”) (emphasis in original). See also ERIC A. POSNER & ALAN O. SYKES, *ECONOMIC FOUNDATIONS OF INTERNATIONAL LAW* 57 (2013) (“When trying to determine whether a norm of customary international law exists, we are really trying to figure out what is optimal and sustainable between states.”); Jonathan I. Charney, *Universal International Law*, 83 AM. J. INT’L L. 529, 538 (1993) (“Certainly, those searching for norms seek to determine whether states that have expressed interest in a matter have reached consensus on establishing a

because such practices are often the best evidence of state preferences. But, because it need not be shown that nations are already following a practice out of a legal obligation, the chronological paradox is avoided.

For similar reasons, the state preferences account is able to explain how CIL can be applied against the first violator of a norm. If a practice is uniform and has no deviations, there may be no opportunity for a sense of legal obligation to develop. When the first deviation occurs, however, the issue of whether the practice is legally binding suddenly becomes relevant. Under the standard view of CIL, the past practice might not count, since it was not necessarily being followed out of a sense of legal obligation. Under a state preferences approach, by contrast, the past practice would be relevant in assessing whether states prefer to have a binding rule governing the issue, and an adjudicator would be open to finding that the first deviation violates CIL.⁵⁸

This account also confirms the argument, made most famously by Bin Cheng, that it is possible for there to be “instant custom.”⁵⁹ Traditionally, it was thought that the creation of CIL tended to be a longstanding process of action and reaction among states. The modern view, however, is that CIL can be created quickly, and the ICJ has confirmed this possibility.⁶⁰ Commentators note that technological changes in communication, along with international fora such as the United Nations, allow for much more extensive and rapid

corresponding norm as law.”); Walden, *The Subjective Element*, *supra* note 47, at 97 (“[W]hat is involved may be, not a belief that the practice is *already* legally binding, but a claim that it *ought* to be legally binding.”).

⁵⁸ *Cf.* Hilton v. Guyot, 159 U.S. 113, 163 (1895) (“[W]hen, as is the case here, there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is, whenever it becomes necessary to do so in order to determine the rights of parties to suits regularly brought before them. In doing this, the courts must obtain such aid as they can from judicial decisions, from the works of jurists and commentators, and from the acts and usages of civilized nations.”).

⁵⁹ *See, e.g.,* Bin Cheng, *United Nations Resolutions on Outer Space: “Instant” International Customary Law?*, 5 INDIAN J. INT’L L. 23 (1965).

⁶⁰ *See* North Sea Continental Shelf (F.R.G./Den.; F.R.G./Neth.), 1969 I.C.J. 3, 74 (Feb. 20) (noting that “the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule”); *see also* KAROL WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW 59 (2d ed. 1993) (“At present . . . an international custom can arise even in a very short time.”).

dialogue concerning what the law is and should be. Although this possibility is recognized by a number of commentators, it is not clear how it can be reconciled with the standard view of CIL. It is consistent with the state preferences account, however, because there will be situations in which it will be possible to have a good sense of state preferences even before there has been enough time for specific state practices to develop.

An oft-cited example of “instant CIL” is the Truman Proclamation in 1945. Within a few years after this Proclamation, it was clear that many states accepted the claim that states had exclusive sovereignty over the resources in their continental shelves, even though this might seem to contradict the traditional principle of freedom of the seas. If CIL developed this rapidly, however, it was not because there was already extensive state practice involving the exclusion of other states from mineral extraction on the shelves, something that was not even technologically possible for most states. Instead, it was because numerous state declarations indicated that the relevant states preferred a CIL rule along the lines of the one advocated by Truman.⁶¹ As Michael Scharf has discussed in his book on “Grotian Moments,” there are a number of modern examples like this one in which CIL is viewed as developing rapidly despite the absence of extensive state practice.⁶²

Principles and rules. The state preferences account also helps makes sense out of the difference between general principles and specific rules, a distinction often glossed over under the standard view of CIL. Sometimes—probably often—there is a generally agreed upon principle but no widespread practice concerning the specific issue, and the decisionmaker must decide whether the principle applies to that specific issue. In that situation, the standard view of CIL seems to offer no help, because there is no state practice

⁶¹ See SUZETTE V. SUAREZ, *THE OUTER LIMITS OF THE CONTINENTAL SHELF: LEGAL ASPECTS OF THEIR ESTABLISHMENT* ch. 2 (2008).

⁶² See MICHAEL P. SCHARF, *CUSTOMARY INTERNATIONAL LAW IN TIMES OF CHANGE: RECOGNIZING GROTIAN MOMENTS* (2013).

directly on point, let alone state practice followed out of a sense of legal obligation. Under a state preferences approach, by contrast, a decisionmaker would be free to apply the principle to the new set of facts. (The possibility that a similar result could be accomplished by utilizing the “general principles” category of the ICJ’s jurisdiction rather than the custom category is considered at the end of this paper.)

A good example of the distinction between general principles and specific rules is the famous *Schooner Exchange* decision by the U.S. Supreme Court that is said to be the fount of the international law of sovereign immunity.⁶³ In that decision, the Court had to decide whether to accord sovereign immunity in an admiralty case to a French warship. There was little state practice directly on point, so the Court explained that it would be “necessary to rely much on general principles and on a train of reasoning founded on cases in some degree analogous to this.”⁶⁴ The Court proceeded to invoke the general principle in CIL concerning the “perfect equality and absolute independence of sovereigns,” and to invoke by analogy various CIL doctrines, such as the CIL governing head of state immunity and the CIL governing diplomatic immunity. Despite the lack of direct evidence of state practice, the Court concluded that there was “a principle of public law that national ships of war entering the port of a friendly power open for their reception are to be considered as exempted by the consent of that power from its jurisdiction.”⁶⁵ The Court was, in other words, *both applying and developing CIL at the same time*. This is a common feature of CIL adjudication, this paper contends, but the standard account of CIL does not have an explanation for it.

⁶³ 11 U.S. (7 Cranch) 116 (1812).

⁶⁴ *Id.* at 136.

⁶⁵ *Id.* at 145. *Cf. Jurisdictional Immunities of the State*, *supra* note 2, ¶ 57 (“Exceptions to the immunity of the State represent a departure from the principle of sovereign equality.”).

Another prominent example is the PCIJ's decision in the *Lotus* case.⁶⁶ There, the court held that Turkey did not violate international law in regulating the conduct of a French citizen on board a French vessel, conduct that was alleged to have caused a collision on the high seas resulting in the deaths of Turkish nationals. The majority reasoned that “[r]estrictions upon the independence of States cannot . . . be presumed,” and it found no affirmative basis for concluding that Turkey had violated an established rule of international law.⁶⁷ Its decision contains no significant review of either state practice or *opinio juris*. Rather, the court noted that it was aware of no relevant decisions of international tribunals and that the decisions of national courts that had been cited to it “sometimes support one view and sometimes the other.”⁶⁸ Because it appeared that national jurisprudence was divided, the court said it need not consider such jurisprudence further because “it is hardly possible to see in it an indication of the existence of the restrictive rule of international law.”⁶⁹ Most of the dissenting opinions also failed to focus on evidence of state practice or *opinio juris*; rather, they referred to propositions such as “the spirit of international law,”⁷⁰ the “consensus omnium” of the international community,⁷¹ and the “principle” of territoriality.⁷² The two partial exceptions are the dissent of Judge Moore, which reviewed a number of domestic cases, and the dissent of Judge Altamira, who reviewed the legislation of a number of states. Of particular relevance to this paper, Altamira concluded his dissent by acknowledging that when international tribunals adjudicate issues of CIL “there are moments in time in which the rule, implicitly discernible, has not as yet taken shape in the

⁶⁶ The Case of the S.S. *Lotus* (France v. Turkey) (Judgment) (Sept. 7, 1927).

⁶⁷ *Id.*, ¶ 44.

⁶⁸ *Id.*, ¶ 77.

⁶⁹ *Id.*, ¶ 78.

⁷⁰ *Id.*, ¶ 100 (Loder).

⁷¹ *Id.*, ¶ 162 (Weiss).

⁷² *See id.*, ¶ 214 (Finlay), ¶ 226 (Nyholm).

eyes of the world, but is so forcibly suggested by precedents that it would be rendering good service to the cause of justice and law to assist its appearance in a form in which it will have all the force rightly belonging to rules of positive law appertaining to that category.”⁷³

Finally, consider the Truman Proclamation, discussed above. Imagine if an international adjudicator were asked to decide the legality of the Proclamation shortly after it were issued. The adjudicator would need to decide how to reconcile two competing principles: freedom of the seas, and territorial control. There would not have been any state practice specifically on point. Of course, there was a practice of inaction: states had not previously asserted exclusive control over the minerals in their continental shelves (although they had at various times made other claims concerning the seabeds of the continental shelves). But that was likely due to the fact that they had no technological ability to access those minerals. As in *The Lotus*, much would have therefore turned on the court’s choice of baseline: would the United States be required to show an established practice in support of its claim, or would a challenger be required to show an established practice disallowing it? The key point is that the standard view does not help resolve such a case.

Evidentiary issues. The state preferences account also helps address a variety of evidentiary uncertainties that surround the standard account of CIL. First, this account avoids artificially excluding state practices from consideration merely because they might be followed for reasons other than a sense of legal obligation. For example, nations presumably follow many customs out of self-interest (and, indeed, one would assume that customs develop because they are generally in the interest of the participants), yet it is unclear why behavior motivated by self-interest should not count when discerning CIL.⁷⁴

⁷³ *Id.*, ¶ 316 (Altamira).

⁷⁴ See George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT’L L. 541, 571 (2005) (noting that “legal obligation and self-interest are not mutually exclusive categories”).

Similarly, nations may follow a custom out of a sense of morality (abolishing the slave trade in the nineteenth century, for example), but, again, it is unclear why that should count against the custom qualifying as CIL, since the law and morality presumably overlap. Finally, many customs described today as CIL are probably followed out of bureaucratic habit rather than a conscious sense of legal obligation, and yet such a state of mind (even though not *opinio juris*) probably is desirable for international law compliance.⁷⁵

There has also been much debate in the literature about whether verbal acts by states can be considered a form of state practice. Those who object to such classification worry that these acts will end up being “double counted” as both practice and evidence of *opinio juris*. Under the state preferences account, verbal acts would certainly be considered, and the classification debate is unimportant, as is the worry about double counting.⁷⁶ To be sure, verbal actions should be considered with caution, since they might simply be “cheap talk” as opposed to the expression of a genuine preference. But this concern relates to the weight to be given to the evidence, not its relevance.

A state preferences account further helps explain why treaties that do not purport to codify CIL are nevertheless relevant to the identification of rules of CIL, a question that has generated significant debate and uncertainty. Although parties to a treaty presumably have a sense of legal obligation *to the treaty*, it is not clear why treaties show that nations are acting out of a sense of legal obligation *under CIL*.⁷⁷ Nevertheless, treaties are among the most

⁷⁵ See generally ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995).

⁷⁶ See, e.g., Maurice Mendelson, *The International Court of Justice and the Sources of International Law*, in *FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE* 63, 87 (Vaughan Lowe and Malgosia Fitzmaurice, eds., 2008).

⁷⁷ Cf. Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), ¶ 90 (Judgment) (ICJ May 24, 2007) (“The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal régimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to

common evidence cited by courts in support of *opinio juris*. Indeed, in many cases, including many cases decided by the ICJ, they are essentially the *only* evidence cited.⁷⁸ The explanation, according to the account provided in this paper, is that adjudicators use treaties as evidence of state preferences. In many cases, of course, a treaty will reveal only a preference for binding consenting parties, but in some cases a widely-ratified treaty might reveal a preference for a universal, community-wide rule. For this and other evidentiary issues, a state preferences approach unifies the “traditional” inductive CIL with the “modern” deductive CIL.⁷⁹ Relatedly, it explains why adjudicators seem to use a sliding scale, requiring more evidence of practice when there is less evidence of *opinio juris*, and vice-versa.⁸⁰ The reason is that both types of evidence are information about state preferences.

International adjudicators also often place great weight on the agreement of the parties with respect to what is CIL. It is difficult to see how this would make sense from the standpoint of the standard two-component view of CIL, but it makes sense from a preferences standpoint. For a recent example, consider the Law of the Sea Tribunal’s provisional order in *The ARA “Libertad Case”* in 2012, which concerned the detention of an Argentinian warship by Ghana. In the order, the tribunal cited no state practice in support of its conclusion that warships are immune from seizure under CIL. It simply noted that

show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary.”); *North Sea Continental Shelf Cases* (Federal Republic of Germany/Denmark), 1969 I.C.J. Rep. 3, 44 (ICJ Feb. 20, 1969) (Judgment) (“From [the action of states that were parties to a treaty setting forth the equidistance principle] no inference could legitimately be drawn as to the existence of a rule of customary international law in favour of the equidistance principle.”).

⁷⁸ See Mitu Gulati, *How Do Courts Find International Custom?* (draft). This is not a particularly new phenomenon. See, e.g., R.R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT’L L. 275, 275 (1965-66) (“Both multilateral and bilateral treaties are not infrequently cited as evidence of the state of customary international law.”).

⁷⁹ Cf. Anthea E. Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757 (2001).

⁸⁰ See Frederic L. Kirgis, Jr., *Custom on a Sliding Scale*, 81 AM. J. INT’L L. 146 (1987).

Argentina claimed that a treaty provision relating to this issue reflected CIL, and that Ghana did not dispute the existence of the immunity.⁸¹ The preferences referred to there are of course those of the parties to the case, not necessarily of the international community, and it is important to distinguish the two. This is why this paper refers to the preferences of the “relevant community” of states. That community depends in part on the nature of the adjudicative institution, and it will vary as between bilateral arbitration, regional adjudication, and a general adjudicatory body like the ICJ.

Consequentialist considerations. A state preferences approach also helps explain why decisionmakers often take into account consequentialist considerations, such as considerations of efficiency and international comity, when discerning rules of CIL. To take one of many examples, in the *Arrest Warrant Case*, the ICJ relied heavily on consequentialist considerations concerning the ability of foreign ministers to carry out duties on behalf of their states.⁸² As Professor Kirgis has noted, “[a] reasonable rule is always more likely to be found reflective of state practice and/or the *opinio juris* than is an unreasonable (for example, a highly restrictive or inflexible) rule.”⁸³ Such normative considerations are difficult to reconcile with the standard, backward-looking account of CIL. But giving weight to these considerations makes perfect sense under a state preferences approach. After all, the community of states presumably has a preference for rules that are functionally beneficial and that promote cooperation.⁸⁴

⁸¹ See The ARA “Libertad Case” (Argentina v. Ghana), ILOS, Case No. 20, Order (Dec. 15, 2012).

⁸² See Case Concerning the Arrest Warrant of 11 April 2000, ¶¶ 53-54 (ICJ, Feb. 14, 2002).

⁸³ Kirgis, *supra* note 80, at 149.

⁸⁴ Cf. EYAL BENVENISTI, SHARING TRANSBOUNDARY RESOURCES: INTERNATIONAL LAW AND OPTIMAL RESOURCE USE 203 (2002) (arguing that the international community accepts a role along these lines for the ICJ in certain types of cases). See also Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT’L L.J. 457 (1985) (“Correspondingly, *opinio juris* is no longer seen as a consciousness that matures slowly over time (and finally imparts obligatory force to a practice once motivated by habit, convenience, or moral sentiment), but instead as a conviction that instantaneously attaches to a rule believed to be socially necessary or desirable.”)

Another good example of this phenomenon is the famous *Trail Smelter* arbitration between the United States and Canada in 1941, in which the tribunal held that “no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.”⁸⁵ The tribunal did not base this conclusion on any specific state practice or *opinio juris*. The tribunal noted that “[n]o case of air pollution dealt with by an international tribunal has been brought to the attention of the Tribunal nor does the Tribunal know of any such case.” Nor could the tribunal find any international decisions concerning water pollution. Instead, the tribunal invoked a “general principle” that states have a duty to protect other states from injurious acts emanating from their territories, and it analogized to decisions of the U.S. Supreme Court concerning cross-border pollution issues between U.S. states.⁸⁶

Changes to CIL. Finally, a state preferences approach does a better job than the standard view of explaining how CIL changes. As previously discussed, the only mechanism for change specified under the standard account is through violations of the norm, and these violations need to be either widespread or widely accepted in order to effectuate change. This process for change seems both difficult to achieve in practice and normatively questionable. Under a state preferences approach, by contrast, an adjudicator can recognize that the deviation, along with other evidence (such as evidence of changed circumstances), shows that the international community no longer prefers the prior rule.

Under this approach, one can imagine, for example, the recognition of an erosion of sovereign or individual official immunity based on changed normative commitments reflected in treaties and other materials. Indeed, consider a shift in immunity that has

⁸⁵ *Trail Smelter Case* (United States/Canada), Decision at 1965 (Mar. 11, 1941)

⁸⁶ *Id.* at 1963-64.

already taken place: the shift during the twentieth century from the absolute theory of sovereign immunity to the restrictive theory.⁸⁷ If an international adjudicator had been called to consider the validity of this shift in its early stages, the standard view of CIL suggests that the adjudicator should have held that it was illegal—a decision that could have prevented the further development of CIL on this subject. The state preferences account, by contrast, allows for a greater ability to recognize and permit evolutionary changes to CIL.

Potential Drawbacks

Despite the above advantages, there are potential drawbacks associated with the state preferences account. Perhaps most significantly, it envisions a quasi-legislative role for adjudicators, a role that naturally raises questions about the extent to which adjudicators have been properly charged to act in this fashion. Critics are likely to contend that adjudicators should be limited to apply the law as it already exists (*lex lata*) rather than the law as it should be (*lex ferenda*).

Questions of judicial authority to develop the law are common in a domestic legal system, particularly in a common law system, but they are more pronounced in the international system that (for the most part) lacks an agreed-upon central judiciary. A significant check on such authority, however, is the ability of states to withdraw (prospectively) from many international adjudicatory institutions.⁸⁸ Moreover, under the persistent objector doctrine, when a rule of CIL is first recognized, it should not be applied

⁸⁷ See GAMAL MOURSI BADR, STATE IMMUNITY: AN ANALYTICAL AND PROGNOSTIC VIEW 115-28 (1984).

⁸⁸ In 1986, the United States withdrew from the ICJ's compulsory jurisdiction in response to the ICJ's decision to exercise jurisdiction in a case brought by Nicaragua concerning U.S. covert and military activities in that country. In 2005, after a series of ICJ rulings against the United States concerning the Vienna Convention on Consular Relations, the United States withdrew from an optional protocol that allowed the ICJ to exercise jurisdiction in such cases.

to states that have clearly disagreed with the rule. Although not part of existing doctrine, it might also make sense to allow for subsequent withdrawal rights for certain types of CIL rules.⁸⁹ In any event, states can override CIL rules as between themselves by treaty, as long as the rules do not have the status of *jus cogens* norms. More generally, literature on international courts suggests that, even when they act creatively, these courts are constrained in a variety of ways.⁹⁰

The concern about judicial lawmaking can also be reduced by limiting the precedential effect of international adjudicatory decisions. For example, it may make sense to give greater emphasis to the fact that ICJ decisions are technically binding only on the parties and thus should not automatically be treated as the last word by the international community on the content of CIL.⁹¹ The modern “fragmentation” of international law and institutions may make this easier by allowing for greater variation in judicial claims about the content of CIL.⁹²

Another reason to allow for such variation in claims about CIL, and to limit the precedential effect of determinations of CIL, is that there is inherent tension between centralized adjudication and the maintenance of a system of customary law.⁹³ As noted above, one of the purported virtues of custom is that it can continue to evolve in response to changing conditions. Judicial decisions concerning its content, however, have the potential to stifle such evolution if states end up coordinating around the decision. This potential is

⁸⁹ See Bradley & Gulati, *Withdrawing from International Custom*, *supra* note 4; Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT’L L. 115, 169-71 (2005).

⁹⁰ See, e.g., Tom Ginsburg, *Political Constraints on International Courts*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION (Cesare P. R. Romano, Karen J. Alter, and Chrisanthi Avgerou eds., 2013).

⁹¹ See UN CHARTER, art. 94(1) (requiring that each member of the United Nations comply with any ICJ decision “to which it is a party”).

⁹² See, e.g., Paul B. Stephan, *Disaggregating Customary International Law*, 21 DUKE J. INT’L & COMP. L. 191, 195-96 (2012). A much-discussed example is the different standards adopted by the ICJ and the International Criminal Tribunal for the Former Yugoslavia concerning state responsibility. See *id.* at 196.

⁹³ See, e.g., Suzanne Katzenstein, *International Adjudication and Custom Breaking by Domestic Courts*, 62 DUKE L.J. 671 (2012).

exacerbated by a backward-looking approach to CIL, as called for by the standard view, which envisions that changes to CIL require violations of the norm. In *Germany v. Italy*, for example, the ICJ concluded that there was no *jus cogens* exception to state sovereign immunity. It may well be that this decision was proper even under a state preferences account of CIL. But if states feel constrained by that decision, or other adjudicatory institutions feel obliged to follow it, evolution that might otherwise have occurred towards a *jus cogens* exception may be stifled.⁹⁴

Another objection that might be raised against the state preferences account is that it is too positivistic—that is, its conception of how adjudicators should apply CIL is too dependent on what states want rather than, say, the demands of international justice. As an initial matter, it is worth keeping in mind that, like the standard view, the account here does not depend on the consent of individual states. Instead, the reference point, at least for general adjudicatory institutions like the ICJ, is the international community overall. (The reference point may be narrower for regional institutions and ad hoc arbitration.) In addition, this account is actually less positivistic than the standard view, since it is not as dependent on states already acting out of a sense of legal obligation. Indeed, one reason that there has been a proliferation of proposed “modern” approaches to CIL is that the standard view does not seem well suited to the protection of human rights, given the frequent divergence between international aspirations and international practice.

Should This Be Called “General Principles”?

⁹⁴ This point suggests that the European Court of Human Rights probably went too far in concluding, in *Jones v. United Kingdom*, that the ICJ’s analysis of the CIL of sovereign immunity in *Germany v. Italy* “must be considered by this Court as authoritative.” *Case of Jones and Others v. The United Kingdom* ¶ 198 (Judgment) (Jan. 14, 2014).

Some commentators have acknowledged that when international adjudicators purport to identify rules of CIL they often do not seem to be applying the standard, two-component view, but these commentators contend that this phenomenon should be labeled as the application of “general principles” rather than the application of CIL.⁹⁵ The objection to using the label “customary international law” appears to be at least partly linguistic: in the absence of state practice in support of a CIL rule, it seems strange to refer to the rule as being “customary.” As Robert Jennings critically observed, “most of what we perversely insist on calling customary international law is not only *not* customary law: it does not even faintly resemble a customary law.”⁹⁶ Moreover, the ICJ Statute, these commentators point out, specifically distinguishes between the application of international custom and the application of general principles.⁹⁷

It is certainly true that the standard view of CIL has difficulty capturing the way in which international adjudicators identify and apply general principles when deciding cases, even though adjudicators often purport to be doing this under the general umbrella of CIL. It is unclear, however, how much would be gained by simply shifting the account of this phenomenon to a different label. The same concerns about judicial law-making, for example, would continue to exist. Moreover, the general principles category referred to in the ICJ Statute has traditionally been thought to be primarily a reference to gap-filling rules derived from common features of domestic legal systems (such as concerning remedies and

⁹⁵ See, e.g., BODANSKY, *supra* note 6, at 199-203; Simma & Alston, *supra* note 23, at 102; Peterson, *supra* note 6.

⁹⁶ Robert Y. Jennings, *The Identification of International Law*, in INTERNATIONAL LAW: TEACHING AND PRACTICE 3, 5 (Bin Cheng ed., 1982).

⁹⁷ See ICJ STATUTE, art. 38(1)(c).

defenses), rather than primary rules of international conduct, so it is not clear how well suited it is taking on a broader role.⁹⁸

In any event, the deficiencies with the standard view of CIL do not primarily concern difficulties in articulating general principles, such as “freedom on the seas,” “territorial integrity,” or “equality of states.” Instead, the difficulties come in attempting to reconcile potentially competing principles and in applying the principles to specific fact patterns. This is what international adjudication typically requires, but the standard view of CIL often fails to describe how judges go about it. Simply positing a separate category of general principles that do not depend on the standard view of CIL does not seem to advance the analysis concerning the application of such principles. This paper contends that a state preferences account, by contrast, does help to advance the analysis.

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As noted at the outset of this paper, there are increasing doubts about the usefulness and viability of CIL as a source of international law, making this an especially appropriate time to rethink some of the assumptions concerning the operation of CIL in theory and practice. In this regard, it is worth emphasizing that the claim here is not only that a state preferences approach is a better account of how CIL adjudication *should* work. It is also a claim that it is a better description of how it already *does* work in institutions like the ICJ. These institutions may recite the standard view of CIL, but they do not actually follow it in practice.

⁹⁸ See, e.g., LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 40 (1995) (“It is a source available only as necessary for interstitial use, to fill out what international law requires but has not recognized as customary law because it has not yet been invoked often and widely enough, and it is too cumbersome for the system to negotiate by multilateral treaty.”); OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 52 (1995) (“The international cases show such use [of the general principles category] in a limited degree, nearly always as a supplement to fill in gaps left by the primary sources of treaty and custom.”). The intended scope of the general principles category is unclear from the PCIJ drafting history. See Giorgio Gaja, *General Principles of Law*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rudiger Wolfrum ed., 2008).