

PRECEDENT, COMPLIANCE, AND CHANGE IN CUSTOMARY INTERNATIONAL LAW: AN EXPLANATORY THEORY

By Pierre-Hugues Verdier and Erik Voeten†*

Customary international law (CIL) is widely recognized as a fundamental source of international law.¹ While its continued significance in the age of treaties was once contested, it is now generally accepted that CIL remains a vital element of the international legal order.² Yet CIL is also plagued with conceptual and practical difficulties, which have led critics to challenge its coherence and legitimacy.³ In particular, critics of CIL have argued that it does not meaningfully affect state behavior.⁴ Traditional CIL scholarship is ill equipped to answer such criticism because its objectives are doctrinal or normative—namely, to identify, interpret, and apply CIL rules, or to argue for desirable changes in CIL. For the most part, that scholarship does not propose an explanatory theory in the social scientific sense, which would articulate how CIL works, why states comply, and why and how rules change.⁵

In recent years, scholars have begun to fill this gap by proposing explanatory theories based on the rational choice paradigm.⁶ These theories generally describe CIL rules as cooperative

* Professor of Law, University of Virginia. Email: verdier@virginia.edu.

† Peter F. Krogh Associate Professor of Geopolitics and Justice in World Affairs, Georgetown University. Email: ev42@georgetown.edu.

¹ See Statute of the International Court of Justice, Art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 33 UNTS 993; AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §102(2) (1986) [hereinafter THIRD RESTATEMENT]. The statute, decisions, and other materials pertaining to the International Court of Justice (ICJ) are available on the court's website, <http://www.cij-icj.org>.

² See, e.g., ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS 183–84 (2008). The International Law Commission (ILC) recently included the topic “formation and evidence of customary international law” in its research program. See Michael Wood, *Formation and Evidence of Customary International Law* (Annex A to the Report of the International Law Commission on the Work of Its Sixty-third Session, UN GAOR, 66th Sess., Supp. No. 10, at 305, UN Doc. A/66/10 (2011)); Report of the International Law Commission on the Work of Its Sixty-fourth Session, UN GAOR, 67th Sess., Supp. No. 10, at 108, UN Doc. A/67/10 (2012). Documents of the International Law Commission are available on its website, <http://www.un.org/law/ilc/>.

³ See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005); N. C. H. Dunbar, *The Myth of Customary International Law*, 1983 AUSTRALIAN Y.B. INT'L L. 1, 2; J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 451 (2000); W. Michael Reisman, *The Cult of Custom in the Late 20th Century*, 17 CAL. W. INT'L L.J. 133 (1987); Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 709 (1986).

⁴ See, e.g., Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1115 (1999) (“The case studies . . . suggest that the behaviors associated with CIL do not reflect a unitary underlying logic, and that CIL does little apparent work in guiding national behavior.”).

⁵ See GOLDSMITH & POSNER, *supra* note 3, at 25–26; GUZMAN, *supra* note 2, at 184.

⁶ See GOLDSMITH & POSNER, *supra* note 3; GUZMAN, *supra* note 2; Mark A. Chinen, *Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner*, 23 MICH. J. INT'L L. 143 (2001); Goldsmith & Posner, *supra* note 4; Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115 (2005); George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AJIL 541 (2005);

equilibria in repeated prisoner's dilemmas, sustained by mechanisms such as reciprocity, retaliation, and reputation.⁷ However, these theories raise their own difficulties. In essence, they are general theories of social norms or international cooperation applied to CIL, without fully considering CIL's distinctive legal characteristics and institutional setting—which set it apart from social norms or treaties.⁸ They focus primarily on the mechanisms that support compliance in equilibrium, and generally neglect changes in the CIL rules themselves, which they see as driven by exogenous factors.⁹ Most importantly, their conclusions often contradict traditional CIL doctrine and the understanding of lawyers, judges, and officials as to how CIL works,¹⁰ which has obstructed dialogue between explanatory and normative or doctrinal debates about CIL.

In this article, we propose a new explanatory theory of CIL, which highlights two ways in which CIL differs from social norms and treaties. First, unlike treaties, CIL offers few legal and institutional features—such as detailed obligations, flexibility clauses, and structured countermeasures—to support reciprocity or retaliation. Second, common knowledge that a rule is CIL comes with shared legal understandings about how CIL works. These shared understandings run against “tit-for-tat” equilibria based on direct reciprocity. CIL rules are commonly understood to be universal in nature: they create rights and obligations that apply to all states, regardless of whether they have themselves accepted them. This universality complicates the systematic use of reciprocity as a stabilizing mechanism, while contributing little to reinforce retaliation or reputational sanctions.

While these characteristics undermine the decentralized punishment strategies emphasized by previous theories, they also lead to an alternative rationale for compliance: a state may comply because it knows its decision to defect creates a precedent that may undermine a cooperative norm it values. Indeed, traditional CIL doctrine recognizes that violations of a CIL rule weaken that rule and may lead to its demise or the emergence of a new rule.¹¹ This precedential effect arises through at least two channels. First, the state's defection weakens the incentives of other states to continue upholding the rule. Second, courts and other legal actors that apply CIL sincerely—that is, by assessing the prevailing practice and *opinio juris*—will see the defection as evidence that the rule has disappeared or changed. Thus, if a state values the continued existence of the cooperative norm and believes its decision to defect will create a precedent that undermines the norm, that state may refrain from defecting despite short-term incentives to do so. But if the state does not value the rule or believes that its defection will not much

Francesco Parisi & Vincy Fon, *International Customary Law and Articulation Theories: An Economic Analysis*, 2 INT'L L. & MGMT. REV. 1 (2006); Edward T. Swaine, *Rational Custom*, 52 DUKE L.J. 559 (2002).

⁷ See GUZMAN, *supra* note 2, at 33–48.

⁸ See *id.* at 193; Goldsmith & Posner, *supra* note 4, at 1120; Norman & Trachtman, *supra* note 6, at 544–48. This point is made in Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT'L L. 345, 354 (1998).

⁹ See, e.g., GOLDSMITH & POSNER, *supra* note 3, at 40–42; Norman & Trachtman, *supra* note 6, at 572.

¹⁰ See, e.g., GOLDSMITH & POSNER, *supra* note 3, at 25 (“Despite the many disagreements within the traditional paradigm, the parties to this debate assume that customary international law is *unitary*, *universal*, and *exogenous*. . . . Our theory of customary international law challenges each of these assumptions.”); GUZMAN, *supra* note 2, at 184 (“Some of the standard views of CIL cannot be reconciled with the theory presented here or any other theory of rational states. These elements of CIL, therefore, must be rethought or discarded if we are to understand how CIL influences states.”)

¹¹ See *infra* note 73 and accompanying text.

affect the behavior of others, it may choose to defect and free ride on continued compliance by others.

Our theory yields several insights. First, it has important implications for the understanding of how CIL works and changes. It suggests that there may be a “tipping point” beyond which defections accelerate and lead to the rapid demise of a CIL rule and to the formation of a new one—a point we illustrate by reference to several major CIL changes. It also suggests, contrary to existing theories, that in some circumstances powerful states may have a greater stake in complying with CIL rules that they value, because the precedential impact of their actions is greater. Second, our theory is consistent with the available empirical evidence on CIL formation and change. Indeed, we initially developed it while conducting the first systematic empirical study of a change in CIL, which examined the transition from absolute to restrictive sovereign immunity in 121 states.¹² Finally, our theory takes traditional CIL doctrine seriously, while also clarifying and refining it. As such, it bridges the gap between traditional scholarship and the “new” explanatory work on CIL.

Before moving on to articulate our theory, we note some important qualifications and limitations of the scope of our argument. First, while we recognize the growing role of nonstate actors, our theory follows most doctrinal and explanatory accounts in emphasizing the behavior of states and their organs. However, we also explore the role of international courts and tribunals in shaping CIL. Second, while we argue that the legal and institutional characteristics of CIL complicate the use of direct reciprocity, our theory is still based on reciprocity in a more diffuse sense.¹³ Indeed, it makes sense for states to be concerned with the precedential impact of their actions on a CIL rule only if they stand to benefit from continued compliance by others, and vice versa. Third, we do not address broader normative questions as to whether specific CIL rules—or, indeed, the CIL formation process itself—is efficient from a welfare standpoint.¹⁴ While our theory may contribute to such analyses, we cannot explore this complex issue within the constraints of the present article.

Part I of the article develops our theory of CIL. After reviewing existing rational choice theories, it explains how institutional limitations and shared legal understandings of CIL undermine the view that cooperative CIL norms are sustained by decentralized threats of punishment. It then articulates an alternative rationale based on the precedential effects of defection and explains its main theoretical implications, including the “tipping point” phenomenon and

¹² Pierre-Hugues Verdier & Erik Voeten, *How Does Customary International Law Change? The Case of State Immunity*, 58 INT'L STUD. Q. (forthcoming). In 2008, Andrew Guzman could state: “Because we do not have any reliable empirical evidence about the actual impact of CIL, virtually all inquiries into CIL . . . have focused on the theoretical side.” GUZMAN, *supra* note 2, at 207. On the lack of empirical scholarship on CIL, see also Kenneth W. Abbott & Duncan Snidal, *Law, Legalization and Politics: An Agenda for the Next Generation of IL/IR Scholars*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 33 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013). While our empirical article (cited above) outlines our theory of CIL, this article develops it in much greater detail, draws on additional examples, and explores its implications for CIL doctrine.

¹³ On the distinction between direct and diffuse reciprocity, see Robert O. Keohane, *Reciprocity in International Relations*, 40 INT'L ORG. 1 (1986).

¹⁴ See, e.g., Eyal Benvenisti, *Customary International Law as a Judicial Tool for Promoting Efficiency*, in THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION: THEORETICAL PERSPECTIVES 85 (Eyal Benvenisti & Moshe Hirsch eds., 2004); Eugene Kontorovitch, *Inefficient Customs in International Law*, 48 WM. & MARY L. REV. 859 (2006); Timothy Meyer, *Codifying Custom*, 160 U. PA. L. REV. 995, 1050 (2012).

the special incentives of powerful states. Part II explores our theory's implications for salient areas of traditional CIL doctrine, including several topics that come within the ongoing program of work by the International Law Commission (ILC) on the formation and evidence of CIL. It shows that, while our theory is broadly consistent with mainstream doctrinal views on CIL, it also sheds new light on several debates and areas of ambiguity. Part III discusses the scope and limits of our theory. In particular, it addresses the relationship between precedential concerns and the decentralized punishment mechanisms emphasized by existing theories of CIL. It also explores the potential application of our theory to international cooperation problems that do not clearly constitute prisoner's dilemmas, such as international human rights.

I. A PRECEDENT-BASED THEORY

Reputation, Reciprocity, and Retaliation

Rational choice accounts hold that many CIL rules—like other international law rules or cooperative social norms—can be understood as equilibria in repeated prisoner's dilemmas. While states can derive mutual benefits from cooperation, they also face short-term incentives to defect and free ride on compliance by others, thus making it difficult to sustain the cooperative equilibrium.¹⁵ The CIL rule of foreign state immunity provides an example: each state benefits when the courts of other states refrain from exercising jurisdiction over it. A state could free ride, however, by allowing foreign states to be sued in its courts—thus allowing local plaintiffs to recover—while continuing to enjoy protection abroad as long as other states continue to observe the rule.

Rational choice theories explain stable cooperation despite such short-term incentives through three mechanisms: reciprocity, retaliation, and reputation.¹⁶ Reciprocity refers to a state's withdrawing its own cooperation in response to defection by another.¹⁷ Because this withdrawal leaves the defecting state worse off than under mutual cooperation, carefully calibrated threats of reciprocity can deter defection.¹⁸ For example, in the case of immunity, other states—either the state affected by the defection or third states—could deprive the defecting state of immunity in their own courts as long as it does not return to compliance. This tit-for-tat strategy is widely considered the most efficient way to achieve stable cooperation in the context of a repeated multilateral prisoner's dilemma.¹⁹

¹⁵ Not all international law rules are prisoner's dilemmas: some may reflect coincidence of interests (where the CIL rule simply reflects the actions that states would independently take in any event) or simple coordination games (where states benefit from a common rule and have no incentives to defect). See GOLDSMITH & POSNER, *supra* note 3, at 26–35 (2005); GUZMAN, *supra* note 2, at 25–29. The prisoner's dilemma is often used, however, to model more difficult international cooperation problems. If international law can sustain a cooperative equilibrium in such circumstances, one can more readily conclude that it has an impact on state behavior. See *id.* at 29–30; Norman & Trachtman, *supra* note 6, at 548–51 (2005). Part III, *infra*, explores the application of our theory to CIL rules that are not prisoner's dilemmas.

¹⁶ GUZMAN, *supra* note 2, at 33, refers to these mechanisms as the “Three Rs” of compliance.

¹⁷ *Id.* at 33.

¹⁸ *Id.* at 42–45.

¹⁹ See, e.g., ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984).

Retaliation refers to actions that states take to punish a defecting state. For example, states can terminate diplomatic relations, cut off foreign aid, impose trade sanctions, or take military action.²⁰ In theory, credible threats of retaliation can provide incentives for cooperation. Retaliation has disadvantages, however, compared to direct reciprocity. First, it is typically difficult to produce effective retaliatory sanctions. Unilateral sanctions are often insufficient to deter defection, which means that the providers of retaliation must overcome a collective action problem.²¹ As a result, retaliation is often weak, and its threat may not be credible, especially for relatively minor offenses. Second, with reciprocity, the offense (for example, allowing a foreign state to be sued in a domestic court) and the remedy (for example, lifting sovereign immunity for the offending state) are directly linked, and the benefits and losses are roughly equivalent.²² By contrast, retaliatory measures are less directly linked to the offense and could potentially be considered disproportional, leading to trade wars or some other form of dispute escalation.

Finally, a state's reputation may be harmed by defection, thereby diminishing the state's ability to engage in beneficial cooperation in the future. For example, if a state breaches a treaty obligation, other states may refuse to enter into treaties with that state in the future because they do not expect it to keep its promises. Likewise, if a state allows a foreign state to be sued in its courts in violation of CIL, other states may infer that it has a low propensity to comply with CIL—or with international law generally—and therefore refrain from concluding treaties or other cooperative relationships in the future. Although the nature and scope of a state's reputation are subject to dispute,²³ scholars who adhere to reputational theories hold that a reputation for cooperation is a valuable asset and that, in order to preserve it, a state may refrain from defecting despite short-term incentives.²⁴

Under all three mechanisms the cost attached to defection provides incentives to comply with international legal or social norms. The leading rational choice theories vary in the relative emphasis that they place on each mechanism and in their conclusions regarding the likelihood of stable cooperation. Jack Goldsmith and Eric Posner argue that, if certain conditions are met, a cooperative equilibrium is possible in CIL rules that address bilateral repeated prisoner's dilemmas.²⁵ These conditions become substantially harder to meet, however, as the number of states increases, with the consequence that multilateral CIL cooperation rarely, if ever, occurs.²⁶ Even in bilateral settings, since cooperation is shaped by state preferences and capabilities, the nature of the equilibrium varies across pairs of states and is intrinsically unstable.²⁷

²⁰ GUZMAN, *supra* note 2, at 34, 46–49.

²¹ The reason is that in many cases, unilateral action will not exact a significant cost from the breaching state. Thus, economic sanctions are often ineffective when they lack broad international support, as they merely divert trade from the sanctioning state to others. See Daniel W. Drezner, *Bargaining, Enforcement, and Multilateral Sanctions: When Is Cooperation Counterproductive?*, 54 INT'L ORG. 73 (2000).

²² See Keohane, *supra* note 13.

²³ See Rachel Brewster, *Unpacking the State's Reputation*, 50 HARV. INT'L L.J. 231 (2009); George W. Downs & Michael A. Jones, *Reputation, Compliance and International Law*, 31 J. LEGAL STUD. S95 (2002).

²⁴ GUZMAN, *supra* note 2, at 34–41; see also MICHAEL TOMZ, *REPUTATION AND INTERNATIONAL COOPERATION: SOVEREIGN DEBT ACROSS THREE CENTURIES* (2007).

²⁵ See GOLDSMITH & POSNER, *supra* note 3, at 29–32.

²⁶ See *id.* at 35–38.

²⁷ See *id.* at 40–42.

As a result, the Goldsmith-Posner theory denies that CIL rules are universal or unitary.²⁸ Instead, they are, at best, temporary cooperative equilibria in bilateral relationships and often represent mere coincidence of interests or coercion.²⁹

Other scholars take a more optimistic view of CIL-based cooperation. George Norman and Joel Trachtman argue that stable cooperation in a multilateral prisoner's dilemma is plausible under reasonable assumptions.³⁰ Their model, based on targeted reciprocity, incorporates numerous parameters that make the emergence of CIL-based cooperation more or less likely.³¹ Andrew Guzman recognizes the limitations of reciprocity and retaliation in multilateral settings, but he argues that these mechanisms can work effectively in some circumstances and that reputational sanctions can compensate for some of their weaknesses.³² Even so, he acknowledges that the reputational costs associated with CIL violations are likely small, providing weak incentives to comply.³³

The theories described above are general theories of social norms or international cooperation applied to CIL. They pay little attention to the legal and institutional characteristics of CIL. In particular, they do not consider how the institutional deficiencies of CIL relative to treaties hinder effective and systematic use of the punishment strategies that they contemplate. More fundamentally, these theories do not explain how common understandings of the CIL process by states and other actors shape the use of reciprocity and retaliation, as well as the reputational consequences of norm violation. By contrast, we argue that such common understandings are of central importance. Repeated prisoner's dilemmas with multiple players have many possible equilibria. What equilibrium emerges depends on how actors expect each other to behave as part of the game, and these expectations are affected by a common legal understanding of how CIL works. In other words, in much the same way as rational choice studies that incorporate culture or common understandings of common law practices, we argue that shared understandings matter because they affect how states and individuals "interpret their world via the likelihoods they accord alternative possibilities."³⁴ CIL offers a "common logic for classifying behavior."³⁵ If a norm is understood to be CIL, states will expect other states to implement that norm in a way that is consistent with how CIL is understood to work. This argument is not about preferences but about common understandings that guide inductive inferences about how to interpret defections, compliance, statements, legislative actions, and so on. In the following sections, we develop the roles of institutional deficiencies and common legal understandings.

²⁸ See *id.* at 25.

²⁹ See *id.* at 40–42.

³⁰ See Norman & Trachtman, *supra* note 6, at 545.

³¹ These parameters include the relative value of cooperation and defection, the number of states, the availability of information, the discount factors of states, and the expected duration and frequency of interactions. *Id.* at 567–68.

³² GUZMAN, *supra* note 2, at 42, 63–69, 190–94; see also Swaine, *supra* note 6, at 617.

³³ GUZMAN, *supra* note 2, at 208–09.

³⁴ Robert H. Bates, Rui J. P. De Figueiredo Jr. & Barry R. Weingast, *The Politics of Interpretation: Rationality, Culture, and Transition*, 26 POL. & SOC'Y 603, 630 (1998).

³⁵ Gillian K. Hadfield & Barry R. Weingast, *What Is Law? A Coordination Model of the Characteristics of Legal Order*, 4 J. LEGAL ANALYSIS 471, 476 (2012).

Institutional Deficiencies

Treaties frequently include flexibility provisions that allow a state to suspend or breach its obligations without denouncing or terminating the treaty. For example, Article XX of the General Agreement on Tariffs and Trade allows parties to adopt nonconforming measures to protect human, animal, or plant life or health, conserve exhaustible resources, or protect public morals, as long as such measures are not discriminatory or otherwise “disguised restrictions on international trade.”³⁶ Likewise, many bilateral investment treaties include clauses that excuse breaches by the host state in circumstances when compliance would threaten its national security or public order.³⁷ Studies of international institutional design have noted the importance of such flexibility clauses—as well as withdrawal clauses, sunset clauses, and amendment procedures—in sustaining cooperation in areas where states sometimes face strong incentives to defect.³⁸

Treaties can also offer detailed rules and institutions to facilitate the implementation of punishment strategies in case of breach. For example, the World Trade Organization (WTO) Dispute Settlement Understanding provides a mechanism under which member states may bring complaints alleging breach by others of their substantive WTO obligations. Under the DSU, the dispute can be settled by an independent arbiter—initially an arbitration panel, then the WTO Appellate Body—applying detailed, agreed-upon rules and principles. This arbiter is empowered to determine the substantive legal issues and, if the breach is established and the defendant state does not offer adequate compensation, to authorize the aggrieved state to impose countermeasures by suspending equivalent WTO obligations. Although reciprocal enforcement of trade obligations could occur in the absence of this legal and institutional framework, its existence greatly facilitates stable cooperation. Most importantly, the existence of rules that govern the timing and extent of countermeasures, and of an independent arbiter to enforce them, allows for effective reciprocity and retaliation while minimizing the risk that they will escalate into trade wars that threaten the viability of the WTO system as a whole.³⁹

Few of the above features apply to CIL. The ILC Articles on State Responsibility (ILC Articles) incorporate several “circumstances precluding wrongfulness” that allow states to avoid

³⁶ General Agreement on Tariffs and Trade, Art. XX, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 UNTS 154, Annex 1A, 1867 UNTS 187, reprinted in THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 17, 455 (1999), 33 ILM 1153 (1994).

³⁷ Another important example is the inclusion in many human rights treaties of clauses allowing states to derogate from protected rights in times of public emergency, see, e.g., International Covenant on Civil and Political Rights, Art. 4(1), Dec. 16, 1966, 999 UNTS 171, or specifying permissible derogations from specific rights, see, e.g., European Convention on Human Rights, Art. 10(2), Nov. 4, 1950, 213 UNTS 222.

³⁸ See, e.g., Laurence R. Helfer, *Flexibility in International Agreements*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS, supra note 12, at 175; Barbara Koremenos, Charles Lipson & Duncan Snidal, *The Rational Design of International Institutions*, 55 INT'L ORG. 761 (2001); Barbara Koremenos, *Contracting Around International Uncertainty*, 99 AM. POL. SCI. REV. 549 (2005).

³⁹ Some scholars also argue that by allowing states that face strong pressure to breach a WTO obligation and, in effect, to pay a penalty for doing so, this system facilitates efficient breach. See Eric A. Posner & Alan O. Sykes, *Efficient Breach of International Law: Optimal Remedies, Legalized Noncompliance, and Related Issues*, 110 MICH. L. REV. 243 (2011–12); 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).

responsibility for breaches of international law, including CIL rules.⁴⁰ These provisions are drafted much more restrictively, however, than typical flexibility clauses in treaties. Thus, Article 25 on the “state of necessity” is drafted negatively and requires a state to meet strict requirements, and international courts and tribunals view attempts to invoke necessity with suspicion. In the *Gabčíkovo-Nagymaros* judgment the International Court of Justice (ICJ) rejected Hungary’s attempt to invoke a state of necessity, stating that “such ground for precluding wrongfulness can only be accepted on an exceptional basis” and “can only be invoked under certain strictly defined conditions which must be cumulatively satisfied.”⁴¹ Likewise, in a series of investment arbitration cases, Argentina generally failed to establish that it could rely on Article 25 to justify its breach of bilateral investment treaty (BIT) obligations due to its financial and social crisis, but was sometimes successful in invoking the less-restrictive exception clauses of individual BITs.⁴² In addition, unlike treaties’ flexibility provisions, the ILC Articles cannot easily be customized in the context of CIL to reflect particular situations or obligations, and several other common treaty flexibility mechanisms—withdrawal, sunset, and amendment clauses—are inherently unavailable for CIL rules.⁴³

The legal and institutional framework of CIL also does little to facilitate reciprocal or retaliatory punishment strategies. Again, the ILC Articles provide a rudimentary regime that applies to all international law obligations. Under the articles, a state affected by a breach may take countermeasures against the state responsible, specifically in the form of “non-performance for the time being of international obligations of the State taking the measures towards the responsible State.”⁴⁴ Countermeasures “may only be taken . . . in order to induce the responsible State . . . to cease the internationally wrongful conduct, if it is continuing, and to provide reparation to the injured State.”⁴⁵ The implication is that countermeasures may not be punitive in nature.⁴⁶ They are subject to several other limitations: they must be “commensurate with the injury suffered”⁴⁷ and may not affect certain fundamental rules such as the prohibition on

⁴⁰ See Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001) [hereinafter ILC Articles on State Responsibility], reprinted in JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 61 (2002).

⁴¹ *Gabčíkovo-Nagymaros Project* (Hung./Slovk.), 1997 ICJ REP. 7, para. 51 (Sept. 25).

⁴² These arbitral decisions and the annulment proceedings that followed several of them are described and debated in an abundant literature. See, e.g., José E. Alvarez, *The Return of the State*, 20 MINN. J. INT’L L. 223 (2011). It should be noted that, narrowly drafted as it is, Article 25 has been criticized as too *broad* to accurately reflect pre-2001 customary international law, which recognized a necessity defense only in circumstances that threatened a state’s very existence. See Robert D. Sloane, *On the Use and Abuse of Necessity in the Law of State Responsibility*, 106 AJIL 447 (2012). Likewise, contrary to Article 25, Brownlie argued in the sixth, 2003 edition of his treatise that “necessity as an omnibus category probably does not exist.” IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 448 (6th ed. 2003); see also Daniel Bodansky & John R. Crook, *Introduction and Overview*, 96 AJIL 773, 788 (2002) (introduction to symposium on ILC Articles on State Responsibility).

⁴³ In some circumstances, flexibility may exist because the applicable CIL rule is unclear or lacks detail. Such flexibility does not provide, however, the same cooperation-enhancing benefits as formal flexibility clauses, under which limited breach is clearly deemed permissible under certain conditions. By contrast, an attempt to justify a breach by reference to the rule’s ambiguity is likely to be interpreted as a violation by the counterparty and (some) third parties.

⁴⁴ ILC Articles on State Responsibility, *supra* note 40, Art. 49(2).

⁴⁵ CRAWFORD, *supra* note 40, at 284.

⁴⁶ See David J. Bederman, *Counterintuiting Countermeasures*, 96 AJIL 817, 822 (2002).

⁴⁷ ILC Articles on State Responsibility, *supra* note 40, Art. 51.

the use of force, human rights and humanitarian law obligations, and *jus cogens*.⁴⁸ They must also follow certain procedural requirements,⁴⁹ must be suspended if the wrongful act has ceased and the dispute is before a court or tribunal, and be reversible—that is, “as far as possible,” be “taken in such a way as to permit the resumption of performance of the obligations in question.”⁵⁰

Debate continues as to whether the ILC Articles accurately codify CIL on countermeasures.⁵¹ In any event, compared to treaty-specific provisions, the general rules on countermeasures provide at best a rudimentary framework to facilitate and circumscribe the use of reciprocity and retaliation in response to breaches of CIL. Because of their general nature, they lack detail and cannot be customized to facilitate their application to specific substantive obligations. For example, while both the ILC Articles and the WTO DSU provide that countermeasures must be commensurate to the injury, the DSU provides guidance as to what concessions may be suspended in response to a WTO breach, and an extensive body of case law is available to guide calculations of proportionality.⁵² By contrast, proportionality under the ILC Articles has to be assessed in the context of an array of different substantive obligations, where comparison is inherently difficult and subjective.⁵³ Perhaps most importantly, whereas treaty regimes can provide dispute settlement procedures to resolve disagreements as to the use of countermeasures, an independent arbiter is rarely available to review or oversee countermeasures used against CIL breaches.⁵⁴ Thus, it is the parties to the dispute themselves who must determine whether a countermeasure is permissible. This situation sets the stage for disagreement, overreaction, and escalation, and deters the active use of reciprocal strategies.

Common Legal Understandings of CIL

Unlike treaties, CIL is generally understood to be general and nonreciprocal. Treaty rights and obligations normally apply only to states that have chosen to become parties.⁵⁵ By contrast, the existence of a CIL obligation toward another state is not conditioned on that state’s recognition of the same obligation. As the ICJ stated in *North Sea Continental Shelf*, “customary

⁴⁸ *Id.*, Art. 50.

⁴⁹ *Id.*, Art. 52.

⁵⁰ *Id.*, Art. 49(3).

⁵¹ According to David Caron, the “articles are a mix of codification and progressive development; to be frank, it would often be difficult to say which article partakes more of one or the other.” David D. Caron, *The ILC Articles on States Responsibility: The Paradoxical Relationship Between Form and Authority*, 96 AJIL 857, 873 (2002); see also Sloane, *supra* note 42, at 451. The codification of state responsibility took more than forty years, and the provisions on countermeasures were among the most controversial and debated. See CRAWFORD, *supra* note 40, at 47–49; Bederman, *supra* note 46.

⁵² See Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 22, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 UNTS 154, Annex 2, 1869 UNTS 401, reprinted in THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, *supra* note 36, at 354 (1999), 33 ILM 1226 (1994).

⁵³ In addition to Article 51’s vague proportionality rule, commentators have pointed to the ILC Articles’ widespread use of imprecise concepts. See Bodansky & Crook, *supra* note 42, at 789.

⁵⁴ For our discussion of the role of international courts and tribunals in CIL, see subsection “International Courts” below.

⁵⁵ The principle of relative effect of treaties is reflected in Article 34 of the Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 UNTS 331.

law rules and obligations . . . , by their very nature, must have equal force for all members of the international community.”⁵⁶ Thus, general CIL rules apply *prima facie* to all states—even those that fail to observe the rule in their own practice.⁵⁷ Applying CIL rules on a reciprocal basis is inconsistent with common legal understandings of how CIL works. Hersch Lauterpacht articulated this idea explicitly: “States do not make the observance of established rules of international law dependent upon reciprocity. Ordinarily, reciprocity is made to apply to concessions and privileges to which states are not entitled, or which they are not bound to grant, according to ordinary international law.”⁵⁸

As a result, states usually do not discriminate among foreign states in applying a CIL rule. Instead, while they may differ in their views regarding the existence and content of a rule, they usually apply their understanding of the rule to all foreign states on a nonreciprocal and non-discriminatory basis. For example, although states long disagreed as to whether absolute or restrictive immunity was the applicable CIL rule, they virtually always applied their preferred doctrine to all foreign states. Thus, as long as the United Kingdom adhered to absolute immunity, that benefit would be granted to all states, not only to states that adhered to it themselves. The argument to the contrary was explicitly rejected by the House of Lords:

It was suggested that immunity would only be granted where the country claiming it, in itself, granted reciprocal immunity to other nations. I can find no authority for this proposition The question is, what is the law of nations by which civilized nations in general are bound, not how two individual nations may treat one another.⁵⁹

The same principle holds for many other CIL obligations. States that insisted that the three-mile rule for the breadth of the territorial sea remained CIL did not selectively enforce a broader claim against states that did so; they applied the three-mile rule to all. Likewise, although states disagree as to whether the rule of prompt, adequate, and effective compensation for expropriation remains CIL, states that retain that rule do not usually provide less compensation to nationals of states that do not recognize the rule when they conduct expropriations.

Indeed, the fact that states apply certain rights and privileges on a reciprocal basis is sometimes explicitly cited as evidence that the practice is followed as a matter of comity and that no CIL obligation is involved. For example, many states recognize and enforce judgments from the courts of other states on a reciprocal basis, but it is generally understood that they have no international legal obligation to do so.⁶⁰ Likewise, when codifying the law of diplomatic relations, the ILC regarded the fact that certain immunities and privileges were typically granted on a reciprocal basis as evidence that they were based on comity rather than law. In certain instances, however, the ILC elected to incorporate them in its draft as a matter of progressive

⁵⁶ North Sea Continental Shelf (Ger./Den.; Ger./Neth.), 1969 ICJ REP. 3, para. 63 (Feb. 20).

⁵⁷ See, e.g., Hugh Thirlway, *The Sources of International Law*, in INTERNATIONAL LAW 95, 106 (Malcolm D. Evans ed., 3d ed. 2010). The discussion here is limited to general CIL, although traditional doctrine recognizes regional and special CIL in some circumstances.

⁵⁸ Hersch Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 1951 BRIT. Y.B. INT’L L. 220, 228.

⁵⁹ *Dollfus Mfg. v. Bank of England*, [1952] A.C. 582, 613 (H.L.).

⁶⁰ See *Hilton v. Guyot*, 159 U.S. 113 (1895) (arguing that the reciprocal recognition of other states’ judgments is evidence that such recognition is a matter of the “comity of nations”); see also Ralf Michaels, *Recognition and Enforcement of Foreign Judgments*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, para. 11 (Rüdiger Wolfrum ed., online ed. 2008), at <http://www.mpepil.com>.

development of the law. Thus, the ILC stated that the exemption from customs duties of items intended for the personal use of diplomats—which was often granted based on reciprocity—had “been regarded as based on international comity.”⁶¹ Nevertheless, it decided to incorporate the exemption in its draft provisions because it had become so general that it “should be accepted as a rule of international law.”⁶²

In sum, common legal understandings of CIL encourage states to adopt a single policy as to a given CIL rule and apply it uniformly to foreign states. If states do not apply the rule uniformly, it signals that the particular issue is not governed by CIL. These patterns are also rooted in the practical realities of the manner in which domestic legal systems and government bureaucracies make decisions. National courts and officials typically deal with many cases over time, which increases the need for a permanent and uniform policy to guide their determinations. In this context, whereas higher-level officials may engage in substantive debate to decide the policy that the state should adopt, it is usually impractical to reevaluate this policy in every subsequent case in which the rule has to be applied. In addition, the relevant actors are often lawyers, which reinforces the tendency to value predictability and consistency, and to rely heavily on rules and precedents.⁶³ Importantly, this dynamic is characteristic not just of the judiciary but also of the executive branch. Thus, the U.S. Department of State’s Office of the Legal Adviser and the Department of Justice’s Office of Legal Counsel play a central role in elaborating U.S. policy toward international law questions, as do lawyers throughout the administration.⁶⁴ The reality of legal and bureaucratic decision making means not only that states tend to adopt a durable and uniform policy on CIL matters but also that a decision to change that policy usually sets a domestic precedent that other states know is likely to apply to them in the future.

The example of state immunity illustrates this phenomenon. In some countries, legislation expressly governs the circumstances in which immunity is granted to foreign states, and courts follow that legislation. In most countries, no specific legislation has been enacted, and courts simply decide, based on their own assessment of the CIL rule—and often deriving their authority to do so from constitutional provisions that incorporate CIL into domestic law—whether to decline jurisdiction. In both cases, the way in which the policy is implemented strongly favors consistent decisions across states and over time. The relevant legislation virtually always adopts a single doctrine (absolute or restrictive) and applies it uniformly to all foreign states. Likewise, although in many legal systems prior court decisions are not formally binding, they are, in practice, highly influential. Once the highest court holds that restrictive immunity is CIL and allows cases against foreign states to proceed, it is highly unusual for other courts to

⁶¹ See Report of the International Law Commission to the General Assembly, UN GAOR, 13th Sess., Supp. No. 9, UN Doc. A/3859 (1958), reprinted in [1958] 2 Y.B. Int’l L. Comm’n 78, 100, UN Doc. A/CN.4/SER.A/1958/Add.1; Yu-Long Ling, *A Comparative Study of the Privileges and Immunities of United Nations Member Representatives and Officials with the Traditional Privileges and Immunities of Diplomatic Agents*, 33 WASH. & LEE L. REV. 91, 111–12 (1976).

⁶² See Report of the International Law Commission to the General Assembly, *supra* note 61, at 100.

⁶³ See FREDERICK SCHAUER, *THINKING LIKE A LAWYER* (2009).

⁶⁴ See Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1132–37 (2013); Harold Hongju Koh, *The State Department Legal Adviser’s Office: Eight Decades in Peace and War*, 100 GEO. L.J. 1747 (2012); Paul B. Stephan, *Privatizing International Law*, 97 VA. L. REV. 1573, 1641 (2011).

decline to follow that precedent, even in civil law countries. In sum, the fact that state immunity is implemented by courts and other legal actors makes it difficult for states either to provide the benefit of the rule only to states that cooperate or to rapidly change their policy in order to implement reciprocal punishment strategies.⁶⁵ Indeed, states that have adopted restrictive immunity have been able to invoke absolute immunity successfully in states that still practiced the older doctrine.⁶⁶

To be clear, we do not argue it would be impossible to apply reciprocity in some areas currently governed by CIL. For example, states could adopt legislation directing their courts to grant absolute immunity only to states that follow that practice themselves. Courts could also adopt such a rule on their own. Yet, beyond the real practical difficulties involved,⁶⁷ the fact that sovereign immunity is governed by CIL complicates such strategies. The use of reciprocity clashes with the expectations of domestic and foreign actors that arise from common legal understandings of CIL—namely, that CIL rules are implemented in a consistent and nondiscriminatory manner. A state that adopted a policy of systematically applying the rule only to reciprocating states would risk seeing its actions interpreted as rejecting the existence of a CIL rule. As a result, when states want to reach and enforce reciprocal bargains or enforce rules through reciprocity, they usually reach for treaties rather than CIL. Indeed, the effort to replace CIL rules by treaties in some areas and delegate their application to specialized international courts and tribunals may be driven in part by a desire to facilitate the use of reciprocal strategies. Treaties do not simply codify CIL; they can also add provisions that aid reciprocity and retaliation, such as dispute resolution mechanisms that help determine what constitutes noncompliance and how it should be punished.

Although common legal understandings of CIL clash with reciprocity, we do not claim that they somehow prohibit or discourage retaliation against defectors. Indeed, the ILC rules on countermeasures contemplate retaliatory actions and attempt to regulate them. As seen above, however, they lack the precision and institutional support to circumscribe retaliatory measures, limit escalation risk, and resolve collective action problems. Moreover, at the national level, imposing retaliatory measures often requires making an exception from established law or policy, such as trade tariffs, civilian and military aid commitments, or diplomatic relations, with all the legal and political hurdles that doing so implies.⁶⁸ The fact that the norm being enforced is CIL does little to overcome these obstacles. It therefore seems clear that imposing retaliatory measures to punish CIL violations is the exception rather than the rule. For example, states

⁶⁵ There are, to be sure, exceptions. See GOLDSMITH & POSNER, *supra* note 3, which provides several examples, primarily from the law of war at sea, where purported CIL rules were applied inconsistently across states and over time. These examples are discussed in part III.

⁶⁶ For example, in the early 1920s, Italy—which had adopted restrictive immunity decades before—successfully claimed immunity in the United States for a state-owned ship engaged in commerce. *Berizzi Bros. Co. v. S.S. "Pesaro,"* 271 U.S. 562 (1926).

⁶⁷ Although Polish courts purported to apply absolute immunity on a reciprocal basis, they did not succeed in doing so, and actually ended up applying absolute immunity even to foreign states that had clearly switched to restrictive immunity. See Verdier & Voeten, *supra* note 12.

⁶⁸ For example, the terrorism exception in the Foreign Sovereign Immunity Act, 28 U.S.C. §§1330, 1332(a)(4), 1391(f), 1441(d), 1602–1611, is arguably a countermeasure against state sponsors of terrorism. Putting the exception in place required statutory amendments, however, and its use requires a presidential designation—a political decision of the highest order that is not available to punish routine international law violations.

virtually never threatened retaliation when foreign courts deprived them of immunity, even when absolute immunity was widely accepted as CIL.⁶⁹

Finally, we accept that states may have reputational incentives to comply with CIL rules, independently of the prospect of reciprocity or retaliation. Several factors suggest, however, that the reputational costs of noncompliance with CIL are often small. As a theoretical matter, scholars disagree as to whether states have general reputations for compliance with international law whose preservation is sufficiently valuable to influence their decisions to comply. Thus, Guzman acknowledges that states likely have narrow reputations for compliance with CIL that are distinct from their reputations for treaty compliance—which implies that CIL violations do not compromise their ability to enter into valuable cooperative arrangements under treaties.⁷⁰ Other scholars argue that a state's reputation is even more segmented, varying across issue areas, regimes, and partners, and diluting the potential reputational costs of defection.⁷¹ Even if states have a general reputation for compliance, the characteristics of CIL described above would reduce the impact of that reputation on CIL compliance. The principal reason for states to cultivate such a reputation is to increase the opportunities for joining beneficial cooperation arrangements in the future. Because CIL rules are usually applied on a non-discriminatory basis, however, it is difficult to systemically exclude states with bad reputations from CIL cooperation *ex ante*, as in the case of treaties.⁷² Thus, it may be that states sometimes comply with CIL in an effort to make themselves more attractive partners for other cooperative arrangements, but a good reputation for law obedience does not necessarily enhance a state's access to beneficial CIL norms. Reputation is consequently a poor candidate for explaining change and continuity in CIL.

The Role of Precedential Concerns

The argument above reveals a puzzle. Whereas existing theories rely heavily on reciprocity and retaliation to explain compliance with CIL, we have shown that these mechanisms are difficult to implement in the context of many CIL rules and that they are often inconsistent with common legal understandings of CIL. Yet, some cooperative CIL rules remain stable for extended periods of time. Thus, for most of the nineteenth and twentieth centuries, states respected the absolute immunity doctrine by refraining from entertaining cases brought against foreign states, even when such cases would benefit their own nationals. Even under restrictive immunity, states still protect each other against proceedings relating to sovereign acts. This situation requires an alternative explanation for the stability of CIL. In this section, we argue that while the legal and institutional characteristics of CIL often impair reciprocity and retaliation, they increase the precedential impact of defections. As a result, states may comply because they expect that their defection would undermine a cooperative norm whose continued existence they value.

A fundamental element of the common legal understandings of CIL is that because a CIL rule results from prevailing state practice, violations of the rule may modify its content or even abolish it altogether: “Nations forge new law by breaking existing law, thereby leading the way

⁶⁹ See Verdier & Voeten, *supra* note 12.

⁷⁰ GUZMAN, *supra* note 2, at 209.

⁷¹ See Brewster, *supra* note 23; Downs & Jones, *supra* note 23.

⁷² GUZMAN, *supra* note 2, at 208.

for other nations to follow.⁷³ As a result, the questions of whether states comply with a CIL rule and whether the rule exists are closely intertwined. This somewhat paradoxical situation is not true of treaties or, for that matter, of most legal rules. In domestic legal systems, a statute does not usually lose its binding force because some—or even many—violate it. Likewise, a treaty usually remains legally binding even though a party has breached its obligations.⁷⁴ The legal validity of these instruments arises from formal acts of adoption or ratification, not from consistent adherence by those to whom it applies. By contrast, violations of a CIL rule intrinsically challenge the continued existence of the rule itself, and beyond a certain volume of violations, a CIL rule ceases to exist.

The precedential effects of defection are further amplified by the weakness of flexibility and reciprocity mechanisms. Because the legal grounds for justifying or excusing a *prima facie* breach of CIL based on exceptional circumstances are weak and contested, states rarely admit that they are breaching CIL. Instead, they attempt to hide or deny breaches. When doing so is not possible or credible, they claim that the CIL rule never truly existed or has changed so as to permit their behavior.⁷⁵ Thus, when states have adopted restrictive immunity, they have virtually never admitted that they were breaching CIL—even when absolute immunity was unquestionably the dominant rule. They also have not argued that exceptional circumstances prevented the breach from giving rise to responsibility. Instead, they have alleged that the CIL rule never existed or that it had changed. When a state behaves in this manner, it communicates to other states that that it no longer considers itself bound by the old rule. This behavior reinforces the destructive effect of violations on the rule itself—a consequence that states must take into account when deciding whether to observe the CIL rule.

To illustrate the choice faced by a state, let us once again use the example of foreign state immunity. State A has previously followed absolute immunity and is faced with a case in which a domestic plaintiff is suing state B for damages resulting from the latter's commercial activities. Let us assume that this scenario is taking place at a time when most states, including state B, still consider absolute immunity to be CIL. State A can derive an immediate benefit from applying restrictive immunity, as it would allow the domestic plaintiff to recover. That benefit

⁷³ Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 1985 BRIT. Y.B. INT'L L. 1, 21; see also *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 ICJ REP. 14, para. 207 (June 27) ("Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law."); ROSALYN HIGGINS, PROBLEMS AND PROCESS 19 (1994) ("One of the special characteristics of international law is that violations of law can lead to the formation of new law."); Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 212 (2010) ("The only way for nations to change a rule of CIL (as opposed to overriding it by treaty) is to violate the rule and hope that other nations accept the new practice."); Michael 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.").

⁷⁴ To be sure, a party affected by the violation may in some circumstances suspend or terminate the treaty, but this option must be exercised affirmatively by the party in question and is exceptional, especially in the case of multilateral treaties that articulate general rules analogous to the sort of general CIL that we are concerned with here. Also, in extreme circumstances a treaty may fall into desuetude. See Yoram Dinstein, *The Interaction Between Customary International Law and Treaties*, 322 RECUEIL DES COURS 243, 411–15 (2006). But that is highly unusual.

⁷⁵ See Jonathan I. Charney, *The Power of the Executive Branch of the United States Government to Violate Customary International Law*, 80 AJIL 913, 916 (1986); Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AJIL 348, 369 (1987).

must be balanced against potential costs.⁷⁶ First, state B and other states might apply reciprocity by refusing in the future to apply absolute immunity when cases are brought against state A in their courts. As seen above, however, this type of reciprocity is rarely implemented. Second, state B might retaliate against state A in some other way—for instance, by imposing economic sanctions. As seen above, the costs, risks of escalation, and collective action problems make retaliation ineffective in many instances. In sum, fear of reciprocity or retaliation is unlikely to tip the scales much in favor of continued adherence to absolute immunity. Finally, the reputational costs of defection are difficult to assess but are often likely to be low.⁷⁷

There is, however, an additional potential cost to state A's decision to defect: the anticipated precedential impact of that decision on the continued existence of the CIL rule itself. To see this, consider that defection is most tempting to state A if it believes it can free ride—that is, adopt restrictive immunity at home while continuing to benefit from the protection of absolute immunity in other states. Because other states generally do not apply immunity reciprocally or retaliate, state A knows that they will not single it out for special treatment and therefore that it may free ride in the short term. Yet, other states are likely to interpret state A's defection not as a single instance of defection but as reflecting a general policy in accordance with a changing view of the relevant CIL rule. Adhering to the absolute norm consequently becomes less attractive for others, as there are now fewer states where absolute immunity can be enjoyed. Thus, state A may believe that its defection will contribute to undermining the rule by making other states more likely to adopt restrictive immunity *as their general policy*. State A must consider whether this risk outweighs the immediate benefits. In other words, in addition to any anticipated retaliation and reputational damage, an important reason for state A to retain absolute immunity is to avoid undermining a cooperative norm that it values.⁷⁸

This rationale for compliance rests on the state's evaluation of the extent to which its own decision to change its policy will affect the decisions of others. There are at least two mechanisms through which this can occur. First, state A's defection may directly affect the incentives of other states faced with the same decision in the future. For example, suppose state A is a major importer of goods and financial center, so that many foreign states and their state-owned enterprises conduct commercial activities, raise funds, and keep accounts there. If state A adopts restrictive immunity, other states will realize that they are now exposed to liability in an important partner. In turn, when these states face the decision whether to uphold absolute immunity, they will be more tempted to defect because the potential precedential impact will be less serious, given that one of their most important partners has already switched. Therefore, state A's defection can trigger or accelerate the unraveling of the absolute immunity rule, which should give state A pause if it values the benefits of the rule.

⁷⁶ In cases where the decision is made by a court, the balancing exercise could be described as one between the court's propensity to expand its jurisdiction (in this case by denying immunity) and its concern with the foreign policy implications of its decision. Courts are often concerned with such implications, leading to the use of various avoidance doctrines to dismiss cases involving foreign states or international law breaches. For a classic statement, see *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

⁷⁷ See *supra* notes 70–72 and accompanying text.

⁷⁸ Of course, this effect will be much attenuated in areas where state practice is not public or when violations are easy to dissimulate. For these, precedential concerns are unlikely to have much of an effect, except in those rare cases in which the violation is exposed. This problem is not unique to our theory, however: the other compliance mechanisms described above—reciprocity, retaliation, and reputation—also cannot have much impact if the violation is not known by other states.

Second, state A may expect its decision to affect those of other states if it believes that at least some of these states sincerely apply CIL in accordance with traditional doctrine. For example, suppose state A believes that in state C, state immunity is implemented by independent courts that reach their decisions based on an impartial analysis of prevailing state practice and *opinio juris*, without engaging in the sort of cost-benefit calculus described above. In that case, state A will still have reason to anticipate that its decision to adopt restrictive immunity will make it more likely for state C to do so. State A's decision will add to the existing corpus of state practice and *opinio juris* that state C's courts will weigh when making the decision, potentially tipping the scales toward restrictive immunity. The impact may be substantial if state A's practice is likely to be especially influential.

In light of this potential precedential effect on the CIL rule, two categories of factors are likely to influence state A's decision. First, the more state A values the continued existence of the relevant CIL rule, the more concerned it will be about the possibility of undermining it. For example, if state A conducts considerable commercial activity abroad and is therefore exposed to more potential lawsuits in other states, it will be more hesitant to adopt restrictive immunity. Conversely, if state A faces strong domestic demand for legal remedies against foreign states—perhaps because foreign states conduct considerable commercial activity in its territory—the benefits of switching will be greater, with the consequence that the state will be less likely to be deterred. The same reasoning applies in other CIL contexts. For instance, a large capital exporter that values the CIL rule of “prompt, adequate, and effective compensation” will likely be more concerned about the precedent it would set by itself expropriating foreign investments. Likewise, a naval state that valued the three-mile rule would presumably have weighed the precedential impact before arresting foreign ships beyond that limit, even if some short-term benefit accrued from doing so in a particular instance.⁷⁹

Second, the more that state A expects that its decision will affect those of others, the stronger the deterrent effect of precedential concerns will be. Thus, if state A is a major trade or financial partner for many other states, or if it otherwise expects its decisions on CIL to be influential with other states and their courts, it will have reason to expect that its decision will have a greater impact in undermining the CIL rule; the state will therefore be more likely to refrain from defecting. But if many other states—including state A's major trade partners—have already adopted restrictive immunity, state A's incentives to maintain absolute immunity become weaker because its defection will no longer have as much of an effect. Likewise, major foreign direct investment exporters and importers know that their positions regarding compensation will have more impact on others, as do major naval powers with respect to the law of the sea. More generally, states that are powerful (or, more precisely, that are heavily involved in the relevant practice) and states whose legal decisions are believed to be especially influential will anticipate their decisions to have a comparatively significant impact on other states. Thus, precedential concerns are likely to weigh more heavily in their decisions unless many other states have already abandoned cooperation or switched to a new equilibrium. Since those powerful

⁷⁹ In some circumstances a state may not value the cooperative rule at all; that is, the state is not merely looking to free ride but would genuinely prefer that all states adopted a different rule. In such cases, defecting should be an obvious choice unless other states are able to implement retaliation strategies or the reputational costs are very high. Unlike for other defections, we would expect the state to attempt to maximize the precedential impact of its decision—for instance, by making a clear declaration that it believes the CIL rule has fundamentally changed rather than asserting a small modification or exception to the rule.

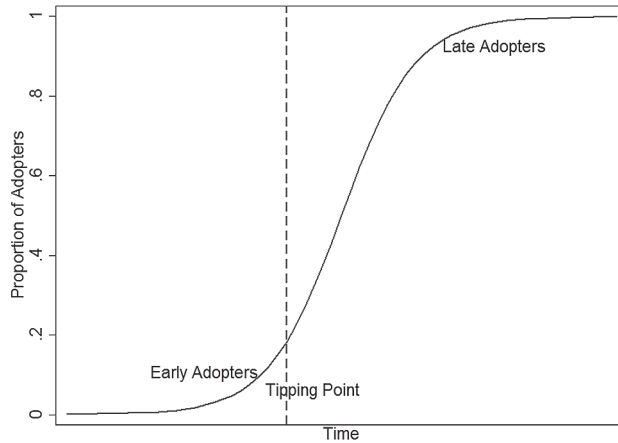


FIGURE 1. Theoretical pattern of change in CIL norms.

states are generally also the ones that cannot easily be deterred by threats of retaliation, this insight leads to an explicit contrast between our theory and existing theories.

Thresholds, Tipping Points, and the Powerful State Paradox

The theory articulated above has several implications regarding the process of CIL compliance and formation. The first main implication is that, in accordance with the intuitions of many international lawyers, our theory suggests that there may be a *tipping point* phenomenon in which a relatively small number of defections slowly build up until they reach a critical mass, beyond which defections accelerate and the CIL rule unravels. This phenomenon is described in the works of economist Thomas Schelling and sociologist Mark Granovetter, who develop models of binary decisions in which the costs and benefits to an actor of making a choice depends on how many others make that choice.⁸⁰ The example Granovetter uses is a crowd in which individuals have different “thresholds” for rioting: a radical with little to lose may be willing to be the first to throw a stone, while the most prudent individual in the crowd may be willing to riot only if everyone else does, thus providing safety in numbers. Others in the crowd have thresholds in between. Under these models, the individual decisions of actors influence those of others and shape the equilibrium outcome. For example, if thresholds are distributed evenly among the crowd, the first rioter may trigger the second one, and so on until the entire crowd riots. If only a handful of radicals are in the crowd, and everyone else has a high threshold, in equilibrium only the radicals riot. In other words, depending on the distribution of thresholds among the crowd, various equilibria can emerge.

At a macro level, change in a threshold model fits the S-curve depicted in Figure 1. Some states act early on private incentives to reject an existing norm (or to adopt a different version of the norm). The more states practice the new norm, the more attractive it becomes for others

⁸⁰ See THOMAS C. SCHELLING, MICROMOTIVES AND MACROBEHAVIOR 83–110 (1978); Mark Granovetter, *Threshold Models of Collective Behavior*, 83 AM. J. SOC. 1420 (1978); Thomas C. Schelling, *Dynamic Models of Segregation*, 1 J. MATHEMATICAL SOC. 143 (1971).

to join them. Beyond the tipping point, change is rapid. Given that optimal behavior is conditional on that of others, most states will switch here. Some states, however, have strong private incentives to uphold the old norm. Only when virtually all other states have altered their positions do these other states follow. Thus, we may see long periods of relative stability punctuated by periods of rapid change.

This model fits the process of CIL formation. In the case of state immunity, a handful of relatively small states defected as early as the late nineteenth century, but defections continued at a trickle until the post–World War II period, when several advanced Western economies switched to restrictive immunity. Then, in the 1980s and 1990s, defections accelerated substantially, culminating in today’s prevalent acceptance of restrictive immunity. Consistent with the idea of states having different thresholds, the early defectors were relatively small states with capitalist economies—which suggests that they valued absolute immunity less and, in any event, expected their defections would have little precedential effect. Conversely, the most persistent holdouts—China and Russia—are large countries with extensive state involvement in their economies, suggesting a high threshold that led them to adhere to absolute immunity while most other states switched. As more states adopted restrictive immunity, however, retaining absolute immunity became less attractive even to the high-threshold states, leading to a domino effect. Indeed, our empirical study shows that the pattern of switches to restrictive immunity over time has the S-shape described above.⁸¹ This pattern is consistent with the famous image offered by Lord Denning: “Whenever a change is made, someone some time has to make the first move. One country alone may start the process. Others may follow. At first a trickle, then a stream, last a flood.”⁸²

A comparable example is the demise of the three-mile rule regarding the breadth of the territorial sea, and the parallel development of the twelve-mile rule and more extensive exclusive fishing zones. The three-mile rule was generally accepted until the mid-twentieth century, when defections began to increase.⁸³ The early defectors were generally states, including Australia, Iceland, Korea, New Zealand, and several Latin American states, that were not major naval powers but that highly valued protecting their coastal fisheries against exploitation by long-range fishing vessels.⁸⁴ They consequently had strong incentives to defect by claiming wider territorial seas and exclusive fishing zones. Precedential concerns likely carried little weight because these states were relatively small and, even if they expected that their practice would influence other states, they likely did not place great value on their own ability to fish

⁸¹ See Verdier & Voeten, *supra* note 12, Figure 1.

⁸² *Trendtex Trading Corp. v. Cent. Bank of Nigeria*, [1977] 1 Q.B. 529, 556 (C.A.).

⁸³ See Bernard G. Heizen, *The Three-Mile Limit: Preserving the Freedom of the Seas*, 11 STAN. L. REV. 597, 618–19, 629–51 (1959). Several authors point out that states’ claims varied to some extent, with some claiming slightly broader four- or six- (nautical) mile territorial seas and some claiming exceptions such as contiguous zones to prevent smuggling. See, e.g., JAMES CRAWFORD, *BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 255, 259–60 (8th ed. 2012); GOLDSMITH & POSNER, *supra* note 3, at 59–66; Heizen, *supra*. For our purposes, it is sufficient that the three-mile rule was widely accepted and that, in any event, even the states that claimed somewhat broader territorial seas accepted limitations that were much more restrictive than the claims later made by the mid-twentieth-century defectors—for example, a fifty-mile exclusive fishing zone in the case of Iceland. See *Fisheries Jurisdiction (UK v. Ice)*, 1974 ICJ REP. 3 (July 25).

⁸⁴ See Charney, *supra* note 73, at 11.

near foreign coasts. By contrast, naval powers such as Japan, the United Kingdom, and the United States wished to fish long-range and to navigate near foreign coasts, and therefore valued the three-mile rule. But resisting change was difficult. These states sent warships to protect their fishing vessels from seizure and, in an effort to encourage fishermen to disregard foreign claims, promised to compensate them for seized vessels.⁸⁵ Such policies were costly, however, and ultimately proved ineffective. The growing volume of defections meant that states still adhering to the three-mile rule had progressively greater incentives to defect: since they could no longer fish along many foreign coasts, they might as well claim their own exclusive zones.⁸⁶ Eventually, even the naval powers that most valued the old rule had to relent.⁸⁷

Threshold models also suggest that under some configurations of preferences among states, separate equilibria may emerge as some states retain the old CIL rule while other reject it. For example, since the 1960s the CIL rule of prompt, adequate, and effective compensation for expropriation of foreign investments has been contested by developing countries. The outcome appears to be that, whereas a bloc of developed economies still accepts it as the CIL rule, developing economies reject it, leading to substantial disagreement and uncertainty.⁸⁸ Each group has engaged in practice that is arguably consistent with its position, but practice between members of one group and the other (such as lump sum agreements and BITs) is ambiguous, and scholars disagree on the state of CIL.⁸⁹ Our theory indicates that this situation is not surprising. Given that some states value the rule much more than others, it may well be that members of one group will defect but that this buildup of defections will be insufficient to convince members of the other group to abandon the rule. When states are deprived of the rule's benefits by members of the defecting group, they may try to enforce the rule through retaliation or reputational sanctions, or to reestablish it through bilateral deals such as BITs. As will be seen below, the BITs themselves may influence the development of CIL. But in the meantime, the CIL rule

⁸⁵ See *id.* at 13; Heizen, *supra* note 83, at 597, 640–41; 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, 462 (1985).

⁸⁶ Heizen, *supra* note 83, reports that by the 1958 Law of the Sea Conference, twenty-seven states claimed territorial seas broader than twelve miles.

⁸⁷ The United Kingdom and United States adopted twelve-mile zones in the 1980s. See CRAWFORD, *supra* note 83, at 260; Michael Akehurst, *Custom as a Source of International Law*, 1975 BRIT. Y.B. INT'L L. 1, 27 (“The United Kingdom thus suffered all the disadvantages of upholding the three-mile limit, without enjoying any of the advantages in practice—a situation which eventually induced the United Kingdom to claim, with some exceptions, a twelve-mile exclusive fishing zone.”). On Japan, see Charney, *supra* note 73, at 12. Eventually, the UN Convention on the Law of the Sea codified a twelve-mile rule for the territorial sea and a 200-mile exclusive economic zone (EEZ) that confers extensive rights to the coastal state. See UN Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 UNTS 397. Both of these regimes are now widely recognized as CIL. See *infra* note 197.

⁸⁸ Thus, the “United States has long maintained that a taking of property for public purposes is contrary to international law unless it is accompanied by ‘prompt, adequate and effective compensation,’ a formulation often attributed to U.S. Secretary of State Cordell Hull.” LORI F. DAMROSCH, LOUIS HENKIN, SEAN D. MURPHY & HANS SMIT, *INTERNATIONAL LAW* 1080 (5th ed. 2009). By contrast, many developing countries—and scholars who share their view—have historically argued that there is no such rule and that CIL allows substantial flexibility to the host state in determining appropriate compensation. See *id.* at 1083–86; Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 646–51 (1998).

⁸⁹ See Guzman, *supra* note 88; M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 435–88 (2d ed. 2004); José E. Alvarez, *The Public International Law Regime Governing International Investment*, 344 RECUEIL DES COURS 193, 292–95 (2009).

remains contested. A similar pattern may explain the development of regional or “special” CIL rules.⁹⁰

Our theory’s second main implication regarding the process of CIL compliance and formation is somewhat counterintuitive. Namely, our theory challenges the conventional wisdom that holds that powerful states have less incentive than others to comply with international law, because they are less vulnerable to reciprocity, retaliation, and reputational loss.⁹¹ While these assumptions may be correct, the precedential concerns that we identify as an additional incentive to comply are ones that apply more strongly to powerful states because they expect their defection to have greater influence on the behavior of other states—and therefore a more destructive impact on the CIL rule. This is true regardless of the mechanism through which this influence is channeled. As seen above, a move by a major trade or financial center to abandon restrictive immunity likely undermines the incentives of others to keep upholding that rule much more than the same move by a commercially or financially insignificant state. In addition, to the extent that courts and officials apply CIL sincerely, the decisions of the great powers are likely to exercise great influence upon their deliberations because those decisions are likely to be more widely distributed in languages understood abroad and to come from prestigious and influential institutions like the U.S. Supreme Court, the House of Lords, or the Cour de cassation. As a result, great powers may be particularly anxious to avoid defecting in circumstances that would undermine a CIL rule that they value or that would create exceptions that may be used against their interests.

The above analysis explains some otherwise puzzling facts about the behavior of great powers toward CIL. For example, great powers often comply with CIL obligations even against states that have no realistic hope of harming them through reciprocity or retaliation. Thus, even before the law of diplomatic relations was codified, the United States granted immunity to foreign diplomats accused of crimes on its territory, despite sometimes strong political pressures to prosecute and little prospect of punishment by the foreign state.⁹² Likewise, the U.S. armed forces generally respect the airspace and territorial sea of other states, despite their overwhelming military superiority. More generally, powerful states maintain sophisticated institutional frameworks to ensure both that proposed actions are reviewed for compliance with international law and that actions that may violate international law are not undertaken absent a deliberate policy decision to proceed despite the potential violation. As mentioned above, the U.S. executive branch routinely requests advice from the Justice Department’s Office of Legal Counsel and the State Department’s Office of the Legal Adviser on questions of international law.⁹³ Likewise, the U.S. military maintains a large contingent of judge advocates general in the field, whose role is to review proposed military actions for compliance with international humanitarian law and other applicable rules.⁹⁴

⁹⁰ The possibility of such rules is well accepted in international case law. *See, e.g.*, *Asylum (Colom./Peru)*, 1950 ICJ REP. 266 (Nov. 20); *Right of Passage over Indian Territory (Port. v. India)*, 1960 ICJ REP. 6 (Apr. 12); Maurice H. Mendelson, *The Formation of Customary International Law*, 272 RECUEIL DES COURS 155, 216 (1998).

⁹¹ *See* Jens David Ohlin, *Nash Equilibrium and International Law*, 23 EUR. J. INT’L L. 915, 936 (2012).

⁹² *See* SIR IVOR ROBERTS, *SATOW’S DIPLOMATIC PRACTICE* 128–30 (6th ed. 2009). On the frequency of traffic offenses by diplomats in the United Kingdom, *see* EILEEN DENZA, *DIPLOMATIC LAW* 288–89 (3d ed. 2008).

⁹³ *See supra* note 64 and accompanying text.

⁹⁴ *See* Laura Dickinson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance*, 104 AJIL 1 (2010).

When great powers decide how to behave, they are often explicitly concerned with the precedential impact of their decisions. For example, as it elaborates its policy regarding the use of unmanned drones, the United States is aware that it is setting precedents that will affect the evolution of CIL.⁹⁵ Importantly, such precedential concerns are often raised in circumstances in which reciprocity or retaliation by the foreign state directly affected by the proposed action is unlikely. In the case of the United States and Yemen, the concern was not that Yemen would reciprocate against the United States by failing to observe appropriate restraint in its use of drones or even that Yemen would otherwise retaliate. Rather, it was that any expansive precedent set by U.S. policy might be followed by other powerful states such as China or Russia. Likewise, in 2011, U.S. officials reportedly debated using cyberwarfare to disable Libya's air defense system and facilitate NATO attacks, but "administration officials and even some military officers balked, fearing that it might set a precedent for other nations, in particular Russia or China, to carry out such offensives of their own," among other reasons.⁹⁶

When great powers do breach CIL or engage in actions that may create unwelcome precedents for future CIL development, they often attempt to hide or deny these actions. For example, while many suspect that the Stuxnet attack against Iran originated from the United States and Israel, they took steps, if so, to keep their role hidden and refused to acknowledge it.⁹⁷ When denial is impossible, great powers use their extensive legal resources to articulate limited exceptions to justify their behavior while circumscribing its precedential impact as much as possible. For example, when the United States and United Kingdom decided to proceed with the 2003 war in Iraq despite doubts about its legality, they chose to articulate a relatively narrow legal justification based on the interpretation of specific UN Security Council resolutions, rather than invoking an emerging CIL doctrine of preemptive self-defense.⁹⁸ This strategy was likely motivated, at least in part, by their desire to minimize the precedential impact that their decision might have on the rules governing the use of force. Likewise, the NATO powers attempted (for the most part, successfully) to keep the legality of their intervention in Kosovo out of international courts, rather than explicitly arguing for a CIL humanitarian intervention doctrine.⁹⁹ While they were no doubt partly afraid of losing the case, they were also likely

⁹⁵ See, e.g., White House Press Release, Remarks by the President at the National Defense University (May 23, 2013), at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>; John O. Brennan, *The Ethics and Efficacy of the President's Counterterrorism Strategy*, LAWFARE (Apr. 30, 2012), at <http://www.lawfareblog.com/2012/04/brennanspeech/>.

⁹⁶ Eric Schmitt & Thom Shanker, *U.S. Weighed Use of Cyberattacks to Weaken Libya*, N.Y. Times, Oct. 18, 2014, at A1. Other examples from U.S. practice might include the State Department's declaration, in determining to grant tax exempt status to property owned by foreign governments and used to house staff of permanent missions to the United Nations or the Organization of American States, that, "[a]s the largest foreign-government property owner overseas, the United States benefits financially much more than other countries from an international practice exempting staff residences from real property taxes, and it stands to lose the most if the practice is undermined." Designation and Determination Under the Foreign Missions Act, 74 Fed. Reg. 31,788 (July 2, 2009). The exemption was expanded in January 2014 to cover additional property. See 79 Fed. Reg. 2927 (Jan. 16, 2014).

⁹⁷ Schmitt & Shanker, *supra* note 96.

⁹⁸ See William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq and International Law*, 97 AJIL 557 (2003). It is worth noting that the Bush administration had articulated such a doctrine shortly before the war in THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 14–16 (2002), at <http://www.state.gov/documents/organization/63562.pdf>.

⁹⁹ To the extent that the NATO powers disclosed a legal rationale, they tried to circumscribe the precedential effect of their actions by articulating that rationale as narrowly as possible. The same approach was followed in the 2013 debates about potential military intervention in Syria. See Prime Minister's Office, *Chemical Weapon Use by Syrian Regime: UK Government Legal Position* (Aug. 29, 2013), at <https://www.gov.uk/government/publications/>

concerned that even if they prevailed, such a doctrine would be an undesirable and unpredictable precedent.¹⁰⁰

Conversely, if a great power sufficiently values a CIL norm, concerns about precedent may create incentives for it to enforce that norm. If defection by a state weakens the incentives of others to keep observing the norm and may lead it to unravel, a great power may retaliate even against defections that do not directly affect it, thereby reaffirming the norm and stabilizing the cooperative equilibrium. For example, a powerful state may rationally expend resources to punish a state that uses chemical or biological weapons against a third state or against insurgents if it believes that leaving the violation unpunished would incentivize others to stockpile and use such weapons, undermining their international prohibition.

Our theory has one further—a third—important implication regarding the process of CIL compliance and formation. In focusing largely on the enforcement side of the story, we have argued that precedential concerns may overcome short-term incentives to defect. But CIL rules may also be solutions to coordination problems with distributive implications, such as the classic “Battle of the Sexes” game. Indeed, states rarely agree on what the optimal rule should be, and many problems in international affairs are characterized by both distribution and enforcement problems.¹⁰¹ For example, even if all states would prefer to enjoy absolute immunity when acting abroad, they differ in how much they value absolute immunity and how much they would benefit from allowing restrictive immunity domestically. Multilateral dilemmas like this are better characterized as mixed-motive games, which combine coordination and collaboration dilemmas.¹⁰² Restrictive immunity, which allows exceptions only for commercial activities, is only one plausible focal point. We could move to a world where certain human rights violations are also excluded from immunity. Yet, as long as the focal point has cooperative features, there may be incentives to defect in individual instances.¹⁰³

While we have emphasized the role of precedential concerns as an incentive for compliance, our theory also helps to explain how states resolve distributive dilemmas. Treaties are generally the result of bargaining processes. CIL evolves through practice. Thus, the change from absolute to restrictive immunity was not the result of negotiations but came about through acts by courts and other state actors. The precedent-setting effect of these acts is what ultimately led to a different distributive outcome. This way of resolving distributive conflict has characteristics that differ fundamentally from bargaining—such as the long period over which the change took place and what particular actors were able to influence the process. These differences suggest that, beyond avoiding the pursuit of short-term gains that create precedents that undermine CIL rules that they value, states may actively try to create precedents that shift the substantive content of CIL rules toward positions that they prefer. Indeed, a state that actively wants to change a CIL rule may openly defect and articulate the new (or modified) rule it

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¹⁰⁰ This concern also explains why states sometimes resist taking a position on CIL in the abstract, before they have had an opportunity to weigh the potential precedential impact of their statements.

¹⁰¹ See James D. Fearon, *Bargaining, Enforcement, and International Cooperation*, 52 INT’L ORG. 269 (1998).

¹⁰² The prisoner’s dilemma is a game in the broader class of collaboration dilemmas.

¹⁰³ See Swaine, *supra* note 6, at 599 (“Customary international law . . . facilitates a choice not just between norms and anarchy, but also between norms in circumstances where states may be well disposed toward binding obligations.”)

intends to follow.¹⁰⁴ Once again, great powers are likely to have disproportionate capacity to shape the rules because their decisions will have greater precedential impact. One such example may be the Truman Proclamation, in which the United States asserted the right of coastal states to appropriate their continental shelves.¹⁰⁵ Further research might illuminate if and how this process yields different types of outcomes than we would have expected under institutionalized bargaining.

II. IMPLICATIONS FOR CIL DOCTRINE

In this part we develop the relationship of our explanatory theory of CIL to doctrinal accounts of CIL formation and change. In contrast to prior theories that model CIL rules as generic social norms, traditional legal views of CIL play a central role in our account. Yet, our theory also has implications for continuing debates in CIL doctrine.

First, the common legal understandings of CIL reflected in traditional doctrine shape how states expect each other to behave in respect of a CIL rule. Thus, when a state declares that a CIL rule exists, it signals its intent not merely to cooperate with select other states on a reciprocal basis but to apply the rule consistently and universally and to expect others to do so as well. In other words, attaching the label “CIL” to a norm defines the basic parameters of a game in which the desired cooperative equilibrium differs in important respects from that which might arise for a treaty or a nonlegal social norm. Of course, cooperation will not therefore necessarily succeed; other states may refuse to go along and may even exploit opportunistically the cooperative behavior of the states that observe the rule. Importantly, the consequences for defecting states also differ from other kinds of cooperative norms: rather than applying reciprocity or retaliation, the cooperative states may simply abandon the rule altogether. They might also decide to cooperate only with states that reciprocate, but in such cases they are likely to choose treaties rather than CIL.

Second, beyond defining the basic parameters of the game, traditional CIL doctrine plays a more specific role in helping states and other actors identify CIL rules and their content. Indeed, CIL formation doctrine mostly consists of rules and principles developed for precisely this purpose. To understand this role, consider that most important CIL determinations are made by individual states, often for purposes of an immediate dispute. In that context, the state must balance the short-term benefits of defection against the long-term consequences, including the potential precedential impact. This calculus is informed not only by the state’s intrinsic preferences but also by the attitudes of other states with respect to the rule. Thus, in the sovereign immunity example, a state considering whether to switch considers the immediate benefits of switching and how much it values the rule, both of which are driven by its own preferences. But crucially, it also considers how many other states have already switched or are likely to do so, because even if it values absolute immunity, it makes less and less sense to incur short-term costs to sustain the rule if many others have abandoned it. The state must consider, too, the likelihood that its own decision will affect those of others.

¹⁰⁴ See *supra* note 79.

¹⁰⁵ See MICHAEL P. SCHARF, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE: RECOGNIZING GROTIAN MOMENTS 107–22 (2013). Indeed, in several chapters of this book, Scharf emphasizes the role of the United States in articulating new CIL rules that subsequently gained widespread acceptance by other states.

In other words, the state's decision must be informed by an evaluation of other states' positions and the likelihood that they will maintain these positions in the future. This is where traditional CIL doctrine comes in. When the German Supreme Court is considering whether to adopt restrictive immunity, it cannot precisely weigh all the costs and benefits described above, but it can do what CIL doctrine prescribes: conduct a survey of state practice and *opinio juris*. If it finds that many states have already adopted restrictive immunity, the case for doing so will be stronger. In conducting its survey, the court will place greater emphasis on the practice and *opinio juris* of certain states. Under traditional CIL doctrine, the "most affected states"—in this context, major trading states and states in which many lawsuits are brought—have greater weight. Not coincidentally, these states are the ones whose decisions are most important to the incentives of the remaining states.¹⁰⁶ The court will also consider whether other states apply the rule consistently and universally, thus expressing an understanding that it is CIL, or only on a reciprocal basis, which might indicate they are playing a different game that may call for a different reaction.¹⁰⁷ In a word, our theory suggests that traditional CIL doctrine serves as a tool for actors involved in CIL determinations to assess prevailing practice among other states, which is relevant to their own decisions.

In this context, it is unsurprising that the views of states as to CIL often diverge; their determinations are made with a view not only to formal CIL doctrine but also to their own interests. Indeed, at any given time different states looking at the same corpus of practice and *opinio juris* may advance different conclusions as to the CIL rule.¹⁰⁸ Precise benchmarks for evaluating objectively the existence and content of CIL—such as quantitative measures of how many states must participate or how consistent the practice must be—have consequently proven impossible to define and apply, and traditional CIL doctrine is often criticized for its vagueness.¹⁰⁹ The fact that specific rules are often contested, however, and that CIL determinations cannot be reduced to mechanical rules does not mean that traditional CIL doctrine is meaningless or that "CIL is . . . a matter of taste."¹¹⁰ In the rest of this part, we show that many aspects of traditional doctrine—the dual requirements of state practice and *opinio juris*, the role of

¹⁰⁶ The court will also likely take a close look at states whose practice may be most important for Germany—such as its neighbors or major trade partners.

¹⁰⁷ For example, if the court finds that other states enter into bilateral treaties granting each other immunity, it might conclude that it would be best to require foreign states to enter into such a reciprocal treaty with Germany in order to receive that benefit, rather than applying it to all as a CIL rule.

¹⁰⁸ Thus, the early adopters of restrictive immunity, such as Belgium and Italy, supported their view of CIL—despite the lack of widespread state practice and *opinio juris*—by citing each other's decisions, invoking fairness arguments, and arguing that a foreign state's sovereignty and dignity are not compromised by holding it liable in respect of its commercial activities. See Harvard Research on International Law, *Competence of Courts in Respect of Foreign States*, 26 AJIL SUPP. 451, 613–14, 622–25 (1932). In a sense, they genuinely believed that their view of the CIL rule was the objective and correct one, and they were ultimately vindicated as other states followed their lead. Conversely, as late as the 1980s, Communist states like China and the Soviet Union actively resisted the ILC's efforts to codify restrictive immunity. They argued that the ILC disregarded the practice and *opinio juris* of many states and that the new doctrine was incompatible with fundamental principles of international law such as sovereign equality and independence. See, e.g., Memorandum Presented by Mr. Nikolai A. Ushakov, Jurisdictional Immunities of States and Their Property, UN Doc. A/CN.4/371 (May 11, 1983), reprinted in [1983] 2 Y.B. INT'L L. COMM'N 53.

¹⁰⁹ See International Law Association, Committee on the Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law 2, 4–5 (2000) (CIL formation rules themselves are determined by the practice of states); Mendelson, *supra* note 90.

¹¹⁰ Kelly, *supra* note 3, at 451.

international courts in developing CIL, the relationship of treaties and CIL, and the persistent-objector doctrine—are consistent with our explanatory account. In many cases, our theory also provides new light on well-known doctrinal difficulties, either by helping to clarify them or by showing that areas of ambiguity are inherent in the CIL formation process and are likely to persist.

State Practice

The conventional view is that the formation of CIL requires two distinct elements to be established: state practice and *opinio juris*.¹¹¹ Nevertheless, despite the broad acceptance of this “two elements” doctrine,¹¹² there is substantial disagreement on the details. With respect to the first element, scholars have long debated what constitutes state practice; what volume, duration, and consistency of practice is required; and under what circumstances the practice of certain states should be attributed greater weight than that of others.¹¹³ These debates are complicated by the fact that, although scholars have advocated many different answers to these questions, international courts and tribunals have been reluctant to make precise statements. For their part, states often appear to assess state practice opportunistically in the context of specific disputes or when arguing for a desired rule, without committing themselves to precise and consistent standards.

Our theory helps illuminate this phenomenon. As seen above, states determine their positions regarding specific CIL rules in light both of the available evidence of state practice and *opinio juris*, and of their own preferences and interests. It is unsurprising that their assessment of the latter influences the former. As a result, because in different situations their preferences and interests may point in different directions, maintaining precise and consistent standards is virtually impossible.¹¹⁴ It would be wrong to infer, however, that CIL determinations by

¹¹¹ See, e.g., CRAWFORD, *supra* note 83, at 23.

¹¹² See, e.g., Statute of the International Court of Justice, *supra* note 1, Art. 38(1)(b); THIRD RESTATEMENT, *supra* note 1, §102(2); S.S. “Lotus” (Fr. v. Turk.), 1927 PCIJ (Ser. A) No. 10, at 28 (Sept. 7); North Sea Continental Shelf, *supra* note 56, para. 77; Continental Shelf (Libya/Malta), 1985 ICJ REP. 13, para. 27 (June 3); Military and Paramilitary Activities in and Against Nicaragua, *supra* note 73, para. 183; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ REP. 226, para. 67 (July 8); PATRICK DAILLIER, MATHIAS FORTEAU & ALAIN PELLET, DROIT INTERNATIONAL PUBLIC 353 (8th ed. 2009); MALCOLM N. SHAW, INTERNATIONAL LAW 74–76 (6th ed. 2008); HUGH THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION 46–47 (1972); KAROL WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW 40–41 (2d ed. 1993).

¹¹³ On these debates, see GOLDSMITH & POSNER, *supra* note 3, at 23–24; GUZMAN, *supra* note 2, at 185–86.

¹¹⁴ For example, in the case of state immunity, some states had low “thresholds” because they conducted relatively little state trading and placed a higher value on giving plaintiffs the ability to sue. These states insisted as early as the late nineteenth century that restrictive immunity was CIL, though they were a small minority at the time. Conversely, states that placed a high value on absolute immunity continued to insist it was CIL long after they themselves became the minority. The phenomenon is further complicated because, even for states that value the rule more or less equally, their evaluation might differ because they care about the practice of different foreign states. For example, even if France intrinsically valued restrictive immunity as much as Japan, it might switch much earlier because a larger proportion of its trade partners have already switched. Thus, although most observers would agree that the CIL rule shifted during that period, it is nearly impossible to elaborate rules to designate a single moment at which it shifted, as opposed to moments where individual states changed their views of the CIL rule. In addition, any rules that purported to identify with precision the moment when CIL rules change would not be followed consistently across different areas of CIL. This is because those states that have “low” thresholds in one area, such as immunity, and would therefore insist on rules that allow CIL to change relatively easily may well have “high” thresholds in other areas, such as human rights, and therefore articulate more restrictive arguments in that context.

states are arbitrary, because—taking a state’s valuation of the cooperative CIL rule to be constant—the desirability of upholding that rule depends on a state’s expectation that others, too, will uphold it in the future. Therefore, the more that foreign state practice supports such an expectation, the more relevant it will be. This evaluation is necessarily influenced by context and cannot easily be reduced to mechanical rules, but it is nevertheless crucial to the enterprise. Thus, while traditional legal doctrine appears inconsistent in simultaneously holding that state practice is a central element of CIL formation but also that the required type, volume, duration, and consistency of practice are a matter of appreciation in every case, this situation reflects an inherent element of the process.

Nevertheless, our theory provides a baseline for assessing some claims relating to state practice. For example, it has occasionally been argued that mere “verbal acts” by states, such as adopting a statute or decree claiming a twelve-mile territorial sea, should not count as state practice. Only physical acts, such as arresting foreign ships within that zone, should count.¹¹⁵ The intuition is clear: talk is cheap. A similar position is sometimes expressed in contemporary debates. Thus, in contesting the findings of a study of customary international humanitarian law by the International Committee of the Red Cross, U.S. officials argued that “the Study places too much emphasis on written materials, such as military manuals and other guidelines published by States, as opposed to actual operational practice by States during armed conflict.”¹¹⁶ Along similar lines, some earlier writers argued that only the practice of the branch of government formally entrusted with the conduct of foreign relations—typically, the executive—should count.¹¹⁷ Here, the rationale seemed to be that since only that branch is authorized to bind the state to international legal obligations by treaties, it should also exclusively contribute to creating obligations through CIL.¹¹⁸

Yet, it is clear that the value of state practice in predicting future behavior does not neatly follow these demarcations. For example, if state A’s legislature adopts a statute that directs its courts to apply absolute immunity, that statute will undoubtedly inform other states’ expectations of the rule that state A will follow in the future. To be sure, the weight of the statute in shaping expectations may vary based on several factors. It may carry more weight if the available evidence indicates that state A’s courts consistently apply it, or that statutes in state A are difficult to amend or repeal. It may carry less weight if the statute discriminates among foreign states—on the basis of reciprocity or otherwise—or if the available evidence indicates that state

¹¹⁵ The dissent of Judge Read in the 1951 *Fisheries* case is sometimes read as such: “The only convincing evidence of State practice is to be found in seizures, where the coastal State asserts its sovereignty over the waters in question by arresting a foreign ship and by maintaining its position in the course of diplomatic negotiation and international arbitration.” *Fisheries* (UK v. Nor.), 1951 ICJ REP. 116, 186, 191 (Dec. 18) (Read, J., dissenting). See also ANTHONY D’AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 50–51, 88 (1971). Wolfke has argued along similar lines, although he allows that in certain cases such as the Truman Proclamation, “the certainty that the verbal acts will be followed by deeds is nearly absolute and may, therefore, be considered not only as evidence but even, for simplification, as elements of custom-generating practice itself.” WOLFKE, *supra* note 112, at 41–42.

¹¹⁶ John B. Bellinger, III & William J. Haynes II, *A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, 89 INT’L REV. RED CROSS 443, 445 (2007).

¹¹⁷ See DIONISIO ANZILOTTI, *COURS DE DROIT INTERNATIONAL* 74–75 (1929); Karl Strupp, *Les règles générales du droit de la paix*, 47 RECUEIL DES COURS 263, 313–15 (1934 I). These authorities are discussed in Mendelson, *supra* note 90, at 198.

¹¹⁸ Indeed, these writers seemed to contemplate that the only acts that should count are those of the specific officials capable of entering binding international agreements. See International Law Association, *supra* note 109, at 17.

A's courts disregard the statute in their actual decisions or, more generally, that they lack independence and often render arbitrary or politically motivated decisions. Nevertheless, under the right circumstances, the statute should be much more probative than a single physical act, such as a navy captain releasing a foreign fishing vessel, unless the available evidence suggests that the act represents some durable policy on the part of the state.¹¹⁹ Thus, our theory is consistent with the mainstream view that both verbal and physical acts can constitute state practice,¹²⁰ that acts of all branches of government count,¹²¹ and that, in each case, probative value should be assessed as a matter of weight, rather than in terms of bright-line rules that exclude certain types of practice.¹²²

The theory is also consistent with the imprecision of the principles that govern the “density” of state practice required for CIL formation. While it is generally agreed that practice must be general and consistent,¹²³ just what these standards imply remains controversial, and precise definitions or rules have proven elusive.¹²⁴ In the end, as a leading textbook concludes, the “question of uniformity and consistency of practice is very much a matter of appreciation.”¹²⁵ Indeed, different states, international courts, and scholars often come to opposite conclusions after reviewing the very same practice. As seen above, this situation may be inevitable, given that state determinations of CIL are informed both by the prevalence of the practice and by their interests, and therefore cannot be reduced to bright-line rules.¹²⁶ In this light, the various principles articulated by courts and scholars—for example, that practice must be extensive but need not be universal,¹²⁷ that it must be consistent but need not be completely uniform,¹²⁸ and that it must usually persist for some time although some CIL rules may form rapidly¹²⁹—are heuristics that identify situations in which expectations of continued adherence are likely to arise among states, but they likely cannot be articulated more precisely.

¹¹⁹ This position is suggested by frequent reliance by courts and other CIL interpreters on national laws and other legal materials rather than on discrete instances of state practice. *See, e.g.*, *The Paquete Habana*, 175 U.S. 677 (1900).

¹²⁰ *See* THIRD RESTATEMENT, *supra* note 1, §102 cmt. b; International Law Association, *supra* note 109, at 13–14; SHAW, *supra* note 112, at 83–84; Akehurst, *supra* note 87, at 2–3.

¹²¹ *See* DAILLIER ET AL., *supra* note 112, at 355–56; International Law Association, *supra* note 109, at 17–18; *id.* at 14 n.32 (list of cases); SHAW, *supra* note 112 at 82. The International Law Association may be incorrect, however, in suggesting that, as a general rule, the executive’s position should carry more weight if it conflicts with that of other branches. Our theory suggests the most relevant branch should be the one that effectively determines the state’s policy with respect to the issue in question.

¹²² *See* International Law Association, *supra* note 109, at 13–14; SHAW, *supra* note 112, at 84.

¹²³ *See* North Sea Continental Shelf, *supra* note 56, paras. 73–74; *see also* International Law Association, *supra*, at 20–26.

¹²⁴ *See, e.g.*, THIRD RESTATEMENT, *supra* note 1, §102 cmt. b; International Law Association, *supra* note 109, at 25–26; WOLFKE, *supra* note 112, at 43–44.

¹²⁵ CRAWFORD, *supra* note 83, at 24; *see also* International Law Association, *supra* note 109, at 25.

¹²⁶ *See* International Law Association, *supra* note 109, at 20 n.47.

¹²⁷ *See* THIRD RESTATEMENT, *supra* note 1, §102 cmt. b; CRAWFORD, *supra* note 83, at 25; International Law Association, *supra* note 109, at 23.

¹²⁸ *See* Fisheries (UK v. Nor.), *supra* note 115, at 131, 138; North Sea Continental Shelf, *supra* note 56, paras. 73–74; Military and Paramilitary Activities in and Against Nicaragua, *supra* note 73, para. 186; Asylum, *supra* note 90, 276–77; CRAWFORD, *supra* note 83, at 24.

¹²⁹ *See* North Sea Continental Shelf, *supra* note 56, para. 74; THIRD RESTATEMENT, *supra* note 1, §102 cmt. b; CRAWFORD, *supra* note 83, at 24; International Law Association, *supra* note 109, at 20; SHAW, *supra* note 112, at 76. Frequently cited examples of CIL rules that emerged over a short period include sovereignty over airspace and coastal state rights over the continental shelf. *See, e.g.*, THIRD RESTATEMENT, *supra* note 1, §102 Reporters Note 2.

Finally, another frequently articulated principle is that the practice of “specially affected states”—usually read as those states that are more actively engaged in the relevant practice, but sometimes equated with “powerful states”—carries more weight.¹³⁰ As seen above, this principle is consistent with our theory: when a state’s practice in a given area touches the interests of many others, its adherence or defection from a CIL rule has a greater impact on whether other states are likely to continue following it. For example, a decision by a major importer or financial center to defect from absolute immunity has a much greater impact on the benefits that other states derive from the rule than the same decision from an economically isolated state. It may also be more influential among foreign courts and lawyers. Thus, the practice is highly relevant both to other states considering whether to adopt the new rule, and to international courts or scholars trying to determine the CIL rule that best reflects general state expectations of future behavior.

Opinio Juris

While state practice has given rise to significant debates, they pale in comparison to those concerning the second element, *opinio juris*.¹³¹ As scholars have pointed out, fundamental conceptual problems abound in the notion that the formation of a CIL rule requires states to follow a certain practice “from a sense of legal obligation.”¹³² In an earlier era, scholars debated whether *opinio juris* meant that states had to *consent* to the rule—thus making CIL a tacit agreement—or merely to share a *belief* that the rule existed.¹³³ Most modern scholarship supports the latter view,¹³⁴ but important difficulties persist. It seems problematic to attribute such a belief to states, because they are composite entities that do not have beliefs in the strict sense.¹³⁵ It also seems paradoxical to require such a belief to exist for a rule to come into existence, because it is unclear why states would hold that belief unless the rule already existed.¹³⁶

¹³⁰ See North Sea Continental Shelf, *supra* note 56, para. 74; CHARLES DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 155 (P. E. Corbett trans., 1968); GUZMAN, *supra* note 2, at 189; International Law Association, *supra* note 109, at 26; SHAW, *supra* note 112, at 79–80; WOLFKE, *supra* note 112, at 78–79; René-Jean Dupuy, *Coutume sage et coutume sauvage*, in MÉLANGES OFFERTS À CHARLES ROUSSEAU 75, 77–78 (1974).

¹³¹ As Thirlway put it:

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

THIRLWAY, *supra* note 112, at 47.

¹³² THIRD RESTATEMENT, *supra* note 1, §102(2).

¹³³ For the former view, see, for example, G. I. TUNKIN, THEORY OF INTERNATIONAL LAW 123–24 (William E. Butler trans., 1974); I. C. MacGibbon, *Customary International Law and Acquiescence*, 1957 BRIT. Y.B. INT’L L. 115, and Strupp, *supra* note 117, at 263. For the latter, see HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 311–17 (1952), and THIRLWAY, *supra* note 112, at 59.

¹³⁴ See, e.g., DAILLIER, FORTEAU & PELLET, *supra* note 112, at 354–55; International Law Association, *supra* note 109 at 31, 38–40; SHAW, *supra* note 112, at 75.

¹³⁵ See International Law Association, *supra* note 109, at 33; WOLFKE, *supra* note 112, at 47.

¹³⁶ See THIRD RESTATEMENT, *supra* note 1, §102 Reporters Note 2; D’AMATO, *supra* note 115; International Law Association, *supra* note 109, at 33; SHAW, *supra* note 112, at 86–87; THIRLWAY, *supra* note 112, at 47; WOLFKE, *supra* note 112, at 47.

From a more practical perspective, doctrinal debates revolve around the exact role of *opinio juris* in the formation of CIL. The mainstream view is that in order for a CIL rule to exist, *opinio juris* must exist alongside state practice and must be established by adequate evidence.¹³⁷ Some scholars argue, however, that *opinio juris* should be presumed from sufficiently dense and consistent state practice,¹³⁸ or even that it is not required at all.¹³⁹ Conversely, some scholars argue that *opinio juris* on its own can suffice to create CIL, at least in some circumstances.¹⁴⁰ Still others have combined these two theories to suggest that CIL rules exist on a “sliding scale,” with some strongly supported by practice and requiring little evidence of *opinio juris*, whereas others supported by strong *opinio juris* may come into being despite little or inconsistent state practice.¹⁴¹ Scholars also disagree on what counts as evidence of *opinio juris*, especially in relation to UN General Assembly resolutions and other nonbinding acts of international organizations.

Our theory sheds light on some of these debates. First, on a conceptual level, it clarifies the somewhat mysterious “subjective” or “psychological” aspect often attributed to *opinio juris*. In our theory, what matters is how states believe others will behave in the future. When state acts are accompanied by explicit claims that the practice is required or permitted by law—for example, a domestic court decision holding that restrictive immunity is CIL—other states will expect the state to follow the same practice toward them in the future, thereby affecting their own calculations of the policy that they should follow. By contrast, state practice that is unaccompanied by legal claims is less likely to create such expectations. In other words, evidence of *opinio juris* is important because it invokes shared legal understandings of CIL that communicate that the state expects to follow the rule consistently and on a nondiscriminatory basis.

¹³⁷ The classical statement is in *North Sea Continental Shelf*, *supra* note 56, para. 77. See also *Continental Shelf (Libya/Malta)*, *supra* note 112, para. 27; *Military and Paramilitary Activities in and Against Nicaragua*, *supra* note 73, para. 207; *Legality of the Threat of Use of Nuclear Weapons*, *supra* note 112, para. 67; S.S. “*Lotus*,” *supra* note 112, at 28.

¹³⁸ This view is often buttressed by references to ICJ and Permanent Court of International Justice decisions in which the court appeared not to require separate evidence of *opinio juris* when it believed state practice to be sufficiently clear. See, e.g., *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 ICJ REP. 3, para. 70 (Feb. 5); *Fisheries (UK v. Nor.)*, *supra* note 115, at 128; *Interhandel (Switz. v. U.S.)*, 1959 ICJ REP. 6, 27 (March 21); *Nottebohm (Liech. v. Guat.)*, 1944 ICJ REP. 4, 22 (Apr. 6); S.S. “*Wimbledon*” (UK v. Ger.), 1923 PCIJ (Ser. A) No. 1, at 25 (Aug. 17). Indeed, as CRAWFORD, *supra* note 83, at 26, observes, “The International Court will often infer the existence of *opinio iuris* from a general practice, from scholarly consensus or from its own or other tribunals’ previous determinations.” See also SIR HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 380 (1958); WOLFKE, *supra* note 112, at 44. In its 2000 statement of principles, the International Law Association went beyond this fairly conventional position by arguing that *opinio juris* is not necessary at all in normal circumstances: a CIL rule may be inferred directly from sufficient practice except in relatively infrequent circumstances in which some evidence suggests that states believe that the practice does *not* give rise to a legal right or obligation. International Law Association, *supra* note 109, at 29–38. The ILA’s position is controversial, however, and has not been generally accepted. See Wood, *supra* note 2, at 305.

¹³⁹ See Paul Guggenheim, *Les deux éléments de la coutume en droit international*, in *LA TECHNIQUE ET LES PRINCIPES DU DROIT INTERNATIONAL PUBLIC. ETUDES EN L’HONNEUR DE GEORGES SCELLE* 275 (1950); Hans Kelsen, *Théorie du droit international coutumier*, 1 *REVUE INTERNATIONALE DE LA THÉORIE DU DROIT* 253, 263–67 (1939); Lazare Kopelmans, *Custom As a Means of the Creation of International Law*, 1937 *BRIT. Y.B. INT’L L.* 127, 151.

¹⁴⁰ See, e.g., Bin Cheng, *United Nations Resolutions on Outer Space: “Instant” International Customary Law?*, 5 *INDIAN J. INT’L L.* 23 (1965); GUZMAN, *supra* note 2, at 200–01, 204; International Law Association, *supra* note 109, at 41–42.

¹⁴¹ See Dupuy, *supra* note 130; Frederic L. Kirgis Jr., *Custom on a Sliding Scale*, 81 *AJIL* 146 (1987); Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 *AJIL* 757 (2001); Oscar Schachter, *Entangled Treaty and Custom*, in *INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABTAI ROSENNE* 717, 731 (Yoram Dinstein ed., 1989).

This implicit commitment shapes the expectations of other states, which, in turn, inform their future decisions.¹⁴² It is a costly signal for the state to send, because to maintain its credibility, the state will have to follow the announced rule even toward states that do not follow it. Importantly, this effect can occur regardless of whether the claim reflects a subjective belief on the part of the state that the rule exists or a tentative commitment to abide by the rule in the hope that others will also adopt it. Thus, there is no paradox in requiring *opinio juris* for a CIL rule to emerge, if that is understood as evidence that states following the practice have *claimed* that it reflects a CIL rule.¹⁴³ This claim matters in and of itself because it shapes expectations about a state's behavior than can, in turn, shape how others behave.

Second, our theory explains the mainstream view that state practice alone is usually insufficient for CIL formation. Although states may infer that a state will continue acting in the future as it has done in the past, the inference should be significantly stronger when it is accompanied by evidence that the state recognizes a legal obligation to do so. After all, a state's decision to refrain from claiming that its practice reflects a CIL rule may be motivated precisely by its desire to preserve its freedom to act otherwise in the future. The state may also believe that the relevant area would be more effectively governed by reciprocal rights and obligations, and therefore that legal commitments in that area should be created by treaties rather than CIL. In any event, the assessment of a state's commitment to a particular practice or course of conduct depends on the context. In some circumstances, a state's adoption of a policy toward other states that is clearly intended to be durable and universal may support expectations consistent with CIL, even if the state does not explicitly articulate the rule as CIL. For example, a state may adopt a domestic statute that instructs courts to apply absolute immunity to all foreign states. If the preamble states that absolute immunity is CIL, there is direct evidence of *opinio juris*. Even without such a statement, however, the decision to adopt a persistent and universal policy about immunity—especially against the background of a well-known debate between absolute and restrictive immunity—will likely create similar expectations on the part of others.¹⁴⁴ From a doctrinal perspective, it would be reasonable to infer *opinio juris* in such circumstances.¹⁴⁵

Third, our theory also explains why *opinio juris* alone is generally considered insufficient to establish a CIL rule. Although freestanding expressions of *opinio juris* may have some value in predicting future adherence to the rule, in many cases that value will be relatively weak. After all, states often express purported rules that are purely aspirational in nature and not consistently followed in practice.¹⁴⁶ Likewise, states that defect opportunistically from a CIL rule often attempt to minimize the precedential impact by insisting that their actions are based on a limited exception but that they continue to recognize the rule generally. It may be that such self-serving assertions reduce the impact of the defections on other states' expectations of future compliance, at least relative to a breach accompanied by a clear statement denying that the CIL

¹⁴² The same fundamental idea is expressed in Mendelson, *supra* note 90, at 188.

¹⁴³ This understanding is consistent with modern doctrine to the effect that what matters are objectively verifiable claims or statements, rather than some inquiry into the subjective beliefs of actors. *See, e.g.*, International Law Association, *supra* note 109, at 33; THIRLWAY, *supra* note 112, at 54; WOLFKE, *supra* note 112, at 47; Cheng, *supra* note 140, at 36; Norman & Trachtman, *supra* note 6, at 570; Swaine, *supra* note 6, at 615; Michel Virally, *Sources of International Law*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 116, 134 (Max Sørensen ed., 1968).

¹⁴⁴ *See* Akehurst, *supra* note 87, at 3.

¹⁴⁵ *See*, for example, the ICJ cases cited *supra* note 138.

¹⁴⁶ *See* Kelly, *supra* note 3, at 487; Reisman, *supra* note 3, at 137.

rule exists. This may be what the ICJ had in mind in its controversial statement in the *Nicaragua* case:

If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.¹⁴⁷

At some point, however, actions will speak louder than words: violations will undermine the purported CIL rule, no matter what expressions of *opinio juris* accompany them, because they will reveal that the rule is a poor predictor of actual behavior. Likewise, despite theories of “instant customary law” based on collective expressions of *opinio juris* through the UN General Assembly,¹⁴⁸ states and courts have been reluctant to recognize such resolutions as reliable indicators of CIL except in very limited circumstances.¹⁴⁹ This reluctance is unsurprising, because such statements are often detached from any domestic steps to implement them in practice.

In sum, our theory supports the salient elements of mainstream contemporary accounts of *opinio juris*. As a general rule, state practice and *opinio juris* together give rise to greater expectations of future consistent and nonreciprocal compliance with a CIL rule, because they invoke shared legal understandings to that effect backed by concrete actions. Hence, our theory explains the persistence of the “two elements” doctrine and argues against proposals to fundamentally modify it by abandoning the *opinio juris* requirement¹⁵⁰ or the requirement of state practice.¹⁵¹

International Courts

So far, our discussion of CIL has emphasized the traditional elements of state-generated practice and *opinio juris*. Because the actions of national courts may contribute to both these elements, they often play a central role in the CIL formation process.¹⁵² Many countries, for example, have adopted the restrictive immunity doctrine through national judicial decisions.

¹⁴⁷ Military and Paramilitary Activities in and Against Nicaragua, *supra* note 73, para. 186. See also the International Committee of the Red Cross's views in Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. RED CROSS 175, 180 (2005).

¹⁴⁸ See GUZMAN, *supra* note 2, at 200–01; Cheng, *supra* note 140.

¹⁴⁹ See, e.g., *Texaco Overseas Petroleum Co. v. Libyan Arab Republic*, 17 ILM 1 (1978) (Dupuy, sole arb., 1977) (finding that UN resolutions on the legality of expropriation passed by a large majority did not reflect CIL because that majority was not sufficiently representative, and that an earlier resolution more consistent with preexisting practice and *opinio juris* remained the more accurate statement of CIL); Legality of the Threat of Use of Nuclear Weapons, *supra* note 112, para. 71 (finding that repeated UN resolutions declaring the use of nuclear weapons to be illegal “fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons”). *But see* Military and Paramilitary Activities in and Against Nicaragua, *supra* note 73, paras. 188–91 (relying on UN General Assembly resolutions to support its finding that the UN Charter principles regarding the use of force are CIL); International Law Association, *supra* note 109, at 57–59 (proposing that some General Assembly resolutions may be rebuttable evidence of CIL, but under strict conditions).

¹⁵⁰ See International Law Association, *supra* note 109.

¹⁵¹ See GUZMAN, *supra* note 2, at 201–04.

¹⁵² Anthea Roberts, *Comparative International Law: The Role of National Courts in Creating and Enforcing International Law*, 60 INT'L & COMP. L.Q. 57 (2011), emphasizes the dual role of domestic courts in applying CIL (and international law in general); in addition to being impartial interpreters of the law, they are national institutions that legitimately try to shape international law consistent with their states' interests. See also Paul B. Stephan, *Disaggregating Customary International Law*, 21 DUKE J. COMP. & INT'L L. 191, 198 (2010).

By contrast, the prevailing view is that the decisions of international courts do not count as state practice for purposes of CIL formation¹⁵³ and do not generate binding precedents.¹⁵⁴ More generally, according to Article 38 of the ICJ Statute, judicial decisions are mere “subsidiary means” for ascertaining international law.¹⁵⁵ The decisions of international courts are nevertheless widely recognized as playing an important role.¹⁵⁶ And as Rosalyn Higgins has noted, “Far from being treated a subsidiary source of international law, the judgments and opinions of the [International Court of Justice] are treated as authoritative pronouncements upon the current state of international law.”¹⁵⁷ Indeed, some have argued that international courts may short-circuit the CIL process by prematurely condemning breaches that might otherwise have been recognized as creating new rules.¹⁵⁸

Although our theory focuses primarily on the role of states, it illuminates the contribution of international courts to CIL. Under our theory, the behavior of states—and, in particular, their adherence to, and compliance with, a CIL rule—is shaped by their expectations concerning the future behavior of others. In that context, international courts can affect state behavior and expectations, thereby having an indirect impact on CIL, by offering a focal point for settlement that helps states choose among multiple equilibria.¹⁵⁹ Moreover, to the extent that international court decisions influence subsequent determinations of CIL by courts and other state actors, they should also inform the expectations of states as to how others will behave. These expectations, in turn, can buttress or undermine a CIL rule.¹⁶⁰

The influence of international court decisions is most pronounced under the “sincere application” mechanism discussed earlier, in which courts and other state actors make CIL determinations based on good faith appreciation of prevailing state practice and *opinio juris*.¹⁶¹ In that context, international decisions can create or reinforce a common understanding among states that an area is governed by CIL and therefore that other states are likely to act in a consistent and nonreciprocal manner. Also, if a state believes that at least some other states are applying CIL sincerely and are therefore likely to follow the international decision, this belief

¹⁵³ See International Law Association, *supra* note 109, at 18–19; Dinstein, *supra* note 74, at 317.

¹⁵⁴ See Statute of the International Court of Justice, *supra* note 1, Art. 59; *Certain German Interests in Polish Upper Silesia (Ger. v. Pol.)*, 1926 PCIJ (Ser. A) No.7, at 19 (May 25); CRAWFORD, *supra* note 83, at 37–39.

¹⁵⁵ See Statute of the International Court of Justice, *supra* note 1, Art. 38(1)(d); THIRD RESTATEMENT, *supra* note 1, §103.

¹⁵⁶ See International Law Association, *supra* note 109, at 18–19.

¹⁵⁷ HIGGINS, *supra* note 73, at 202; see also THIRD RESTATEMENT, *supra* note 1, §103 cmt. b; SHAW, *supra* note 112, at 109; Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT’L L. 631, 639 (2005) (“In practice, . . . customary law is often first identified by courts.”).

¹⁵⁸ See, e.g., Suzanne Katzenstein, *International Adjudication and Custom Breaking by Domestic Courts*, 62 DUKE L.J. 671 (2012); see also Eyal Benvenisti & George W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 EUR. J. INT’L L. 59, 63 (2009) (“[International adjudicatory bodies] are in a position to act as agenda setters by having an early opportunity to interpret international norms, and thus establish a legal focal point which can function to narrow the range of options that remain open to national legislatures and courts.”)

¹⁵⁹ See Paul K. Huth, Sarah E. Croco & Benjamin J. Appel, *Bringing Law to the Table: Legal Claims, Focal Points, and the Settlement of Territorial Disputes Since 1945*, 57 AM. J. POL. SCI. 90 (2013); Leslie Johns, *Courts as Coordinators: Endogenous Enforcement and Jurisdiction in International Adjudication*, 56 J. CONFLICT RESOL. 257 (2012).

¹⁶⁰ See Alberto Alvarez-Jiménez, *Methods for the Identification of Customary International Law in the International Court of Justice’s Jurisprudence: 2000–2009*, 60 INT’L & COMP. L.Q. 681, 705 (2011).

¹⁶¹ See Ginsburg, *supra* note 157, at 640.

will affect its expectations of future behavior.¹⁶² Finally, to the extent that retaliation and reputation play a role in sustaining a CIL rule, a decision affirming the rule signals to states that they will more likely incur such consequences if they defect, whereas a decision finding that the rule has disappeared or changed reduces these costs and encourages further defections.¹⁶³

In the case of sovereign immunity, the ICJ was not called upon to decide whether absolute or restrictive immunity was CIL during the transition period. If that had happened, however, the decision likely would have had a substantial impact on further developments. If the ICJ had decided that restrictive immunity was then CIL, it would likely have influenced future decisions of domestic courts, and states deciding whether to switch would have predicted that other states were more likely to switch in the future. It would thus have been less attractive for states to uphold absolute immunity, even if they valued that norm. But if the court had reaffirmed absolute immunity, it would have made states more confident that other states would continue upholding the rule, therefore making it more rational to continue upholding it themselves. Importantly, because state practice and *opinio juris* varied among states, it would have been difficult for the ICJ to determine objectively what the CIL rule actually was. More generally, CIL rules are often contested when international courts are called upon to decide on them.¹⁶⁴

Given the above, the ICJ does have the capacity to influence the development of CIL, and it possesses some discretion to do so in order to advance rules that it believes to be normatively desirable. International courts have, indeed, sometimes taken the lead in accelerating the emergence of new CIL rules. In *S.S. "Wimbledon,"*¹⁶⁵ the Permanent Court of International Justice arguably accelerated the development of a CIL rule—free passage through major canals connecting areas of open seas—that had only weak support in practice and *opinio juris* up to that point. The ICJ arguably does the same in many cases where it simply affirms the existence of a CIL rule without a thorough review of practice and *opinio juris*.¹⁶⁶ In other cases, international courts have been less willing to give impetus to contested changes in CIL. Thus, in *Jurisdictional Immunities of the State*, the ICJ refused to recognize a *jus cogens* exception to state immunity despite some state practice and *opinio juris* to the contrary.¹⁶⁷ That decision will certainly slow down and perhaps stop the emergence of a new exception that, if the ICJ had not

¹⁶² This effect will be stronger if the decision comes from a court that has more legal and institutional ability to impose its decisions within the relevant national legal system. For instance, from the perspective of a third state, a decision of the European Court of Justice or the European Court of Human Rights adopting a CIL rule significantly increases the likelihood that the states subject to their respective jurisdiction will uphold the rule in the future.

¹⁶³ International court decisions may also affect state behavior through other channels. For example, Helfer and Slaughter argue that they can mobilize domestic constituencies that press their governments for compliance with international law. See Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899, 935–36 (2005).

¹⁶⁴ See HIGGINS, *supra* note 73, at 202; Roberts, *supra* note 152, at 90–91.

¹⁶⁵ *Supra* note 138.

¹⁶⁶ See WOLFKE, *supra* note 112, at 72–76; Alvarez-Jiménez, *supra* note 160, at 689–93; Jonathan I. Charney, *Universal International Law*, 87 AJIL 529, 537 (1993).

¹⁶⁷ *Jurisdictional Immunities of the State* (Ger. v. It.; Greece intervening) (Int'l Ct. Justice Feb. 3, 2012). In several other cases the ICJ has followed a conservative path. See Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Preliminary Objections, 2007 ICJ REP. 582, paras. 89–94 (May 24) (declining to find that CIL allows states to exercise diplomatic protection by substitution); Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 ICJ REP. 3 (Feb. 14) (refusing to recognize universal jurisdiction for grave violations of international humanitarian law and exceptions to head of state immunity despite some national court decisions to the contrary); Legality of the Threat of Use of Nuclear Weapons, *supra* note 112 (declining to find a CIL rule prohibiting the threat or use of nuclear weapons); North Sea Continental Shelf, *supra* note 56 (declining to find that the equidistance rule for continental shelf delimitation has become CIL).

been called upon to decide the issue, might have become CIL through the accumulation of state practice.¹⁶⁸

In sum, even in the absence of formal *stare decisis* in international law, it matters whether international courts are conservative or pathbreaking in their interpretations of CIL. This position is consistent with the widely shared notion that the ICJ and other international courts have the ability to guide the development of CIL.¹⁶⁹ However, this effect should not be exaggerated. Unlike domestic appellate courts, which often play a similar function, the ICJ has a small caseload, does not consistently have jurisdiction over disputes in which a particular CIL rule is invoked, and does not control the timing of the cases brought before it. Much the same can be said of other major courts and tribunals, although the rise of more routine international adjudication in permanent courts like the European Court of Human Rights, the WTO's Appellate Body, and the International Criminal Court may be changing this situation.¹⁷⁰

Treaties and CIL

Another long-standing debate concerns the relationship between treaties and CIL—in particular, the circumstances in which treaties may contribute to the formation of general CIL rules. As noted above, a fundamental principle of treaty law is that treaties create rights and obligations only for their parties: “A treaty does not create either obligations or rights for a third State without its consent.”¹⁷¹ Yet, the Vienna Convention on the Law of Treaties recognizes that this principle does not preclude “a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.”¹⁷² Likewise, the *Third Restatement* provides that “[i]nternational agreements . . . may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.”¹⁷³ International courts and tribunals also recognize that

¹⁶⁸ See Katzenstein, *supra* note 158. Katzenstein's argument that this phenomenon is normatively undesirable appears to assume that the potential new rule is an improvement. But if, in fact, the defection is opportunistic and risks triggering the unraveling of a welfare-enhancing cooperative rule, it may be desirable for an international court to step in and reaffirm that rule. After all, states presumably created international courts so that they could play this function of affirming and enforcing existing law.

¹⁶⁹ Indeed, scholars have argued that by considering an issue area to be governed by CIL, states may sometimes be intentionally delegating to international courts the authority to develop appropriate rules. See Benvenisti, *supra* note 14; ROBERT E. SCOTT & PAUL B. STEPHAN, *THE LIMITS OF LEVIATHAN* 34–35 (2006).

¹⁷⁰ Although we believe the mechanism by which international court decisions may influence CIL should apply to courts beyond the ICJ, there may be important differences in their approaches to CIL and in the objectives they pursue. See, e.g., Gerald L. Neuman, *Import, Export and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT'L L. 101 (2008). In some circumstances, international courts may compete to shape CIL, leading to fragmentation. A full exploration of this phenomenon is beyond the scope of this article.

¹⁷¹ Vienna Convention on the Law of Treaties, *supra* note 55, Art. 34.

¹⁷² *Id.*, Art. 38. The ILC commentary adds: “The role played by custom in sometimes extending the application of rules contained in a treaty beyond the contracting States is well recognized.” Reports of the Commission to the General Assembly, pt. 1, Report of the International Law Commission on the Work of the Second Part of Its Seventeenth Session, UN Doc. A/6309/Rev.1, reprinted in [1966] 2 Y.B. INT'L L. COMM'N 169, 230, UN Doc. A/CN.4/SER.A/1966/Add.1.

¹⁷³ THIRD RESTATEMENT, *supra* note 1, §102(3).

possibility,¹⁷⁴ as do leading scholars.¹⁷⁵ Thus, traditional doctrine recognizes that treaties may not only declare or codify existing CIL—as they often do—but also lead to the formation of new CIL rules binding even on states that are not parties to the treaty.

Despite widespread agreement that treaty provisions may lead to new CIL rules, the transformation process is fraught with theoretical and practical difficulties. Most courts and scholars agree that the general conditions for CIL formation apply: the purported rule must be supported by state practice and *opinio juris*—which must establish that states consider it to be legally obligatory independently of the treaty.¹⁷⁶ However, identifying satisfactory evidence of these elements is difficult. The practice of the parties is inherently ambiguous: the act of signing or ratifying the treaty could be read as supporting either the existence or nonexistence of a CIL rule,¹⁷⁷ and the parties' subsequent behavior may simply reflect compliance with the treaty rather than with a CIL rule.¹⁷⁸ Indeed, some scholars argue that the practice of the parties should be disregarded altogether.¹⁷⁹ Most authorities allow that such practice may contribute to CIL formation, but only if accompanied by *opinio juris* that the rule is binding as CIL independently of the treaty.¹⁸⁰ In practice, evidence to this effect is often scant and ambiguous.¹⁸¹ The alternative is to rely on the practice of nonparties that follow the rule. That practice is also inherently ambiguous, however, because it might be motivated by many considerations other than compliance with CIL.¹⁸² Here again, the problem can theoretically be solved by direct evidence of *opinio juris*,¹⁸³ but that inquiry is often hindered by the scarcity of evidence, a problem exacerbated when the relevant treaty is widely ratified.¹⁸⁴ The inquiry is further complicated by disagreement regarding the interpretation of the ICJ's statement that in order to lead to CIL, a treaty provision must have a “fundamentally norm-creating character.”¹⁸⁵

¹⁷⁴ See, e.g., North Sea Continental Shelf, *supra* note 56, para. 70; see also Continental Shelf (Libya/Malta), *supra* note 112, para. 27; Military and Paramilitary Activities in and Against Nicaragua, *supra* note 73, para. 188.

¹⁷⁵ See, e.g., CRAWFORD, *supra* note 83, at 31–32; SHAW, *supra* note 112, at 95–98; MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 173–75 (2d ed. 1997); R. R. Baxter, *Treaties and Custom*, 129 RECUEIL DES COURS 25 (1970 I); Robert Y. Jennings, *Law-Making and Package Deal*, in LE DROIT INTERNATIONAL: UNITÉ ET DIVERSITÉ. MÉLANGES OFFERTS À PAUL REUTER 347 (1981).

¹⁷⁶ See North Sea Continental Shelf, *supra* note 56, paras. 75–77; VILLIGER, *supra* note 175, at 182; Dinstein, *supra* note 74, at 376.

¹⁷⁷ The parties may have intended to establish legal obligations among themselves when there were none, or even to contract out of a CIL rule, in which case the act of signing or ratifying the treaty is inconsistent with a parallel CIL rule. Or they may have intended to codify, clarify, or provide institutional mechanisms to sustain a CIL rule, in which case the act is consistent with such a rule. See, e.g., Ahmadou Sadio Diallo, *supra* note 167, at 615; VILLIGER, *supra* note 175, at 27–28. Likewise, failure to ratify is ambiguous: it may express disagreement with the rule but may also result from many other motivations. See Baxter, *supra* note 175, at 66–67.

¹⁷⁸ See North Sea Continental Shelf, *supra* note 56, para. 76; VILLIGER, *supra* note 175, at 183.

¹⁷⁹ See Baxter, *supra* note 175, at 64.

¹⁸⁰ See, e.g., Schachter, *supra* note 141, at 729.

¹⁸¹ See Dinstein, *supra* note 74, at 377; VILLIGER, *supra* note 175, at 183–84.

¹⁸² See North Sea Continental Shelf, *supra* note 56, paras. 76–78. In the case of widely ratified treaties, reliance on the practice of nonparties is even more problematic since they may constitute only a small and unrepresentative minority.

¹⁸³ See North Sea Continental Shelf, *supra* note 56, paras. 77–78.

¹⁸⁴ See Baxter, *supra* note 175, at 64; Dinstein, *supra* note 74, at 378. The *Nicaragua* case was an extreme example of this problem, as virtually all states are parties to the UN Charter.

¹⁸⁵ North Sea Continental Shelf, *supra* note 56, para. 72. For criticism, see, for example, Baxter, *supra* note 175, at 62–64, and Dinstein, *supra* note 74, at 363–65.

Our theory helps overcome some of these difficulties. As seen above, most treaty obligations are explicitly reciprocal: they apply only among the parties and incorporate provisions and institutions that facilitate targeted punishment. CIL obligations, by contrast, reflect shared expectations that states will abide by them universally toward all other states and consistently over time. Although these two kinds of obligations are usually clearly distinct, there is a potential intersection: if a treaty creates expectations consistent with CIL on the part of other states, it may support the emergence of a CIL rule. In particular, if a treaty commits its parties to apply a rule universally—that is, even to states that are not parties to the treaty—it is more likely to create expectations of cooperative behavior by third states and therefore to be recognized as CIL. This effect may arise either explicitly or implicitly, and therefore likely varies based on the nature of the treaty obligations. Thus, by turning attention away from the search for explicit statements of *opinio juris*, and toward the nature of the substantive obligations themselves and the way they are implemented domestically, our theory helps overcome the theoretical and practical difficulties involved in identifying which treaty obligations lead to CIL.

In practice, several elements may make a treaty obligation more likely to be recognized as CIL. First, as recognized by traditional doctrine, explicit statements are important: if a treaty expressly states that some or all of its provisions are declaratory of CIL, it expresses the parties' understanding that the resulting rights and obligations apply not only to the parties but also to third states.¹⁸⁶ Likewise, provisions that purport to bind nonparties—such as the articles of the UN Convention on the Law of the Sea (UNCLOS) that impose obligations on all states—express a similar understanding.¹⁸⁷ In some circumstances, the *travaux préparatoires* may also express the parties' view that certain provisions reflect CIL.¹⁸⁸ In all these cases, the statements are likely to raise expectations on the part of third states that the parties will apply the relevant rights and obligations to them. Indeed, “[i]n relations between a party and a non-party to the treaty, the party may be called upon to conform its conduct to its past assertions of the law or risk being charged with inconsistency and irrationality in its application of law.”¹⁸⁹ In turn, such expectations may support third states' own decisions to adhere to the CIL rule, even in circumstances where they are unwilling to join the treaty.¹⁹⁰ It is important to note, however, that statements are unlikely to suffice by themselves: if the parties do not act in accordance with the purported rule in their relations with third states, any expectations that might otherwise have arisen will be defeated, and the rule is unlikely to be recognized as CIL.¹⁹¹

Second, even without express statements that a treaty provision reflects CIL, the nature of the obligations it creates may lead to expectations that support the formation of a CIL rule. As

¹⁸⁶ See Baxter, *supra* note 175, at 38 (“[T]he very fact that the parties acknowledge rules to be rules of customary international law indicates their willingness to apply those rules in relations not governed in strict law by the terms of the treaty.”).

¹⁸⁷ See, e.g., UN Convention on the Law of the Sea, *supra* note 87, Art. 137 (providing that “No State shall claim or exercise sovereignty or sovereign rights over any part of [the seabed and ocean floor and subsoil thereof] or its resources . . .”). See generally Dinstein, *supra* note 74, at 332–33.

¹⁸⁸ See Baxter, *supra* note 175, at 42; Dinstein, *supra* note 74, at 361–62. But often it is unclear whether the provisions of a treaty purport to codify CIL or to develop it. Even the ILC does not consistently adhere to the distinction between “codification” and “progressive development” in its statute. See VILLIGER, *supra* note 175, at 187; Baxter, *supra*, at 41.

¹⁸⁹ Baxter, *supra* note 175, at 55.

¹⁹⁰ For example, they might disagree with other substantive or procedural provisions of the treaty.

¹⁹¹ See Dinstein, *supra* note 74, at 378–79; Villiger, *supra* note 175, at 187.

seen above, treaties usually create rights and obligations limited to the parties, as is manifestly true of most bilateral treaties. While scholars assert that bilateral treaties may in theory contribute to CIL formation,¹⁹² in practice such treaties usually reflect strictly reciprocal bargains that create no expectations of similar treatment for third states.¹⁹³ That is why even widespread networks of bilateral treaties such as extradition, taxation, and trade agreements almost never give rise to CIL.¹⁹⁴ Even in multilateral treaties, many provisions enshrine negotiated reciprocal bargains. For example, when a state joins the General Agreement on Tariffs and Trade and lowers its tariffs for other members, third states do not therefore expect similar privileges. On the contrary, the regime is explicitly premised on discrimination between members and nonmembers, and the latter expect to be excluded; if they want the rights and obligations of the treaty, they need to become parties. Thus, treaty provisions that are premised on a quid pro quo between specific state interests, or are linked to other concessions so that they cannot be extracted in isolation, are unlikely to be recognized as CIL.¹⁹⁵

Some multilateral treaties, however, establish rules that are meant to apply universally. Even if such “lawmaking” treaties do not purport to codify existing CIL, to the extent that they create expectations on the part of third states that the same rights and obligations will apply to them, they may support the formation of CIL.¹⁹⁶ For example, UNCLOS created various new legal frameworks, such as the 200-mile exclusive economic zone (EEZ). As a matter of treaty law, the relevant provisions would bind only the parties. Nevertheless, it was clear that these provisions would not apply only among them. States that joined UNCLOS did not typically exclude other parties from their EEZs while letting nonparties exploit them, nor would they refuse to recognize EEZ claims by nonparties. As a result, nonparties expected to be subject to the same rights and obligations as parties, and increasingly so as more states joined UNCLOS. These expectations pointed toward recognizing the relevant provisions as CIL. Indeed, the ICJ, leading scholars, and important nonparties soon acknowledged them as such.¹⁹⁷ Similarly, some treaties establish obligations for which discrimination is impossible. For example, a treaty obligation not to commit genocide or torture against a state’s own citizens cannot be applied only for the benefit of the other parties; nonparties cannot be excluded from the benefit of the

¹⁹² Thus, the *Third Restatement* states that a “wide network of similar bilateral arrangements on a subject may constitute practice and also result in customary law.” THIRD RESTATEMENT, *supra* note 1, §102 cmt. i.

¹⁹³ See VILLIGER, *supra* note 175, at 189; Dinstein, *supra* note 74, at 348, 375–76; Schachter, *supra* note 141, at 732.

¹⁹⁴ See International Law Association, *supra* note 109, at 47–48; Jonathan I. Charney, *International Agreements and the Development of Customary International Law*, 61 WASH. L. REV. 971, 980 (1986). A fortiori, treaties entered into to settle specific issues between states (rather than establish rules generally applicable to their relations) do not give rise to CIL. See International Law Association, *supra*, at 45.

¹⁹⁵ See Charney, *supra* note 194, at 983; see also R. R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 1966 BRIT. Y.B. INT’L L. 275, 284; Schachter, *supra* note 141, at 735.

¹⁹⁶ See CRAWFORD, *supra* note 83, at 31 (“Law-making treaties create *general* norms, framed as legal propositions, to govern the conduct of the parties, not necessarily limited to their conduct *inter se*—indeed the expression of an obligation in universal or ‘all states’ form is an indication of an intent to create such a general rule.”) Some authors have suggested that such rules are more likely to give rise to CIL when the treaties focus on human rights obligations or other “generalized interests and aspirations of the international community.” Charney *supra* note 194, at 981–83.

¹⁹⁷ See THIRD RESTATEMENT, *supra* note 1, pt. V, Introductory Note; *id.*, §511, Reporters Note 8; *id.*, §514 cmt. a; Continental Shelf (Libya/Malta), *supra* note 112, at 29–34 (recognizing the EEZ as CIL); Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.), 1984 ICJ REP. 246, paras. 94–96 (Oct. 12) (recognizing certain aspects of the continental shelf and EEZ as CIL).

parties' compliance.¹⁹⁸ In all of the above situations, even without any explicit statements of *opinio juris*, the treaty provisions are likely to raise expectations on the part of other states that go beyond the reciprocity associated with ordinary treaty obligations.¹⁹⁹ To be sure, the treaty may incorporate features that strengthen the rule, such as more precise obligations, reciprocity-based enforcement, and dispute resolution. Compliance may consequently be more robust among parties than when nonparties are involved.²⁰⁰ Widespread participation in the treaty, however, may lead others to accept the rule as CIL.

This account illuminates the ICJ's controversial passage in *North Sea Continental Shelf*, which stated that in order to give rise to CIL, the provision must "be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law."²⁰¹ Although the exact meaning of this phrase is debated, it appears to require that the rule be articulated in general terms, so as to potentially be universally binding.²⁰² In that case, the ICJ held that several features of the equidistance provision cut against its norm-creating character: it was secondary to parties' primary obligation to agree on a delimitation; it was subject to modification in "special circumstances," and states could make reservations.²⁰³ Scholars have criticized this passage, arguing that these facts could be consistent with a CIL rule; for example, the possibility of contracting out by special agreement is inherent in most CIL.²⁰⁴ Although the assessment will differ depending on the context, the ICJ's basic insight is correct: all these features weaken a treaty provision's claim to universality and therefore decrease the likelihood that it will create expectations that would support adherence by third states. More generally, the presence of flexibility provisions often suggests that a rule is reciprocal and case specific rather than universal. Conversely, a rule that has limited or no flexibility, such as the basic prohibition in the Convention Against Torture, has a stronger claim to CIL status.²⁰⁵ Here again, however, practice is important: if the parties do not actually comply with the rule—especially in their relations with third states—its claim to CIL status will be much weaker.²⁰⁶

¹⁹⁸ For now, we bracket the question of whether and how other states benefit from another state's compliance with such obligations. Our point is simply that, to the extent such benefits exist, nonparties to the treaty cannot be excluded from them.

¹⁹⁹ The same can be said of treaties that purport to create or codify general rules that are not bargain-like but that have a coordinating function, such as the Vienna Convention on the Law of Treaties' interpretation provisions. Indeed, such provisions are frequently recognized as CIL by international courts and tribunals. See Dinstein, *supra* note 74, at 353.

²⁰⁰ By contrast, treaties that try to set universal nonderogable rules (for example, the Torture Convention) may function more like CIL: states may comply to avoid undermining the norm (making the treaty a "dead letter") rather than because of threats of reciprocity or retaliation. This interpretation is consistent with the absence in such treaties of features commonly found in other treaties to facilitate reciprocity, such as flexibility and countermeasures provisions.

²⁰¹ *North Sea Continental Shelf*, *supra* note 56, para. 72.

²⁰² See International Law Association, *supra* note 109, at 52–53; VILLIGER, *supra* note 175, at 177 ("General rules may be defined as intending to regulate *pro futuro*, with regard to a potentially unlimited, general number of subjects, rather than individualized ones."), 178 ("[S]ince customary law is usually *general*, a smooth transition from the conventional to the identical customary rule requires that the conventional rule also be general.")

²⁰³ *North Sea Continental Shelf*, *supra* note 56, para. 72. On reservations contradicting the CIL status of a treaty provision, see Baxter, *supra* note 195, at 284. *But see* International Law Association, *supra* note 109, at 44–45.

²⁰⁴ See *supra* note 185.

²⁰⁵ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 UNTS 85.

²⁰⁶ Thus, the ICJ also emphasized that, as with other CIL rules, time and consistency of practice were relevant when a treaty provision is alleged to give rise to CIL. See *North Sea Continental Shelf*, *supra* note 56, paras. 73–74;

Third, the nature of the domestic implementation of treaty provisions may create or reinforce expectations consistent with CIL. Even if a treaty obligation could theoretically be implemented by discriminating among foreign states, in some cases states do not, in fact, discriminate. For example, if a party to UNCLOS implements its treaty right to claim an EEZ by passing domestic legislation, it may be impractical to incorporate exceptions that carve out nonparties. More generally, if a treaty provision is incorporated into domestic law in such a way that it is implemented consistently and on a nondiscriminatory basis, the resulting incentives for third states become similar to those we described for CIL.²⁰⁷ This phenomenon helps explain the uncertainty that surrounds the impact of the network of BITs on CIL. As noted above, bilateral treaties generally reflect specific bargains and do not give rise to expectations consistent with CIL. BITs may be significantly different, however, from other networks of bilateral treaties. Extradition, tax, and trade treaties can usually be implemented relatively easily so as to exclude third-state nationals from their benefits. By contrast, some BIT obligations are difficult to implement in that way. For example, if state A enters into a BIT with state B that requires state A to maintain a stable regulatory framework for investors, it may be difficult to provide this benefit to state B investors without providing it also to state C investors. The reason is that a stable regulatory framework has to be implemented through generally applicable measures, such as reforming the regulatory process, reinforcing judicial review, or fighting corruption. As a result, such provisions may give rise to expectations on the part of third states that they will also benefit from the protection, supporting the emergence of CIL.²⁰⁸ Conversely, it is rarely, if ever, argued that BIT provisions that are inherently reciprocal—such as access commitments—give rise to CIL.²⁰⁹

Persistent Objectors

Virtually all international lawyers agree that once a general CIL rule emerges, it is binding even on a state that has not expressly consented to it or participated in the relevant practice.²¹⁰ Most authorities, however, recognize an exception under which a state that has persistently objected to a new rule during its formation is not bound by that rule, even once it is otherwise established as CIL binding on all states.²¹¹ This “persistent objector doctrine” has been central

see also International Law Association, *supra* note 109, at 53–54. The court also held that “this result is not lightly to be regarded as having been attained.” North Sea Continental Shelf, *supra*, para. 71. Consistent with our theory, scholars have recognized that the practice of parties toward nonparties may be especially probative of a CIL rule. *See* International Law Association, *supra* note 109, at 47.

²⁰⁷ The similarities are especially strong when states adopt domestic legislation that clearly binds domestic courts (and other legal actors) to apply the treaty obligation. *See* Dinstein, *supra* note 74, at 379.

²⁰⁸ Even among the parties, a consequence of using most-favored-nation clauses in BITs is that states may in some circumstances avail themselves of concessions made to others, thus weakening the strictly reciprocal nature of the bargain. *See* Stephan W. Schill, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses*, 27 BERKELEY J. INT’L L. 496 (2009).

²⁰⁹ *See* José E. Alvarez, *A BIT on Custom*, 42 N.Y.U. J. INT’L L. & POL. 17, 31 (2009). Note, though, that in line with the discussion of *opinio juris* above, BIT provisions that “explicitly or implicitly rely on general international law or reflect an intent by their drafters to affirm traditional principles of state responsibility to aliens” are more likely to support CIL rules. *Id.* at 31–34.

²¹⁰ *See, e.g.*, North Sea Continental Shelf, *supra* note 56, para. 60.

²¹¹ *See* THIRD RESTATEMENT, *supra* note 1, §102 cmt. d & Reporters Note 2; International Law Association, *supra* note 109, at 27. Many leading scholars also recognize the exception. *See, e.g.*, CRAWFORD, *supra* note 83, at

to voluntarist theories of international law, as it reconciles the fact that CIL rules routinely emerge without the express consent of every state with the notion that all international law is ultimately based on state consent.²¹² In such voluntarist accounts, states are said to implicitly consent to be bound by the emerging rule unless they object in a timely and persistent manner.

Scholars have challenged the persistent objector doctrine on several grounds.²¹³ They have pointed out that only a handful of international judicial decisions support it and that in each case the relevant statements can be characterized as mere obiter dicta. For example, in the widely cited *Fisheries Jurisdiction* case, the ICJ first rejected the United Kingdom's argument that the "ten-mile rule" limiting straight baselines across bays was general CIL; only after doing so did the court add that in any event such a rule would be inapplicable against Norway as it had consistently objected to it.²¹⁴ Likewise, few, if any, states have successfully invoked the doctrine to exempt themselves from obligations imposed by general CIL rules.²¹⁵

The example of China's steadfast resistance to restrictive immunity illustrates the limits of the persistent objector doctrine. In 2009, the Chinese Ministry of Foreign Affairs reaffirmed in a statement to a Hong Kong court that the "consistent and principled position of China is that a state and its property shall, in foreign courts, enjoy absolute immunity . . . and has never applied the so-called principle or theory of 'restrictive immunity' This principled position held by the Government of China is unequivocal and consistent."²¹⁶ Indeed, *Brownlie's Principles of Public International Law* explicitly cites China's position as an example of persistent objection.²¹⁷

What benefit—if any—does China derive from this purported persistent objector status? Of course, it can continue to grant absolute immunity to other states in its own courts, but it needs no special exemption to do so; it is merely granting foreign states more protection than is required by CIL. The crucial question is whether China can rely on its persistent objector status to demand that other states continue to grant it absolute immunity. No evidence suggests that China has been successful in doing so.²¹⁸ Consistent with our theory, states that have

28; DAILLIER ET AL., *supra* note 112, at 363; CHARLES ROUSSEAU, 1 DROIT INTERNATIONAL PUBLIC: INTRODUCTION ET SOURCES 320, 326 (1970); THIRLWAY, *supra* note 112, at 109–10; WOLFKE, *supra* note 112, at 66–67; Akehurst, *supra* note 87; Mendelson, *supra* note 90, at 227–44. As discussed below, the persistent objector doctrine is also alluded to in some international court decisions, although their significance is debated.

²¹² For a classic exposition of this argument, see Prosper Weil, *Towards Relative Normativity in International Law*, 77 AJIL 413, 433–34 (1983).

²¹³ See Charney, *supra* note 73; Patrick Dumberry, *Incoherent and Ineffective: The Concept of Persistent Objector Revisited*, 59 INT'L & COMP. L.Q. 779 (2010); Stein, *supra* note 85.

²¹⁴ *Fisheries (UK v. Nor.)*, *supra* note 115, at 131. Likewise, in the *Domingues* case, the Inter-American Commission on Human Rights found that the prohibition on imposing the death penalty on minors was *jus cogens*, with the consequence that the persistent objector doctrine was inapplicable. *Domingues v. United States*, Case 12.285, Inter-Am. Comm'n H.R., Report No. 62/02 (2002). For critical discussion of the cases invoked in support of the persistent objector doctrine, see Charney, *supra* note 73, at 9–11, and Dumberry, *supra* note 213, at 784–90. *But see* Mendelson, *supra* note 90, at 228–33.

²¹⁵ The *Third Restatement* admits as much. See THIRD RESTATEMENT, *supra* note 1, §102 cmt d; *see also* Charney, *supra* note 73, at 11–16; Dumberry, *supra* note 213, at 791–94; Stein, *supra* note 85, at 459–63.

²¹⁶ *Dem. Rep. Congo v. FG Hemisphere Assocs.*, [2011] 14 HKCFAR 95, para. 44 (CFA), available at <http://legalfref.judiciary.gov.hk/lrs/common/>.

²¹⁷ See CRAWFORD, *supra* note 83, at 28 n.45.

²¹⁸ Thus, in cases brought against China, U.S. courts apply the commercial exception as they do against other states. *See, e.g.*, *CYBERSitter, LLC v. China*, 805 F.Supp.2d 958 (C.D. Cal. 2011) (finding jurisdiction in suit against China for misappropriation of trade secrets, copyright infringement, unfair competition, and civil conspiracy in connection with a commercial activity).

adopted restrictive immunity do not make exceptions based on the defendant's purported persistent objector status. To be sure, China can insist that a failure to recognize the exception violates international law; it can lodge diplomatic protests; and it can threaten various forms of retaliation. But this approach is costly and becomes less viable as more states adopt restrictive immunity—which is likely why China has signed the UN convention on jurisdictional immunities²¹⁹ and is now considering domestic legislation that would incorporate restrictive immunity. A similar phenomenon took place concerning the law of the sea. As seen earlier, major naval powers resisted coastal states' claims to more extensive areas of territorial sea and to exclusive fishing zones, but those efforts were ultimately futile.²²⁰ The United Kingdom even brought a case in the ICJ against Iceland's claim to a fifty-mile exclusive fisheries zone, and the court held that the new zone was not opposable to the United Kingdom.²²¹ Despite this victory, Iceland continued to exclude British fishing vessels from its claimed zone, and the United Kingdom eventually accepted broader fishing zones.²²²

In all these cases, the persistent objector doctrine was of little benefit to the purported objectors. Other states changed their positions as to the state of CIL—from absolute to restrictive immunity, and from the three-mile territorial sea to more extensive coastal state control—and, as predicted by our theory, applied the new rule uniformly to all foreign states. Because the states that adopted the new rule did not carve out an exception for states that persistently objected, the latter found themselves suffering only disadvantages from their positions. They could not claim the benefit of the new rule (for example, claim their own exclusive fishing zones) without undermining their positions, but their persistent objector status did not effectively exempt them from application of the new rule by other states. In such circumstances, once it was clear that their resistance would not prevent the emergence of a new general rule, the only sensible option was to join the fold. In sum, our theory explains why, though lawyers may value the persistent objector doctrine as a rhetorical resource and for its theoretical role in reconciling CIL formation with state consent, the doctrine is, in fact, of limited practical significance.²²³

²¹⁹ UN Convention on Jurisdictional Immunities of States and Their Property, GA Res. 59/38, annex (Dec. 2, 2004).

²²⁰ See *supra* notes 83–87 and accompanying text.

²²¹ See *Fisheries Jurisdiction (UK v. Ice.)*, *supra* note 83.

²²² See Charney, *supra* note 73, at 10–11.

²²³ There are special circumstances in which the persistent objector doctrine might appear more significant, but upon closer examination its role remains marginal. First, the objecting states may be successful in preventing others from applying the new rule. For instance, if the U.S., UK, and Japanese navies had consistently and successfully defended their states' fishing vessels within the purported exclusive zones of other states, they would have effectively prevented the new rule from being applied against them. This kind of enforcement, however, is likely to be very costly and infrequent. Also, most international lawyers would not characterize such an outcome as an application of the persistent objector doctrine but as one in which states successfully prevented the purported new CIL rule from emerging at all. Second, in some cases—such as for most human rights CIL norms—other states may not have the ability to withhold the benefit of the “old” rule from the persistent objector. For example, suppose that a general CIL rule prohibiting the death penalty were to be widely accepted. A state that persistently objected could continue applying the death penalty within its own territory, invoking its persistent objector status. Other states could not prevent it from doing so except at great cost, which may give the impression that the state indeed benefits from an exception to the rule because of its objector status. However, other states could denounce the objector's actions, complain before international tribunals and review mechanisms, and perhaps even try its officials in their own courts. If acceptance of the new rule was sufficiently widespread, they could argue that it had attained *jus cogens* status, thus defeating the persistent objector doctrine. In such a case, even though the violation might continue indefinitely, the consequences for the objector would not be much different from those that attach to violation of

III. SCOPE OF PRECEDENTIAL CONCERNS

In parts I and II, we described how our theory illuminates CIL formation, change, and compliance, as well as some salient aspects of traditional CIL doctrine. In particular, we have drawn on long-standing CIL rules such as foreign state immunity and the law of the sea to illustrate the role of precedential concerns. CIL is a diverse phenomenon, however, which raises the question whether our theory applies to other areas. In this part we briefly explore three such areas—wartime CIL rules, the use of force, and human rights—and suggest that, consistent with our theory, precedential concerns play an important role.

Wartime CIL Rules

Goldsmith and Posner point to several examples of wartime CIL rules that were implemented inconsistently and often breached. Thus, they argue that the “free ships, free goods” rule that protected neutral shipping during pre–World War I conflicts was often violated opportunistically, except when enforced by threats of retaliation by strong powers. For example, Britain repeatedly breached the rule during the Boer War by arresting neutral ships carrying supplies to the insurgency, and stopped only when Germany and the United States threatened to retaliate.²²⁴ Goldsmith and Posner conclude that the purported general CIL rule did not truly exist; at most, bilateral cooperation was sometimes sustained by threats.²²⁵

Consistent with our theory, Goldsmith and Posner do not give examples of direct reciprocity; instead, they argue that states generally did not comply with the rule and that they did comply only when threatened with retaliation. In itself, this argument does not undermine our argument: no reasonable CIL theory implies that CIL rules are never violated or that all CIL rules remain stable. In our theory, incentives arising from precedential concerns must be weighed against short-term incentives to defect, and even those states that might prefer the rule to survive may defect if the stakes are sufficiently high.²²⁶

Indeed, precedential concerns appear to have played a role in the “free ships, free goods” rule, but they were insufficient to prevent defection. Even states that ultimately seized neutral ships in violation of the “free ships, free goods” rule did not openly reject that rule; indeed, they virtually always announced their adherence to it at the outset of conflict.²²⁷ When they did violate it, they attempted to hide the breach or argued that it was permitted under a limited exception—for example, because the ships were carrying contraband. Such claims may simply have been attempts to avoid retaliation, but it is unlikely that the enemy was fooled by them. The claims were more likely motivated by a desire to avoid undermining a general rule that the state may have wanted to invoke in a future conflict. Yet, as predicted by our theory, eventually actions spoke louder than words: repeated violations of the rule, culminating during World War I, led to its demise.

a human rights CIL norm in the absence of the persistent objector doctrine. Thus, it is unclear that the objector would derive any real benefit from invoking the doctrine.

²²⁴ GOLDSMITH & POSNER, *supra* note 3, at 45–54.

²²⁵ *Id.* at 54.

²²⁶ More precisely, on one side of scale are the short-term benefits of defecting; on the other, the costs, including precedential concerns and also any expected costs of retaliation and reputational loss.

²²⁷ *See* GOLDSMITH & POSNER, *supra* note 3, at 46.

More generally, the features of particular issue areas and the context of decisions likely influence the strength of precedential concerns. For instance, a state at war is more likely to look for the most advantageous short-term move and to be less concerned about long-term consequences such as setting a bad precedent or harming its reputation. And high-level military and executive officials may be less constrained in their ability to make decisions on a case-by-case basis and to implement strategies based on reciprocity or retaliation.²²⁸ This may explain why wartime CIL rules of the sort described by Goldsmith and Posner were more likely to be followed when precedential concerns were supplemented by short-term costs, such as credible threats of retaliation by a powerful state.²²⁹ Nevertheless, while precedential concerns may loom larger when CIL rules are enforced in peacetime by courts and other legal actors, this does not mean that they are absent in wartime. Military and executive officials may also be concerned about the long-term costs of undermining a CIL rule. In addition, even these actors face legal and bureaucratic constraints that make it difficult to discriminate or to rapidly change policy.²³⁰ Therefore, even for wartime rules, the default position may be adherence to the state's position on CIL except in cases where the short-term stakes are especially high.

Use of Force

It is generally acknowledged that the prohibition on the use of force in the UN Charter has become CIL.²³¹ The self-defense exception to this prohibition might seem inconsistent with our theory, as it contemplates a form of reciprocal self-help on the part of states. Self-defense, however, does not involve direct reciprocity, in which a state may be deprived of the reciprocal benefit of the rule in response to a breach. A state that illegally uses force against another retains its right to be free of use of force by others. The CIL rule is universal and nonreciprocal—unlike, for example, a trade commitment, for which the reciprocal deprivation of benefits is considered a permissible response to a breach.²³² Instead of reciprocal deprivation, the self-defense exception contemplates direct action to counteract the breach and possibly to prevent or deter further breaches. In such cases, self-defense is best understood as a form of retaliation—which, though a costly measure for the state exercising it, is intended to bring the violator back into compliance or to sustain the credibility of future responsive actions. As discussed above, the need for retaliation is unsurprising in wartime circumstances, as the short-term stakes are often high, and precedential and reputational incentives may be insufficient to uphold the rule. The risks of escalation are obvious, however, which may be why states have developed a body

²²⁸ The fact that these two sets of circumstances are often present at the same time is not coincidental. When states expect to face situations in which the ability to make case-by-case decisions and enforce CIL rules through reciprocity and retaliation is valuable, they will tend to entrust these decisions to institutions capable of doing so.

²²⁹ Our claims with regard to retaliation are modest. States do on occasion retaliate against violations of CIL norms, just as they retaliate against other actions that they wish to punish or deter. Yet, as seen above, the status of a norm as CIL does not necessarily make retaliation more likely, nor does CIL mitigate some of the undesirable effects of retaliation, such as the risk of escalation. Thus, although we believe that for most CIL rules, cooperation is unlikely to be sustained solely by retaliation, the use of retaliation and its playing a greater role for some CIL rules than for others do not undermine our account.

²³⁰ See *supra* notes 63–64; Stephan, *supra* note 152, at 201–02.

²³¹ See THIRD RESTATEMENT, *supra* note 1, §102 cmt. k.

²³² Indeed, it is widely seen as *jus cogens*. One of the implications is that, outside of self-defense, force may not be used as a countermeasure against a breach of international law. ILC Articles on State Responsibility, *supra* note 40, Art. 50(1)(a).

of law specifically circumscribing the use of force in self-defense, rather than relying on the more general rules on countermeasures.

Human Rights

CIL rules have evolved in the area of human rights. Unlike in other areas, payoffs on human rights issues are not obviously interdependent: states are not directly harmed when others defect from human rights norms, and do not have greater incentives to defect because others are defecting. As a result, states have little reason to fear reciprocity or retaliation.²³³ Reputational sanctions are also attenuated, at least if reputation for human rights compliance is segmented from other issue areas.²³⁴ In this context, one might expect that states will show little or no concern about setting a dangerous precedent.

Nevertheless, human rights CIL rules seem to show patterns of behavior that are consistent with our theory. CIL human rights obligations are almost always characterized as universal and nonreciprocal in nature.²³⁵ The ILC Articles specifically prohibit states from suspending fundamental human rights obligations as a countermeasure against breaches by other states of any obligations.²³⁶ In practice, reciprocity is virtually never observed. States do not breach their human rights obligations in response to breaches by others. While retaliation sometimes occurs in the form of economic sanctions or even military action, it is rare, targets only the most egregious violations (for example, regarding apartheid, Kosovo, and Libya), is often selective,²³⁷ and is hampered by serious collective action problems. Thus, as with other CIL rules, reciprocity and retaliation play a minor role in human rights CIL.

That said, many states appear to be preoccupied with precedent. The precedential effects of defection are frequently raised as primary objections when incentives to defect arise. For example, one of the most frequently heard arguments in advanced democracies against using torture in a “ticking bomb” scenario is that it will “establish a dangerous precedent and openly acknowledge that no rules are absolute.”²³⁸ Thus, allowing even limited uses of torture in circumstances that may seem legitimate to some could result in a new rule in which, like the CIL rule of immunity, the prohibition on torture would be relative rather than absolute. When states do defect, they attempt to deny or hide breaches. And when doing so is not possible, they attempt to minimize the precedential consequences by arguing for narrow exceptions to the

²³³ See BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS* (2009); see also GOLDSMITH & POSNER, *supra* note 3, at 669 (“absent special circumstances . . . , a nation otherwise inclined to abuse its citizens gains nothing from declining to do so in return for a reciprocal commitment from another nation to do the same.”); GUZMAN, *supra* note 2, at 45.

²³⁴ GUZMAN, *supra* note 2, at 110–11.

²³⁵ See, e.g., Barcelona Traction, Light & Power Co., *supra* note 138, para. 34 (stating that “the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination” give rise to *erga omnes* obligations); Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 ICJ REP. 15, 23 (May 28) (recognizing the customary and universal character of the principles underlying the Genocide Convention).

²³⁶ See ILC Articles on State Responsibility, *supra* note 40, Art. 50(1)(b).

²³⁷ See GOLDSMITH & POSNER, *supra* note 3, at 668–71.

²³⁸ Alan Dershowitz, *Should Mohammed Be Tortured for Information?*, at <http://www.alandershowitz.com/publications/docs/mohammedtorture.html>. Dershowitz is an advocate of limited uses of torture but consistently treats the precedent-setting effect as a serious and valid objection.

rule, such as a public emergency.²³⁹ Given the apparent lack of interdependence, how can this concern with precedent be explained?

While human rights violations abroad only sometimes directly affect the material economic interests of states, a subset of states nonetheless behaves as if promoting human rights abroad is indeed in their national interest, perhaps because they have internalized norms or for domestic political reasons. These “steward states”²⁴⁰ act as if their national interests are negatively affected if a CIL human rights norm erodes through acts of defection by themselves or others. This implies a theory that differs from the one expressed in this article, at least in the sense that precedential effects restrain the behavior of some states (those that identify the persistence of the norm with their national interests) but not of other states, who would have to be motivated by other means to comply. We do not develop a full theory here of how these arguments pertain to human rights issues, other than to suggest that at first glance the evidence is consistent with a prominent role for precedent. A more comprehensive theory should develop precisely why allowing limited torture in the United States or Germany would give other states incentives to lower their own standards.

IV. CONCLUSION

In this article, we have articulated a theory of CIL that departs from prior rational choice accounts by emphasizing precedential concerns over decentralized punishment as a source of cooperative stability. While precedential concerns do not displace other incentives that states may have for complying with CIL, we have shown that such concerns explain salient features of CIL formation, compliance, and change. Our theory also clarifies several important features of traditional CIL doctrine that prior accounts could not easily accommodate.

In our theory, the distinctive shared legal understandings and institutional features of CIL are central to understanding how it works. These characteristics of CIL are familiar to international lawyers but have not featured prominently in models of CIL based on theories of international cooperation. As a survey of interdisciplinary work noted, “the intellectual terms of trade have been highly asymmetrical, with most [international law/international relations] writings involving the application of international relations theories and methods to the study of international legal phenomena.”²⁴¹ Our theory contributes to rebalancing these terms of trade by illustrating the importance of incorporating fundamental legal insights in explanatory analyses of international law.

Finally, by distinguishing CIL rules from social norms and other forms of cooperative equilibria, our theory helps explain why states usually insist on maintaining a clear boundary between legal and nonlegal obligations. As Kal Raustiala has observed, “international law is a

²³⁹ Indeed, the system facilitates this practice. See Emilie Hafner-Burton, Laurence Helfer & Christopher Fariss, *Emergency and Escape: Explaining Derogation from Human Rights Treaties*, 65 INT’L ORG. 673 (2011).

²⁴⁰ The term is from EMILIE HAFNER-BURTON, *MAKING HUMAN RIGHTS A REALITY* (2013).

²⁴¹ Jeffrey L. Dunoff & Mark A. Pollack, *International Law and International Relations: Introducing an Interdisciplinary Dialogue*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS, *supra* note 12, at 3, 10.

tool that governments employ with care.”²⁴² As we have shown, claiming that a course of action is required or permitted by CIL invokes shared understandings and expectations that significantly shape subsequent interactions and potential equilibria. Finally, while we have articulated our theory in a framework of rationalist assumptions, its emphasis on such shared understandings and expectations potentially leaves the door open for broader yet compatible social and cultural explanations of CIL along constructivist lines.²⁴³

²⁴² Kal Raustiala, *Form and Substance in International Agreements*, 99 AJIL 581, 587 (2005).

²⁴³ For salient constructivist accounts of international law, see JUTTA BRUNNÉE & STEPHEN J. TOOPE, *LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW* (2010); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2005).