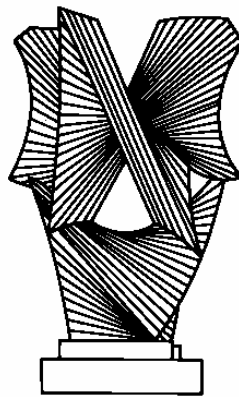


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## Inefficient Customs in International Law

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## INEFFICIENT CUSTOMS IN INTERNATIONAL LAW

EUGENE KONTOROVICH\*

### ABSTRACT

*This Article explores whether and when rules of customary international law (CIL) can be expected to be efficient. Customary rules are often regarded as desirable because in certain circumstances, they promote the welfare of the group in which they arise. Unless these circumstances apply among states, the efficiency arguments for the legalization of customary norms do not apply.*

*The Article takes as its central observation the divergent treatment of custom in domestic and international law. In international law, if a customary behavior of states can be identified, it is automatically elevated to the status of legal obligation without any independent examination of whether the custom is a good one. International custom is customary international law. This reification of custom is in marked contrast to the treatment of custom in private law. No one doubts that customary behaviors exist in various societal subgroups, but tort law does not assume that customs are normatively desirable, and does not automatically transform customs into legally binding obligations. Thus tort law does not take custom to dictate the standard of care; the fact-finder must independently determine whether the practice is efficient, though its customary status has some positive evidentiary value.*

*Law and economics scholars have varied views about whether custom is presumptively efficient in the private law context. The most optimistic view holds that private custom will generally be welfare*

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*enhancing, and thus courts should give legal recognition to such practices. Yet even the optimistic view holds that efficient custom would only arise in certain circumstances: when there are thickly repeated dealings between members of an insular, homogenous group whose members play reciprocal roles.*

*The Article takes these earmarks of efficient custom and examines whether they apply to international custom. It finds that much of international custom should not be expected to be efficient even in the most optimistic view of custom. Some areas of CIL, like diplomatic privileges, might satisfy efficient custom criteria. This suggests that, contrary to current practice, CIL should not be treated as one undifferentiated phenomenon. Rather, the standards for establishing a CIL norm should vary across different substantive contexts and different groups of states.*

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### INTRODUCTION

Custom is one of the two sources of international law and, in some areas, the only source of international norms.<sup>1</sup> Thus whether customary international law (CIL) improves the welfare of nations is a significant question. However, customs are not designed to improve welfare or for any other normative goal. They are not designed at all, but rather emerge from a system of interactions within a group. This Article shows that there is little reason to expect that international customs will improve states' joint welfare.

Although most legal systems operate against a backdrop of custom, they differ in the deference they show to it. Some legal systems give no deference to customary norms or even seek to undermine them. The common law takes a middle course, looking to custom but also often overriding it. International law lies at the other extreme. It reifies custom. International law (IL) automatically transforms customary norms into binding legal obligations.<sup>2</sup>

International law is regarded as a progressive, liberalizing force.<sup>3</sup> Custom is generally seen as conservative, even reactionary. The champions of custom as a source of law are Burke and Hayek, not Rousseau and Dworkin. This makes IL's unparalleled reliance on custom surprising. Customary norms develop slowly, through a mix of tradition and incremental modification, through the uncoordinated actions of numerous private parties.<sup>4</sup> Custom is a form of privatized lawmaking, whereby the regulated actors gradually

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1. See Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 116 & n.1 (2005) (observing that CIL "is central to our understanding of international law" and listing some matters "governed wholly or partially by CIL" such as state responsibility, foreign direct investment, jurisdiction, human rights, and immunities).

2. See SHABTAI ROSENNE, PRACTICE AND METHODS OF INTERNATIONAL LAW 55 (1984) ("[I]n the general theory of international law, customary law is positive law no less than conventional law.").

3. See T.O. Elias, *New Trends in Contemporary International Law*, in CONTEMPORARY ISSUES IN INTERNATIONAL LAW: A COLLECTION OF THE JOSEPHINE ONOH MEMORIAL LECTURES 1, 1 (David Freestone et al. eds., 2002).

4. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES pt. I, ch. 1, introductory note at 18, 19 (1987) (observing that CIL develops "slowly and unevenly, out of action and reaction," in contrast to the "purposeful" lawmaking through treaty).

develop their own rules of conduct rather than having them legislated from above.

The extraordinary embrace of custom by international law is all the more striking in contrast to the more cautious approach taken by the common law, particularly tort law. The common law does not assume that customs are normatively desirable, and thus does not automatically bestow on them the status of binding law.<sup>5</sup> In tort cases, for example, customary practice does not define the level of legal obligation; it is at best persuasive evidence which the fact-finder can consider along with other evidence.<sup>6</sup>

This Article uses the markedly different treatment of customary norms in international and common law as the point of departure for examining when one can expect the customary practices of states to develop into welfare-enhancing norms. As will be seen, customary practices are only likely to be efficient under conditions that do not generally obtain or obtain only weakly in the international setting.<sup>7</sup> This calls into doubt one of the central maxims of IL—that customary international *norms* should be reflexively elevated to the status of customary international *law*.<sup>8</sup>

5. See *infra* Part I.B.

6. The proposed *Third Restatement of Torts: Liability for Physical Harm* states that “[w]hile [an] actor is entitled to present to the jury evidence showing that the actor complied with custom, the other party is free to present other evidence, ... and in doing so seek to establish that the actor’s conduct lacks reasonable care.” RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 13 cmt. a (Proposed Final Draft No. 1, 2005).

7. Efficiency in this Article is meant in the Kaldor-Hicks sense. When a norm is said to be inefficient here, it does not mean that it is not a Nash equilibrium, but rather that it fails to improve welfare. Any discussion of the efficiency effects of a norm is relative to the default situation. The default may be another norm, or no norm. In international law, the default position is no norm. See *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 18-19 (Sept. 7) (holding that in the absence of CIL or treaty, there are no restrictions on state conduct). There are some potential sources of alternate norms, such as international tribunals, but their coverage is not as broad as that of CIL. If CIL is efficient in the sense of being welfare enhancing, it might still be undesirable if there exists superior sources of norms. See Part V.A for a discussion of such alternatives.

8. See Eric A. Posner, *International Law: A Welfarist Approach*, 73 U. CHI. L. REV. 487, 490 (2006); see also Ronald A. Cass, *Economics and International Law*, 29 N.Y.U. J. INT’L L. & POL. 473, 497 (1997) (“[E]fficiency’s comparative advantage as a norm for international law ... follows from the greater diversity of situations and values encountered in the international arena. This diversity undermines normative claims based on shared morality ... or on other ... non-utilitarian norms.”). Eyal Benvenisti goes much further, arguing that efficiency is “the *Grundnorm*” of CIL, though he presents no evidence for this bold contention aside from a few ICJ decisions that he believes adopted efficiency-promoting rules. See EYAL BENVENISTI,

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International law scholars generally assume that customary norms are efficient.<sup>9</sup> The contrasting status of custom in international and domestic law has scarcely been noted<sup>10</sup> and its implications for customary international law have gone unexplored. This is a particularly striking gap in the international law literature given that custom plays a much larger role in IL than in private law. CIL is like heaven: some people believe it exists, others do not, and some take the middle view of seeing it as a metaphor. But no one doubts that it is a good thing. Yet the literature has not sought to justify this assumption, and thus leaves open the question of why the customary practice of some or even most states should be law for all states.<sup>11</sup>

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SHARING TRANSBOUNDARY RESOURCES: INTERNATIONAL LAW AND OPTIMAL RESOURCE USE 204 (2002). Of course, international norms may be attractive for entirely nonconsequentialist reasons, such as morality or fairness. These considerations are held to one side in this Article.

9. See, e.g., Anthony D'Amato, Editorial Comment, *Modifying U.S. Acceptance of the Compulsory Jurisdiction of the World Court*, 79 AM. J. INT'L L. 385, 402 (1985) ("The rules of international law ... were not imposed on states from on high, but rather grew out of their interactions over centuries of practice and became established as customary international law. Thus the rules, *almost by definition, are the most efficient possible rules* for avoiding international friction and for accommodating the collective self-interest of all states." (emphasis added) (footnote omitted)); Alan O. Sykes, *International Law*, in HANDBOOK OF LAW AND ECONOMICS (A. Mitchell Polinsky & Steven Shavell eds., forthcoming 2007). In contrast, John McGinnis has argued that CIL will tend towards inefficiency because customary norms will reflect the interests of states and their leaders, which are often antagonistic to those of their citizens. John O. McGinnis, *The Appropriate Hierarchy of Global Multilateralism and Customary International Law: The Example of the WTO*, 44 VA. J. INT'L L. 229, 237, 242-45 (2003). The present Article approaches welfare at the level of states, rather than individuals; thus McGinnis's arguments are complementary to those made herein.

D'Amato has suggested elsewhere that international customs may well be inefficient. See ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 177 (1971) [hereinafter D'AMATO, CONCEPT OF CUSTOM] (noting that just as common law can develop inefficient yet stable rules, "[i]nternationally, it is particularly difficult to say whether given ... rules of law are desirable or undesirable").

10. The proposed *Third Restatement of Torts: Liability for Physical Harm* notes in passing that international law adopts custom much more readily than domestic tort law. It observes that although in international law "custom can be the actual source of legal obligations," tort law will only make custom obligatory if it satisfies objective criteria of reasonableness (efficiency). RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 13 cmt. a (Proposed Final Draft No. 1, 2005).

11. See Samuel Estreicher, *Rethinking the Binding Effect of Customary International Law*, 44 VA. J. INT'L L. 5, 7 (2003) ("Why is the practice of other states, no matter how widespread and even when informed by a sense of legal obligation, *law* for a state that declines to follow it?").

In private law, on the other hand, the relationship between law and customary norms has received significant attention in recent years.<sup>12</sup> The literature has recognized that customs should not be given the force of law unless they would tend towards efficiency. Because customary practices, which develop over time and with no particular author, are by definition not *designed* to improve efficiency, the theory must explain why the process of their formation would result in efficient norms.<sup>13</sup>

There is no general assumption that the customary practices are efficient. However, the scholarship on custom points to several conditions that support the emergence of efficient customary norms. The group in which the norm emerges cannot be too large.<sup>14</sup> Its members should have a significant degree of homogeneity and interact frequently.<sup>15</sup> They should be known to each other. The participants in the formation of the custom should over time find themselves on both sides of the emerging norm;<sup>16</sup> for example, each should act as both buyer and seller, as both polluter and pollutee. The paradigmatic incubator for efficient customs is a geographically circumscribed ethnic or trade group, such as the cattle ranchers of Shasta County, California.<sup>17</sup> Finally, even when an efficient norm evolves within a group, it may not be efficient as applied to outsiders with whom the group interacts. To be sure, not all of these factors need to coincide for an efficient norm to develop, nor is it clear to what degree they must be present. This Article will explore to what extent the factors that promote efficient custom obtain among the nations in the world.

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12. See, e.g., Steven Hetcher, *Creating Safe Social Norms in a Dangerous World*, 73 S. CAL. L. REV. 1, 2-3 nn.2-4 (1999) (providing a brief overview of this body of literature). The literature variously refers to nonlegal norms as "social norms" and "customs." *Id.* The terms are mostly used interchangeably, though there may be some difference in meaning in particular contexts. This Article uses the term "custom" in keeping with IL terminology, but the term should be understood to embrace much of "social norms" as well.

13. Richard A. Epstein, *The Path to The T.J. Hooper: The Theory and History of Custom in the Law of Tort*, 21 J. LEGAL STUD. 1, 11 (1992) ("[J]ust because something has always been done does not necessarily mean that it has always been done correctly. What must be shown is that there is a strong set of incentives that leads custom to succeed.").

14. See *infra* Part III.C.1.

15. See *infra* Part III.C.2-3.

16. See *infra* Part III.C.4.

17. See *infra* notes 154-55 and accompanying text.

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A few words should be said about this Article's relation to the literature on CIL. The basic observation that international customs are akin to social norms in the decentralized manner of their creation and enforcement is not novel.<sup>18</sup> The attraction of social norms literature to IL scholars is obvious. International law's central weakness is a lack of centralized enforcement—there is no power above states. Social norms literature suggests the possibility of a robust normative system enforced by the parties themselves, through decentralized mechanisms such as reputation and internalization.<sup>19</sup> However, most international law scholarship has ignored the important differences between the contexts in which social norms and CIL develop.<sup>20</sup>

Goldsmith and Posner have drawn on international relations and game theory to argue that CIL has no force in itself.<sup>21</sup> What

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18. See, e.g., Michael J. Glennon, *How International Rules Die*, 93 GEO. L.J. 939, 953-64 (2005) (noting that international customs are a species of social norm, and thus violations of the norm increase the likelihood of future noncompliance by decreasing group members' belief in the norm's existence); Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1138 n.54 (1999) (observing "that similar game theory principles might explain the emergence of customs among individuals" as among nations); Tim Wu, *When Code Isn't Law*, 89 VA. L. REV. 679, 692 n.37 (2003) ("Compliance in international law is studied in the absence of a centralized enforcement system, creating concerns more akin to the study of compliance with social norms.").

19. One strand of CIL literature claims that, much as social norms sometimes work by being internalized in group members' preferences and thus become self-enforcing, international norms become internalized in the values of nations and their political leaders. See, e.g., Harold Hongju Koh, Special Feature, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1400-01 (1999). The "transnational legal process" theory fails to specify the mechanism of norm internalization or to explain why interactions with international norms will result in internalization rather than rejection, in particular when the international norms compete or even conflict with national ones. Koh draws analogies to small-group social norms without recognizing the differences between the global "community" and the face-to-face community of Shasta County cattlemen that can influence the ease of norm internalization. See *id.* at 1401 & n.10; *infra* note 154 and accompanying text.

In any case, the "transnational legal process" theory does not speak to the subject of this Article—whether the internalized international norms will be efficient ones. Indeed, internalization may make it less likely that CIL rules will be efficient. See *infra* notes 142-44 and accompanying text.

20. For an important exception, see Goldsmith & Posner, *supra* note 18, at 1138 n.54 ("[C]ustoms among nations appear to be less common and more fragile than customs among individuals. This difference is probably explained by the many differences between the factors that influence individual behavior and those that influence international behavior.").

21. See *id.* at 1114-15. Some private law scholars, in a vein parallel to the Goldsmith-Posner critique, have suggested that commercial customs either do not arise frequently or cannot be accurately identified in the litigation context. See, e.g., Lisa Bernstein, *The*

international lawyers regard as binding customary norms are merely the predictable behavioral regularities of pairs of self-interested states.<sup>22</sup> It is the incentives faced by states, rather than exogenous norms, that guide their behavior. As a result, states' behaviors will change when incentives change.<sup>23</sup> In this model, the behavioral regularities of each pair of interacting states are independent of each other, and thus do not combine to form a general custom. In response to Goldsmith and Posner's critique, several scholars have themselves turned to game theory to show that genuine multilateral international customs can arise under certain circumstances.<sup>24</sup> Customary international norms, however, only recommend themselves as sources of legal obligation if they are normatively attractive. So merely showing that international custom exists does not offer any reason for following it. Similarly, showing that customs *could* be efficient under certain circumstances does not give reason to think that CIL *is* efficient unless the circumstances correspond to those in the world.

This Article assumes that customary international norms exist and can be identified in a principled manner—thus holding to one side the issues raised by Goldsmith and Posner. This focuses attention on whether these behavioral regularities will be welfare maximizing—a question Goldsmith and Posner do not address.<sup>25</sup>

This Article concludes that, based on the account of customary efficiency developed in the social norms literature, CIL reaches far beyond its optimal scope. The universal ambit of CIL—looking for custom on the highest level of geographic and subject-matter generality—is misaligned with the likely scope of efficient norms. This is not to say efficiency and CIL are inconsistent. But the private law account of norms shows that their efficiency is context

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*Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710, 744-46 (1999).

22. Goldsmith & Posner, *supra* note 18, at 1138-39. For example, the mere inertia of states that have no reason to act contrary to a putative norm is taken as evidence of compliance.

23. See, e.g., *id.* at 1147-51.

24. See generally Mark A. Chinen, Special Feature, *Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner*, 23 MICH. J. INT'L L. 143 (2001); Guzman, *supra* note 1; Edward T. Swaine, *Rational Custom*, 52 DUKE L.J. 559 (2002).

25. See Goldsmith & Posner, *supra* note 18, at 1139 n.55; Guzman, *supra* note 1, at 128-29.

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specific. Some norms may be efficient, some may not; the circumstances under which they arise are crucial. Yet CIL, as currently understood, does not make such distinctions. This Article suggests that efforts to identify and establish CIL should focus on the scenarios where custom is most likely to be efficient. Instead of a global, monolithic, customary international law, it makes sense to recognize an array of more local, limited customs—multiple customary international law *regimes* rather than a unified Customary International Law.

Before proceeding, some basic assumptions should be spelled out. First, this Article treats rational, self-interested, Westphalian states as the relevant actors in customary international law. An efficient custom is one that improves the joint welfare of all the states in the world.<sup>26</sup> Although states are presumed to be self-interested, this simply means they seek to maximize an objective function; it does not specify the objective function itself. States are too heterogeneous to say much more than that, like people, they prefer to have more wealth rather than less, and to continue to exist. The welfare of their nationals will be a term in states' objective function, but the function is not always increasing in it.<sup>27</sup>

Examining the welfare effects of norms from the perspective of states/regimes raises the question of whether states can be said to have welfare, or whether the state is merely a “veil” behind which are people, and it is their welfare that matters.<sup>28</sup> First, states behave as if they have interests and welfare. Thus it is a standard convention of rational choice analysis of international law, which considers interactions between states, to consider only the welfare

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26. It is unclear whether theories of customary efficiency predict that custom will improve group welfare relative to the situation that obtained before the creation of the custom, or whether it would maximize group welfare, that is, outperform all other potential norms. The implications of these different conceptions for international custom are discussed *infra* Part V.A.

27. Dictatorships often benefit from increased trade because they have more resources to expropriate and invest in defending the regime, but trade may also benefit the population. Past some point, the growing self-reliance of the people could outweigh the increased benefits to the regime. At the other extreme, the North Korean regime seems to have adopted a pure strategy of national impoverishment. See PAUL FRENCH, NORTH KOREA: THE PARANOID PENINSULA—A MODERN HISTORY 73-74 (2005).

28. For such a discussion, see Posner, *supra* note 8.

of the states themselves.<sup>29</sup> This is not surprising given that states are the actors whose behavior is being modeled.

Second, whatever the artificiality of treating states as having welfare, their observed behavior suggests it is superior to the alternative—treating aggregate human welfare as the goal of international law. In principle, states and their governing regimes might act either as agents for their states' populations, or as principals. Even if regimes were agents for their populations, the difficulty of the populations' monitoring and controlling the states' participation in custom formation would make the state a highly imperfect agent.<sup>30</sup> The degree of imperfection is such that one would be justified in treating the regime, for purposes of analysis, as principals rather than agents. In any case, in their domestic conduct many states do not seek to maximize the welfare of their populations, and sometimes they purposefully undermine it. States that are only occasionally interested in promoting their own populations' welfare would not likely seek, in their mutual dealings, to maximize the welfare of the world's population.

Even if a norm improves the welfare of states, it may leave most people worse off. Conversely, what this Article calls "inefficient norms" could improve aggregate individual welfare.<sup>31</sup> So it bears repeating that the efficiency of norms from the perspective of states is not the only relevant criterion for assessing the normative desirability of international custom.<sup>32</sup>

In any case, the circumstances under which international custom is created make it unlikely to advance *whatever* goals states as a

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29. See, e.g., Eric A. Posner & Alan O. Sykes, *Optimal War and Jus Ad Bellum*, 93 GEO. L. J. 993, 1001-02 (2005); see also Goldsmith & Posner, *supra* note 18.

30. See McGinnis, *supra* note 9, at 242-45. McGinnis treats states as agents of their populace, and the goal of international legal rules as maximizing the aggregate welfare of the world's population. *Id.* at 237-38.

31. In one important way, individual welfare is improved by norms that are efficient from the states' perspective. Because interstate conflicts are fought by the nationals of states, they are disastrous for individual welfare. Using state welfare as a normative criterion should reduce interstate conflict, which will benefit individuals. See *supra* note 9. Conversely, if a norm is inefficient from a state-centered perspective, but nonetheless represents a stable equilibrium, it can prevent the welfare losses of international conflict that could arise in a transition to a better norm. That is, given the cost of conflict, a bad norm may be better than no norm, and may even be better than a more efficient norm once transaction costs (in the form of war) are taken into account. See *infra* note 211 (discussing coordination games).

32. See *supra* note 7.

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group seek. Those features of the international system that make state-efficient customs unlikely to emerge make it unlikely, a fortiori, that customs will be efficient in the more ambitious sense of individuals' welfare, because of the additional assumptions individual welfarism makes about states as agents for their populations.

It should also be stressed that this Article does not evaluate the efficiency of particular customs themselves, but rather deduces it from the conditions under which they develop.<sup>33</sup> Aside from limiting the scope of the project—a comprehensive normative assessment of a single norm is an endeavor in its own right<sup>34</sup>—there are two justifications for keeping the analysis to the general level.

The first goes to why customary norms may be attractive in the first place. The attraction of custom as a source of law lies in its ability to aggregate information about costs and benefits not visible to individual observers.<sup>35</sup> Custom synthesizes wisdom across space and time in a way that is difficult for individuals to match. Customary international practices involve complex institutions and multiple actors over long time periods. They are likely to have many ramifications, positive and negative, all of which bear on their efficiency. Many effects will not be observable or readily attributed to the custom.<sup>36</sup> Thus merely telling plausible stories about why some customary practices are or are not efficient smacks of ad hockery. Second, the evaluation of particular customs is somewhat incidental to the central exploration of this Article, which is whether CIL as a whole has a claim to normative desirability of the kind made by other customary regimes. Identifying particular inefficient

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33. Robert Cooter describes this mode of analysis as “[t]he structural approach,” which infers efficiency or inefficiency from “the incentive structures” that produce the norm, rather than attempting to directly measure the norm’s costs and benefits. See Robert D. Cooter, *Structural Adjudication and the New Law Merchant: A Model of Decentralized Law*, 14 INT’L REV. L. & ECON. 215, 226-27 (1994).

34. See, e.g., Eugene Kontorovich, *A Transaction Cost Analysis of Universal Jurisdiction*, 2007 U. ILL. L. REV. (forthcoming) (arguing that universal jurisdiction prevents efficient resolution of international criminal cases by preventing implicit or explicit settlements, because settlement with one potential forum does not preclude future prosecution by another); Posner & Sykes, *supra* note 29 (using economic models to show that norms against preemptive attack and humanitarian intervention are suboptimal).

35. See *infra* Part II.A.

36. See Cooter, *supra* note 33, at 226-27.

customs would not prove this Article's thesis, nor would finding efficient ones refute it.

This Article proceeds in five parts. Part I compares the status of custom in international law and common law. It shows that private law takes a much more cautious approach to the legalization of custom than IL does. Part II explores the social norms literature on whether customs can be expected to improve efficiency. Although there is no consensus here, there is agreement about the factors that would make the emergence of efficient customs more likely. Part III goes on to consider whether these factors obtain in the international context, which allows for a rough estimate of whether CIL norms are likely to be efficient. Part IV applies these insights to specific doctrinal questions and controversies in CIL. Most significantly, it argues that CIL exceeds the possible contours of customary efficiency by giving customs global application. Part V shows how the ability of customary norms to enhance welfare will vary greatly across areas of law. The legalization of customary norms, therefore, should depend on whether those customs arise in a context conducive to efficiency. The point is illustrated with two polar examples: diplomatic immunity and laws relating to war.

#### I. THE ROLE OF CUSTOM IN INTERNATIONAL AND PRIVATE LAW

This Part contrasts the differing positions toward custom taken by international and common law. In IL, when a custom exists among a significant number of states, it becomes law for *all* states.<sup>37</sup> In private law, on the other hand, courts do not assume that a custom should be given the force of law without some independent evidence that it is efficient.<sup>38</sup> Thus the judge or jury must make an independent determination as to whether the custom satisfies normative criteria. In international law, by contrast, there is no filter between customary and legal obligation. To find a customary international norm is to find a customary international law.

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37. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

38. See, e.g., *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932).

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### A. *International Law*

#### 1. *Defining CIL*

Customary international law arises “from a general and consistent practice of states followed by them from a sense of legal obligation.”<sup>39</sup> The standard definition has two elements: state practice, and sense of legal obligation (*opinio juris neccesitatas*). The former is an objective element, consisting of observable acts or omissions; the second is subjective—a “mental” state, most often proven through diplomatic statements and declarations.<sup>40</sup> State practice defines the substantive contours of the norm. *Opinio juris* distinguishes mere behavioral regularities, such as calling ambassadors “your Excellency,” from binding *norms*, such as giving ambassadors immunity from legal processes.

Every aspect of Customs’ definition has long been plagued by deep disagreement. The process by which customs emerge remains mysterious.<sup>41</sup> There is considerable confusion over what kind of acts count as “practice”; whether omissions count; for how long the practice must continue; how many nations must participate in the practice for it to be general; how easily contrary practice defeats the requirement of “consistency”; and whether state practice is required at all.<sup>42</sup>

The subjective element raises as many questions. Does the *opinio juris* need to be contemporaneous with the practice? What constitutes evidence of *opinio juris*, particularly when a state has numerous officials who might express different views on the legality of an action? Some authorities argue that *opinio juris* is not required at all.<sup>43</sup> Most famously, the *opinio juris* requirement has been criticized for its “circularity.”<sup>44</sup> Regular practice “ripens” into

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39. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

40. Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT’L L. 365, 372-73 (2002).

41. See D’AMATO, CONCEPT OF CUSTOM, *supra* note 9, at 4.

42. See, e.g., Guzman, *supra* note 1, at 148-49.

43. See COMM. ON FORMATION OF CUSTOMARY (GEN.) INT’L LAW, INT’L LAW ASS’N, STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW (2000), available at <http://www.ila-hq.org/pdf/CustomaryLaw.pdf>.

44. See, e.g., D’AMATO, CONCEPT OF CUSTOM, *supra* note 9, at 66.

binding CIL when done with the belief that it is legally required. But the behavior is not required until it has ripened—until it has been done repeatedly out of a sense of legal obligation.<sup>45</sup> Thus, a state's *belief* that a course of conduct is obligatory must come before the behavior truly becomes obligatory. This would mean CIL depends on states being mistaken about their legal duties.

## 2. *Universal Scope*

Despite this confusion, several broad points are clear. Custom arises from the practice of numerous states, but not *all* states need to participate in a custom for it to become law.<sup>46</sup> The custom need not even be joined by all states in a position to do so.<sup>47</sup> The pattern of state practice need not be uninterrupted.<sup>48</sup> Furthermore, the vocal opposition of some states does not prevent a customary practice from becoming law.

Once a custom becomes CIL, it is law for *all* states, even those that did not participate in its formation.<sup>49</sup> CIL also applies to states that were unaware of the customary practice, and even those that openly disapproved.<sup>50</sup> Indeed, a CIL norm binds even states that came into existence after the custom was established.<sup>51</sup> Furthermore, once a custom becomes CIL it cannot be “repealed” except by contrary state practice, yet the first instances of such state practice would themselves be illegal.

45. *See id.*

46. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. b (1987) (“A practice can be general even if it is not universally followed; there is no precise formula to indicate how widespread a practice must be ....”); D’AMATO, CONCEPT OF CUSTOM, *supra* note 9, at 58; Guzman, *supra* note 1, at 124-25.

47. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. b.

48. *See* The Paquette Habana, 175 U.S. 677, 686 (1900).

49. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. d (1987) (“[C]ustomary law may be built by the acquiescence as well as by the actions of states ... and become generally binding on all states ....”).

50. Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F. L. REV. 1, 56 (2005).

51. *See* LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 37-38 (1995); Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT’L L. 529, 538-39 (1993).

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CIL does provide a narrow escape hatch for nations who oppose an emerging custom. The “persistent objector” exception exempts from a CIL norm nations who, in the period before the custom “matures” into law, repeatedly and vocally made their opposition known.<sup>52</sup> The “persistence” required of the objector is quite substantial, and there is a tendency to aggressively construe a failure to raise objections at a particular moment as a waiver, despite previous and subsequent objections.<sup>53</sup> Moreover, states that come into existence after the creation of the norm cannot become persistent objectors.<sup>54</sup> Similarly, a state would be bound if it failed to object simply because it was not engaged in the relevant area of activity when the custom developed.<sup>55</sup>

Some international lawyers advocate even further broadening the legal effect of international customs. The doctrine of *jus cogens* holds that certain humanitarian norms, like the prohibition of genocide and war crimes, cannot be trumped by subsequent custom.<sup>56</sup> Unlike other customary norms, *jus cogens* norms cannot be contracted around by treaty. It is unclear what customary norms count as *jus cogens* or how they acquire that status. The general idea seems to be that prohibitions of morally egregious conduct are *jus cogens*.<sup>57</sup>

To summarize, the key move of CIL is to transform the custom of some states into law for *all* states, even those that have not participated in or consented to the customary practice. CIL has no minor leagues; its presumptive scope is the entire world.<sup>58</sup> A customary practice is either nonlegal, in which case it binds no one, or legal, in which case it binds all current and future states (persistent objectors aside).<sup>59</sup>

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52. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. d (1987).

53. See, e.g., David Sloss, *Do International Norms Influence State Behavior?*, 38 GEO. WASH. INT'L L. REV. 159, 173-74 & n.81 (2006) (reviewing JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005)).

54. Charney, *supra* note 51, at 538-39.

55. See *id.* at 538.

56. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. k (1987).

57. See Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183, 204-05 & n.129 (2004).

58. See, e.g., D'AMATO, *CONCEPT OF CUSTOM*, *supra* note 9, at 234; Guzman, *supra* note 1, at 153.

59. See *supra* notes 49-52 and accompanying text.

### 3. *Special Custom*

International law has infrequently admitted the possibility of “special” or “local” customs arising and taking on legal force. A “special custom” is created through repeated dealings of a smaller group of states than would be required to create a general custom—perhaps as few as two.<sup>60</sup> More importantly, when a special custom takes on the status of CIL, it is only binding on the specific states that participated in its formation.<sup>61</sup> In other words, special custom is opt-in, whereas general custom is opt-out.

The special custom doctrine has been the neglected stepchild of CIL.<sup>62</sup> International law textbooks devote only a few pages to special custom.<sup>63</sup> Indeed, legal recognition of special custom exists more in theory than in practice. Discussions of special custom are confined to four International Court of Justice cases decided in the 1950s and 60s, not all of which explicitly invoked the concept.<sup>64</sup>

What little writing there is on special custom takes a dim view of it. A leading case suggests that it is harder to enforce a special custom against a defendant state than it is to enforce a general custom.<sup>65</sup> Scholars have argued that special custom should only become legally cognizable with clearer demonstrations of *opinio juris* and state practice than would be required for general custom.<sup>66</sup>

60. See *Right of Passage over Indian Territory* (Port. v. India), 1960 I.C.J. 6, 1960 WL 2, at \*40 (Apr. 12). In the two-state scenario, special custom comes to resemble course of dealing in contract law, or prescription in property law. See U.C.C. § 1-303(b) (2001); RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §§ 2.16-.17 (2000).

61. See *Asylum* (Colom. v. Peru), 1950 I.C.J. 266, 1950 WL 10, at \*\*277-78 (Nov. 20).

62. See Edward T. Swaine, *The Local Law of Global Antitrust*, 43 WM. & MARY L. REV. 627, 709 (2001) (“Special custom remains ... a controversial method for analyzing international law.”).

63. See, for example, BURNS H. WESTON ET AL., *INTERNATIONAL LAW AND WORLD ORDER: A PROBLEM-ORIENTED COURSEBOOK* (3d ed. 1997), in which neither the table of contents nor the index mention special customs.

64. See D’AMATO, *CONCEPT OF CUSTOM*, *supra* note 9, at 263 (noting that “the examples [of a court giving recognition to a special custom] are too few to spell out all the elements of special custom in international law,” and suggesting that there may not be any definite doctrine of special custom at all).

65. See *North Sea Continental Shelf* (F.R.G. v. Den.), 1969 I.C.J. 3, 1969 WL 1, at \*\*130-31 (Feb. 20) (Ammoun, J., concurring) (“[W]hile a general rule of customary law does not require the consent of all States, ... it is not the same with a regional customary rule ....” (footnote omitted)).

66. D’AMATO, *CONCEPT OF CUSTOM*, *supra* note 9, at 234; KAROL WOLFKE, *CUSTOM IN*

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This is puzzling in contrast to the treatment of general custom; in the latter, dozens of nations that did not participate in a norm's formation can be bound without their consent. In special custom, however, international law will not bind even a single nation without the clearest evidence of its consent.

The emphasis on general custom over special custom may be motivated by an assumption that the larger the number of nations participating in a customary practice, the more likely it is to be desirable as a binding norm. Or it may relate to programmatic concerns about special custom inhibiting the formation of broader rules,<sup>67</sup> which is itself troubling only under the cosmopolitan assumption that global rules are more normatively attractive than a collection of local rules.<sup>68</sup> Or it may just be that since treaties and customs are substitutes, and the costs of negotiating among a small group are much lower, much of what would be done by special custom will be done by treaties.

### *B. Private Law*

Custom finds a much cooler reception in private law. The general rule is that customary practices do not automatically receive legal backing. Courts recognize that inefficient customs can arise and persist.<sup>69</sup> The significant exception to this pattern is the law of sales, where statutory reforms have supplanted the traditional suspicion to custom.<sup>70</sup>

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PRESENT INTERNATIONAL LAW 90 (2d rev. ed. 1993).

67. See Swaine, *supra* note 62, at 710.

68. Recently some scholars have argued for a greater receptivity to local custom. See Guzman, *supra* note 1, at 161 (“[I]t is neither necessary nor desirable to increase the showing required to find *opinio juris* in special custom. In a world of heterogeneous states, there is reason to think special custom will play an important role in the relations among them.”); Swaine, *supra* note 62, at 709-10 (arguing that special custom allows diverse interests to be accommodated, and counters the antidemocratic tendency of general CIL).

69. See, e.g., *infra* note 76 and accompanying text.

70. See Clayton P. Gillette, *Harmony and Stasis in Trade Usages for International Sales*, 39 VA. J. INT'L L. 707, 707-10 (1999).

### 1. Tort

A group's custom does not establish its members' legal obligation in tort.<sup>71</sup> Instead, the efficiency ("reasonableness") standard governs whether due care has been taken.<sup>72</sup> Although custom may be looked to as evidence of cost-justified measures, the fact-finder may reject it. This cautious approach to custom is both universally accepted<sup>73</sup> and longstanding.<sup>74</sup> A few nineteenth century cases reflect a knee-jerk adoption of custom akin to that found in CIL, but such cases were unusual then<sup>75</sup> and even more so since Judge Learned Hand's famous criticism of such an approach in *The T.J. Hooper*:

There are, no doubt, cases where courts seem to make the general practice of the [industry] the standard of proper diligence .... [A] whole [industry] may have unduly lagged in the adoption of new and available [safety] devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required ....<sup>76</sup>

The *T.J. Hooper*, a tug towing barges along the Atlantic coast, lost its cargo in a storm.<sup>77</sup> Had the tug been equipped with a radio, it would have known of the storm and avoided it.<sup>78</sup> In a suit by the barge and cargo owners, the tugboat owner claimed that it was not

71. See, e.g., *Stone v. Crown Diversified Indus. Corp.*, 9 S.W.3d 659, 670 (Mo. Ct. App. 1999) ("[C]ustoms and usage evidence does not set the legal standard of care. In fact, even if such evidence of custom and practice is unchallenged, a court may disregard it and find the custom fails to require conduct that rises to the level of ordinary care." (quoting *Inst. of London Underwriters v. Eagle Boats, Ltd.*, 918 F. Supp. 297, 300 (E.D. Mo. 1996))); *Wanner v. Getter Trucking, Inc.*, 466 N.W.2d 833, 837 n.4 (N.D. 1991); *Abram & Tracy, Inc. v. Smith*, 623 N.E.2d 704, 710 (Ohio Ct. App. 1993) ("Evidence of industry custom does not conclusively establish the legal standard of care in a particular case, but may be considered by a court as evidence ...."); see also Epstein, *supra* note 13, at 1-3 (observing that the long-dominant view in tort law is that custom plays only a "subordinate role" in establishing the standard of care).

72. See *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932).

73. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 13 cmt. b (Proposed Final Draft No. 1, 2005) (noting that "there is no minority rule").

74. Epstein, *supra* note 13, at 25 ("By far the largest group of nineteenth-century cases adhere to the line that was articulated with such eloquence by Learned Hand: that custom is only evidence of the role of due care.").

75. *Id.*

76. 60 F.2d at 740.

77. *Id.* at 737.

78. *Id.* at 739.

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the custom of the industry for owners to equip their vessels with receivers.<sup>79</sup> Judge Hand held that, despite the custom of sailing without a receiver, the law required ships to have one.<sup>80</sup>

Just as a defendant's compliance with customary norms does not insulate him from liability, failure to conform to custom does not establish it.<sup>81</sup> Thus custom is neither the ceiling nor the floor for standard of care.<sup>82</sup> Medical custom has long been the exception to the rule, with the profession's customary procedures providing the standard of care in malpractice cases.<sup>83</sup> Here courts attempt to cast the custom as narrowly as possible, looking to the standard of care for the relevant specialty rather than that for a general practitioner, when at one time the defendant's standard of care was dictated specifically by the custom of his locality.<sup>84</sup> However, the medical custom exception may be eroding.<sup>85</sup>

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79. *Id.* at 737, 739-40. The evidence in the case paints a more complex picture. Most tugs did have such equipment on board, though it appeared that many of these were brought on by the captain, and not provided by the owner as standard safety equipment. *See also* Epstein, *supra* note 13, at 33-36 (arguing that custom was closer to having a radio on board than not having one).

80. *The T.J. Hooper*, 60 F.2d at 740.

81. *ServiceMaster of St. Cloud v. GAB Bus. Servs., Inc.*, 544 N.W.2d 302, 307 (Minn. 1996) (“[T]he evidence of industry custom ... did not establish a [legal] duty ...”); *Fellers v. St. Louis-S.F. Ry. Co.*, 572 P.2d 972, 977 (Okla. 1977) (Simms, J., dissenting) (“[Custom] does not establish directly the ultimate issue of negligence by showing that failure to comply with the usual procedure or custom was the equivalent of negligence ‘per se.’”); *Lovins v. Jackson*, 378 P.2d 727, 731 (Or. 1963) (en banc) (“[V]iolation of a general custom or usage was some evidence of negligence, and not negligence per se.”).

82. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 13 (Proposed Final Draft No. 1, 2005); RESTATEMENT (SECOND) OF TORTS § 295A cmt. c (1965); *see also* *Am. Smelting & Ref. Co. v. Wusich*, 375 P.2d 364, 367 (Ariz. 1962) (en banc) (“A custom may exact more or less than the demands of due care ...”); *Elmer v. Mut. S.S. Co.*, 130 N.W. 1104, 1106 (Minn. 1911) (“Evidence of custom in negligence cases is admitted, not on the theory that a breach of custom is negligence per se, or observance of custom necessarily conclusive that there was no negligence.”).

83. Philip G. Peters, Jr., *The Quiet Demise of Deference to Custom: Malpractice Law at the Millenium*, 57 WASH. & LEE L. REV. 163, 163 (2000) (“While defendants in ordinary tort actions are expected to exercise reasonable care under the circumstances, physicians traditionally have needed only to conform to the customs of their peers.”).

84. *Id.* at 166 n.15.

85. *Id.* at 170 (observing that by 1999 twelve states “expressly refused to be bound by medical customs” and another nine states had moved in that direction, suggesting a “steady pattern of defections from the custom-based standard of care” in the future).

## 2. Property

Custom plays a relatively small role in property law because most property rights are clearly assigned and the rules for their transfer well known. Custom is valuable in part because of information constraints: in torts, the uncertainty inherent in accidents, when victim and tortfeasor do not know one another in advance; and in contracts, the parties' inability to contract as to every possible eventuality.<sup>86</sup> Thus property law seems to confront custom most often in cases of capture of fugitive resources and new types of property.<sup>87</sup>

In the textbook case on the first-possession rule, *Pierson v. Post*,<sup>88</sup> a court disregarded the unchallenged community custom in order to lay down a more efficient norm. *Pierson* involved a dispute over a fox between two Long Island gentlemen-hunters. Post organized a fox hunt, during which he managed to give chase to a fox.<sup>89</sup> Along came Pierson, who shot the fox that Post pursued.<sup>90</sup> The unambiguous custom among hunters in the area was that a rider in pursuit had superior title against the world.<sup>91</sup> The court, however, decided the fox should go to whoever killed it.<sup>92</sup> Justice Livingston, in dissent, argued for custom.<sup>93</sup>

A recent analysis suggests the custom could indeed have been inefficient, a means of excluding interlopers from the high-society sport of riding to hounds.<sup>94</sup> Huntsmen, who gave rise to the custom, were not the only ones with an interest in killing foxes. Farmers

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86. See Epstein, *supra* note 13, at 9-10 (describing custom as an information-economizing device for transactors); Gillette, *supra* note 70, at 708-09.

87. See, e.g., *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 236 (1918) (labeling the news as "quasi property"). See generally Richard A. Epstein, *International News Service v. Associated Press: Custom and Law as Sources of Property Rights in News*, 78 VA. L. REV. 85 (1992).

88. 3 Cai. 175 (N.Y. Sup. Ct. 1805).

89. *Id.* at 175.

90. *Id.*

91. See Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221, 1231 (1979).

92. See Dhammika Dharmapala & Rohan Pitchford, *An Economic Analysis of "Riding to Hounds": Pierson v. Post Revisited*, 18 J.L. ECON. & ORG. 39, 45 (2002) ("[T]he majority's holding directly contradicted the relevant social custom.").

93. *Pierson*, 3 Cai. at 181-82 (Livingston, J., dissenting).

94. Dharmapala & Pitchford, *supra* note 92, at 45-46.

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wanted them dead too, and both the majority and the dissent conceded that the optimal rule would be the one that resulted in the most pest eradication.<sup>95</sup> Yet hunters had mixed motives, such as the enjoyment of riding to hounds in the company of one's peers, uninterrupted by the hoi polloi; and the prestige of *personally* killing a fox, which is different from the group killing the *most* foxes.<sup>96</sup> Thus hunters would prefer a rule that results in less net fox killing, as it would maximize their recreational pleasure. The hunters' custom could be inefficient when the interests of both hunters and farmers are considered.<sup>97</sup>

*Pierson* teaches several lessons about the dangers of legalizing custom. First, heterogeneity—here, a society composed of farmers and hunters—is the enemy of efficient custom. Second, a custom can be inefficient even when the heterogeneity is not antagonistic in nature. That is, both farmers and hunters had a common interest in killing foxes. But the differences in the intensity of their preferences could be enough to make the customs of one group suboptimal when the interests of all are taken into account. Third, reciprocity of roles is crucial: the hunters' custom, not surprisingly, would not reflect the farmers' interest because class differences ensured that farmers would never hunt.<sup>98</sup> Customs that at first glance seem efficient may create subtle externalities that escape notice in a case where one member of a close-knit group seeks to enforce a custom against another. In such a context, an outside observer might not even imagine the nature of the externalities and on whom they fall.<sup>99</sup>

Another classic case takes a more favorable approach to custom. *Ghen v. Rich*<sup>100</sup> is particularly notable in that custom triumphed despite the heterogeneity of the relevant community. Certain types of Massachusetts whalers killed their prey and let it wash ashore,

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95. *Pierson*, 3 Cai. at 179, 180.

96. Dharmapala & Pitchford, *supra* note 92, at 45-46 & n.12 (“[T]he value placed by hunters on participation in the sport suggests that the gains from preventing interference with the hunt were large.”).

97. *Id.* at 46.

98. *Id.* at 45 (“Due to the wealth required ... to engage in the sport, there would have been little uncertainty about which side of the issue any particular individual would be on ...”).

99. It does not seem that the *Pierson* court set aside the custom because it understood that the farmers suffered from it; rather, the majority preferred bright-line rules over standards. Nonetheless, the court saw the question as the social desirability of the custom, and did not consider the hunters to be the final authority on that question.

100. 8 F. 159 (D. Mass. 1881).

a process that took several days.<sup>101</sup> According to local custom, the whaler owned the whale from the moment he killed it.<sup>102</sup> When it would be subsequently found by beachcombers they would not keep it, but rather return it to the whaler for a salvage fee.<sup>103</sup> In *Ghen*, the whale washed up seventeen miles from where it was killed, and the finder decided to keep it for himself.<sup>104</sup> The finder was held liable for violating the custom.<sup>105</sup>

The heterogeneity among community members was apparent, and presumably the two roles would never be flipped. The court did stress the small size of the relevant community, even suggesting that it would not trust custom that bound a larger group,<sup>106</sup> and also alluded to a high frequency of interactions.<sup>107</sup> Apparently both groups participated in the formation of the custom

Note that in *Ghen* the court did not reflexively adopt the custom as the legally enforceable norm. Instead, the court made clear that it applied the customary rule only because it was satisfied that doing so was socially optimal.<sup>108</sup> The court worked through the incentive effects of the rule: given the characteristics of the animal in question, any other method of recovery was impractical, and thus not giving title to the whaler would eliminate the industry altogether.<sup>109</sup> Indeed, the court claimed that the customary origin of the norm may have been entirely incidental to the court's adoption of it: "It is by no means clear that without regard to usage the common law would not reach the same result."<sup>110</sup> Similarly, in a case *Ghen* relied on, the custom of whalers on the same issue as *Pierson v. Post* was decided in favor of the customary rule.<sup>111</sup> The court was careful

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101. *Id.* at 159-60.

102. *See id.* at 160.

103. *Id.*

104. *Id.*

105. *Id.* at 162.

106. *Id.* (holding that the custom's "application must necessarily be extremely limited, and can affect but a few persons").

107. *See id.*

108. *Id.* For confirmation of this point from a modern scholar, see Robert C. Ellickson, *A Hypothesis of Wealth-maximizing Norms: Evidence from the Whaling Industry*, 5 J.L. ECON. & ORG. 83, 93 (1989).

109. *See Ghen*, 8 F. at 162.

110. *Id.*

111. *Swift v. Gifford*, 23 F. Cas. 558, 560 (D. Mass. 1872) (No. 13,696) (observing that custom applied only to the tiny community of New England Arctic whalers, and that "[i]n this

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to note, however, that there would be many circumstances in which the custom would not be upheld because it would not be reasonable.<sup>112</sup>

Thus, both *Pierson* and *Ghen* suggest courts will consider customary property norms as providing evidence of a possible efficient equilibrium. However, that something is a custom does not automatically make it legally enforceable, as it may be inefficient.

### 3. Contract

Modern commercial law comes closest to international law's uncritical legalization of custom. Under article 1 of the Uniform Commercial Code (UCC), parties are bound not just by the written terms of their agreement, but also by relevant industry custom.<sup>113</sup> Thus the UCC makes custom legally binding, even on those members of the industry who dissented from the emerging norm.<sup>114</sup> Although the custom generally will be applied only against members of the same industry, it could potentially bind outsiders who deal with an industry member and "know or have reason to know of [the practice]."<sup>115</sup> Nonetheless, the custom to which the UCC looks has more the flavor of "special" than "general" custom—the group among which the custom arose should be geographically or professionally circumscribed.<sup>116</sup> Contract law's warmer attitude towards custom may make sense on efficiency grounds. Unlike in tort and property law, commercial contracting customs emerge in market conditions. If markets lead to efficient resource allocations, they

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case the parties all understood the custom" and had agreed to it).

112. *Id.* at 559-60.

113. U.C.C. § 1-303(d) (2001) ("A ... usage of trade in the vocation or trade in which [the parties] are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement."). "Usage of trade" is the Code's term for custom. *Id.* § 1-303 cmts. 4-5. The UCC's incorporation of commercial norms has recently drawn considerable criticism, especially from norms-focused scholars. *See, e.g.,* Bernstein, *supra* note 21, at 779-80.

114. U.C.C. § 1-303 cmt. 4 (2001) ("[F]ull recognition is thus available for new usages and for usages currently observed by the great majority of decent dealers, even though dissidents ready to cut corners do not agree.").

115. RESTATEMENT (SECOND) OF CONTRACTS § 222 cmt. c (1981).

116. U.C.C. § 1-303(c) (2001) ("A 'usage of trade' is any practice or method of dealing having ... regularity of observance *in a place, vocation, or trade* ...." (emphasis added)).

must also generate efficient customs, much like the whalers and beachcombers.<sup>117</sup>

The UCC presumes mercantile customs to be efficient; courts under the UCC do not conduct independent inquiries into the desirability of commercial practices.<sup>118</sup> The UCC explicitly assumes that the processes through which industry custom is formed vouch for their desirability. As with *jus cogens*,<sup>119</sup> the doctrines of unconscionability and bad faith are intended to serve as an extraordinary filter to catch the rare custom that is grossly inefficient. Unconscionability aside, parties can opt out of the customary norms through explicit contractual provisions.<sup>120</sup>

Of course, custom will only be looked at when a contractual relationship already exists. This significantly limits its scope—custom is used as a gap filler to written contracts; it would be unusual for a custom to create a contractual obligation in the absence of an explicit agreement. This distinguishes it from much of CIL, which does not require or even presume any treaty relationship between the disputing states.<sup>121</sup> However, CIL is sometimes called on to serve a gap-filling function in treaty interpretation.<sup>122</sup> This use of CIL is most analogous to the UCC's approach to usage of trade.

117. See *supra* notes 100-11 and accompanying text.

118. See U.C.C. § 1-303(c) cmt. 5 (2001) (“The very fact of commercial acceptance makes out a *prima facie* case that the usage is reasonable, and the burden is no longer on the usage to establish itself as being reasonable.”). The UCC departs significantly from the earlier common law of contracts in this regard. *Id.*; see WILLIAM BLACKSTONE, 1 COMMENTARIES \*\*74-77 (explaining that “[w]hen a custom is actually proved to exist, the next enquiry [sic] is into the legality of it; for if it is not a good custom it ought to be no longer used”).

119. See *supra* notes 56-57 and accompanying text. And like *jus cogens*, the filter-doctrines are vague enough that they can be misused by courts to arrive at particular results.

120. U.C.C. § 1-303(e)(1) (2001) (“[E]xpress terms prevail over ... usage of trade.”).

121. See WOLFKE, *supra* note 66, at 143 (“The recurring provisions in numerous treaties do not of themselves constitute sufficient evidence of customary rules binding other states. Such treaties, on the contrary, may often express exceptions to general customary law.” (footnote omitted)).

122. See *id.* at 141-43 (discussing courts' use of treaties as evidence of parties' acceptance of CIL).

## INEFFICIENT CUSTOMS IN INTERNATIONAL LAW

### II. THE POTENTIAL EFFICIENCY OF CUSTOMS

The role of nonlegal norms in regulating behavior and the interaction of these norms with positive law has become a significant field of interest for legal scholars. A major theme of this literature is whether social norms tend towards efficiency, or at least are better regulators than deliberate ordering by legislatures and courts.<sup>123</sup> The question is far from being resolved.<sup>124</sup> Much influential writing reflects the view that customs outperform other modes of regulation.<sup>125</sup> More recent literature, however, has demonstrated how customary norms can be inefficient.<sup>126</sup>

Some broad lines of agreement can be discerned. Skeptics do not argue that customs cannot be efficient, but rather that they are not particularly likely to be. More importantly, even those most optimistic about custom acknowledge that it will only be efficient within certain parameters.<sup>127</sup> Generalizing the scholarly positions in terms of “custom skeptics” and “custom enthusiasts” will be convenient.

This Article does not attempt to resolve any questions about whether customary practices are generally efficient. Both skeptics and optimists have produced game-theoretic models demonstrating the possible evolution of inefficient and efficient norms,<sup>128</sup> and one

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123. See, e.g., Paul G. Mahoney & Chris W. Sanchirico, *Competing Norms and Social Evolution: Is the Fittest Norm Efficient?*, 149 U. PA. L. REV. 2027, 2030 (2001).

124. *Id.* (characterizing the dominant view of social norms scholars about the efficiency of norms “as guarded optimism” with “a few pessimistic notes”).

125. See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 167-63 (1991); 1 F.A. HAYEK, *LAW, LEGISLATION AND LIBERTY: A NEW STATEMENT OF THE LIBERAL PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY* 85-89 (1973); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 132 (1987); Cooter, *supra* note 33, at 226; Epstein, *supra* note 87, at 85-86; Epstein, *supra* note 13, at 10.

126. See JON ELSTER, *THE CEMENT OF SOCIETY: A STUDY OF SOCIAL ORDER* 130-47 (1989) (giving examples of inefficient norms and explaining reasons customs may be inefficient); ERIC A. POSNER, *LAW AND SOCIAL NORMS* 169-79 (2000) (“Functionalism—the view that social practices and norms are efficient or adaptive in some way—is empirically false and methodologically sterile.”); Steven Hetcher, *Creating Safe Social Norms in a Dangerous World*, 73 S. CAL. L. REV. 1, 78-79 (1999); Jody S. Kraus, *Legal Design and the Evolution of Commercial Norms*, 26 J. LEGAL STUD. 377, 407-08 (1997) (using a cultural evolution theory to argue that customary practices are unlikely to be efficient); Mahoney & Sanchirico, *supra* note 123, at 2048-54 (using games to demonstrate inefficiency in property, tort, and contract norms).

127. See, e.g., Epstein, *supra* note 87, at 87.

128. Compare Mahoney & Sanchirico, *supra* note 123, with Randal C. Picker, *Simple*

can point to examples of well-established efficient norms,<sup>129</sup> as well as ones that are inefficient.<sup>130</sup>

Even relatively optimistic assumptions about the efficiency of custom have significant cautionary implications for current CIL doctrine. To the extent this optimistic view overstates the case for custom, the implications for CIL are even more dramatic, as will be briefly shown.

### A. Custom Optimism

No account of custom specifies precisely *how* customs emerge and develop. Hayek, a leading champion of custom, spoke of a “spontaneous order[ing],”<sup>131</sup> though he clearly did not mean spontaneous in the sense of instantaneous. Rather, custom emerges through the noncoordinated interactions of group members, each seeking to advance their interest. It has no clear starting point. It is incremental but also prone to cascades.

Optimistic accounts of custom generally rely on evolutionary stories in which, over time and multiple interactions, welfare-maximizing norms beat out inferior ones. In the beginning, an issue exists that must be resolved one way or another. A series of interactions between group members allows for testing of various possible behaviors.<sup>132</sup> Indeed, the behaviors are not chosen from a menu, but may be invented by the parties based on their view of the best way to deal with a situation—or they may even be randomly chosen. Because behaviors are chosen in the context of a *consensual interaction* between members, self-serving or opportunistic behavior will be rejected by one party or the other. What will be left is a range of behaviors that *might* plausibly increase joint welfare.

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*Games in a Complex World: A Generative Approach to the Adoption of Norms*, 64 U. CHI. L. REV. 1225, 1227 (1997) (using game theory to show efficiency in self-organized groups with “shared values about norms”).

129. See ELLICKSON, *supra* note 125, at 167-83.

130. See ELSTER, *supra* note 126, at 286; POSNER, *supra* note 126, at 172-77.

131. See 1 F.A. HAYEK, *THE FATAL CONCEIT: THE ERRORS OF SOCIALISM* 37 (W.W. Bartley III ed., 1988).

132. Cooter describes group members “as hosts for competing behaviors.” Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1660 (1996).

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Of these, the behaviors that most increase the joint surplus of the parties to an interaction will be chosen more often than those that do not. The group members' choice of behavior need not be purposeful so long as a selection mechanism exists. In commercial settings, the competitive market serves as such a mechanism. Surpluses can be shared with customers, and thus group members who choose inefficient norms will fail.<sup>133</sup> Thus, in a commercial setting equilibrium customs will be efficient—even when applied to outsiders who have a business relationship with the group members.<sup>134</sup> An inefficient custom would in effect mean that the industry refused to sell customers something they wanted—a better custom.

Hayek's laudatory account of custom suggests that it, like the price mechanism, economizes on information and thus produces results superior to legislation.<sup>135</sup> His account is also an evolutionary one, but it stresses that the individual group members *cumulatively* possess more information about the circumstances in which the custom would operate than any legislator could.<sup>136</sup> Custom is a tool for aggregating this knowledge. When group members select among competing behaviors, the selection is not a random choice but one informed by this local knowledge. Group members can also draw on their private information to modify or reject a developing customary behavior. The custom that emerges from these repeated interactions reflects the information available to all that participated in its formation. Hayek's account is particularly relevant to international law because it applies beyond the commercial context, that is, to areas where competitive forces do not provide a selection mechanism.

### *B. Custom Pessimism*

Customs can go bad. If they are not more likely to promote efficiency than to retard it, they should not be given deference.<sup>137</sup> First, it will be useful to specify what is meant by an inefficient

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133. See Kraus, *supra* note 126, at 383-84.

134. See LANDES & POSNER, *supra* note 125, at 132-33; Epstein, *supra* note 13, at 10.

135. See HAYEK, *supra* note 125, at 72-74.

136. See *id.* at 12.

137. See ELSTER, *supra* note 126, at 130-35; POSNER, *supra* note 126, at 176 (“[O]ne can make no presumptions about whether group norms are efficient ....”).

custom. The weak form of the inefficiency argument is that custom will not improve group welfare by as much as norms produced by an alternative institution, such as a court. In a stronger form of the argument, a social norm may be entirely dysfunctional, reducing group welfare relative to a situation in which there is no norm. Simply removing the norm would increase welfare even if it is not replaced by an alternative.<sup>138</sup> Consider some reasons custom may be inefficient.

First, customs are path-dependent. Because custom proceeds in an incremental fashion, a step that is a marginal improvement may actually preclude much more significant future improvements by leading customary development into a dead end.<sup>139</sup> Second, customs develop slowly, which is a problem when circumstances change quickly. Customs that were welfare maximizing at one point in time may persist after changed circumstances render them suboptimal or even welfare diminishing.<sup>140</sup> Third, once a custom is in place, defection from it may be more costly for each group member than bearing the cost of inefficiency would.<sup>141</sup>

Moreover, custom sometimes works through norm internalization.<sup>142</sup> Norm internalization, by making compliance self-enforcing on the individual level through feelings of guilt, makes efficient breach less likely.<sup>143</sup> For the individual who internalizes norms, compliance no longer turns on a comparison of the marginal benefits of violation to the marginal cost of punishment, but rather becomes an end in itself. Thus the instrumental purpose of the norm becomes lost.<sup>144</sup>

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138. ELSTER, *supra* note 126, at 114-16 (discussing medical triage practices); POSNER, *supra* note 126, at 169-71 (discussing the giving of unwanted gifts).

139. See Cooter, *supra* note 132, at 1687-88 (discussing "nonconvexity"); Mahoney & Sanchirico, *supra* note 123, at 2048-51 (discussing "'endogenous interaction,' under which evolution will select for the efficient strategy even when that strategy's mismatch risk outweighs its efficiency advantage").

140. See POSNER, *supra* note 126, at 171; Richard A. Posner & Eric B. Rasmusen, *Creating and Enforcing Norms, with Special Reference to Sanctions*, 19 INT'L REV. L. & ECON. 369, 378-79 (1999).

141. See POSNER, *supra* note 126, at 173-74, 176; Kraus, *supra* note 126, at 407-08.

142. See POSNER, *supra* note 126, at 43-44.

143. Posner & Rasmusen, *supra* note 140, at 373-74.

144. See *id.* at 370; Richard A. Posner, *Social Norms and the Law: An Economic Approach*, 87 AM. ECON. REV. 365, 367 (1997).

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The simplest reason for an inefficient custom is when group members improve their welfare by externalizing costs onto outsiders.<sup>145</sup> Public choice might suggest that such customs would be the most common. Customs regulating output among producers may enhance their welfare at the expense of consumers. Here customs are substitutes for express anticompetitive planning. The benefits of custom are perverse here; the diffuse information that custom allows to be drawn together in such a case is information about the equilibrium production quota. In such cases custom makes cartels more effective and thus reduces social welfare.

### *C. Factors Promoting Efficient Custom*

Custom optimists and skeptics differ on the general question of whether custom is likely to be efficient compared to other methods of regulation. Underneath these differing views, one finds considerable agreement about the conditions that facilitate the emergence of efficient custom.<sup>146</sup> Even custom optimists do not think any norms emerging from any social context will be efficient, nor do pessimists rule out the possibility that certain confluence of factors could give rise to efficient norms. Efficient social norms will most likely develop under the following circumstances, which will be explained in more detail below:

- (a) small group size,<sup>147</sup>
- (b) frequent interactions between group members<sup>148</sup>
- (c) who are homogenous along some important dimension (such as religion, ethnicity, or scope of operations)<sup>149</sup> and
- (d) who alternately play reciprocal roles.<sup>150</sup>
- (e) Finally, even when group interactions give rise to efficient norms, the norms will most likely be efficient when applied to members of the group itself and

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145. When group members have contractual relationships with the outsiders, externalizing costs is harder because they can be priced into the contracts.

146. See Bernstein, *supra* note 21, at 714 & n.14.

147. See *infra* Part II.C.1.

148. See *infra* Part II.C.2.

149. See *infra* Part II.C.3.

150. See *infra* Part II.C.4.

perhaps those in privity with them (insiders rather than outsiders).<sup>151</sup>

These factors are listed in no particular order, and they interact and overlap, though the literature seems to stress small group size and a high frequency of interactions as the most important ones.<sup>152</sup> Furthermore, the presence of any one of these factors is not strictly necessary;<sup>153</sup> rather, the list should be taken as a “best case” scenario for the creation of efficient norms. To put it differently, one should have more confidence in the social utility of a norm that arises under the confluence of all these circumstances than in a norm that arises in the presence of only one of them, though in principle both norms could be efficient.

The interaction of these factors is also important. More of one may make up for another. A reduction in group size may offset a decrease in frequency of interactions, and vice versa. Furthermore, some factors are correlated with others. All things being equal, as group size increases maintaining the same level of homogeneity becomes harder—the perennial dilemma of class actions. And the smaller the group, the more frequent the dealings between any pair of members. Now, a few more words can be said about the role of these circumstances in facilitating the emergence of efficient norms.

### 1. Group Size

Social norms scholars have attempted to illustrate the efficiency of norms through case studies of various communities. Ellickson’s influential study of cattle ranchers in Shasta County, California<sup>154</sup> is the most famous of these, and most scholars adopt his focus on “close-knit groups”—small, discrete, and insular populations.<sup>155</sup> The

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151. See *infra* Part II.C.5.

152. See Bernstein, *supra* note 21, at 714 & n.14.

153. *Id.* at 714 n.14.

154. See generally ELLICKSON, *supra* note 125.

155. See, e.g., Richard H. McAdams, *Group Norms, Gossip, and Blackmail*, 144 U. PA. L. REV. 2237, 2241 (1996) (limiting discussion of “group norms” to those of “close-knit” groups of the sort studied by Ellickson); Lior Jacob Strahilevitz, *Social Norms from Close-knit Groups to Loose-knit Groups*, 70 U. CHI. L. REV. 359 & n.2 (2003) (describing social norms literature’s focus on small groups); see also Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 116 (1992)

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norms literature suggests that, other things being equal, the customs of a smaller group are more likely to be efficient than those of a large one.

Ellickson notes that in a small group it is relatively cheap for members to monitor each other's actions, making it easier to detect norm violators.<sup>156</sup> Detection, however, is useless without a way to punish. In a small group, members more likely are dependent on each other for reputation (which makes future cooperation possible)<sup>157</sup> or esteem (valued in itself).<sup>158</sup> Interdependence creates the *means* of sanctioning. Information circulates more easily in a small group, which is crucial because esteem and reputation are informational currency.

Yet this only explains how and why the public good of enforcement would be provided within the group. It does little to explain why the norm being enforced would more likely be welfare enhancing. Perhaps general knowledge of reputation directs group members toward interactions with those who adhere to what the other group members perceive as the better norm. Or perhaps smallness is important to efficiency only to the extent it is accompanied by other favorable circumstances.

The terms "small" or "close-knit" group are purely ones of degree. The same is true of the other factors, such as homogeneity, discussed below. What counts as "large" or "small" depends on the subject matter of the group's interactions, the stakes, the nature of the relations between group members, and other factors. Group size, therefore, is a very imperfect indicator for predicting whether a given population's norms will be efficient. But group size, like homogeneity and the other factors, does allow for marginal predictions. An increase in group size will, at the margin, decrease the likelihood of efficient norms emerging or persisting. In keeping with the case studies, one might tentatively define the upper limit of group size as that dictated by the requirement of a face-to-face society.<sup>159</sup>

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[hereinafter Bernstein, *Opting Out*]; Bernstein, *supra* note 21, at 714 n.14; Ellickson, *supra* note 108, at 84.

156. See ELLICKSON, *supra* note 125, at 181.

157. See *id.*

158. See McAdams, *supra* note 155, at 2241 n.11.

159. Recent literature has begun to explore situations in which a larger group or one with

### 2. Repeat Transactions

Group members should frequently interact with each other, and expect to do so in the future. Custom evolves not from someone coming up with a good norm, but from undirected “widespread imitation and adaptation.”<sup>160</sup> Hayek sees customs as encoding the diffuse information of myriad actors—more information than can be known by a central planner.<sup>161</sup> The norm thus must be the distillation of a broad set of transactions. If norm development is an evolutionary process, thick transactions provide the necessary “mutations” for the selection mechanism of self-interest to act upon. But because none of the norms chosen by any pair of members was necessarily the result of great deliberation, it would take many transactions to ensure the welfare-maximizing rule emerges. Furthermore, *future* transactions are needed to facilitate informal sanctions.<sup>162</sup>

### 3. Homogeneity

Homogeneity also makes it easier for efficient norms to emerge.<sup>163</sup> It makes it more likely that a norm developed by some group members will reflect the interests of all. It also makes easier certain types of enforcement—such as reputational sanctions or the conferral of esteem. Reputation depends on third parties characterizing a state’s conduct as cooperative or uncooperative. When third

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weaker connections between members could develop robust and perhaps welfare-enhancing norms. Lior Strahilevitz has argued that such a phenomenon can be observed even on computer networks such as Napster, Strahilevitz, *supra* note 155, at 361-63, which cannot be considered “small” in any sense of the word; eBay might be another example. See eBay Home Page, <http://www.ebay.com> (last visited Nov. 24, 2006). If these large networks do give rise to efficient norms, it should draw attention to the mechanisms by which they do so.

The electronic medium facilitates the establishment and monitoring of reputation, as well as private enforcement. See Strahilevitz, *supra* note 155, at 365 n.31 (arguing that “the salient theoretical issue is not the size of the relevant community per se,” but rather “the community members’ ability to monitor instances of noncooperation and communicate with fellow members about each member’s reputation”). By making information cheaper, technology increases the size of the community in which efficient customs can emerge.

160. See Epstein, *supra* note 13, at 12.

161. See *supra* note 136 and accompanying text.

162. See ELLICKSON, *supra* note 125, at 178-80.

163. Many kinds of homogeneity will be relevant—different discount rates, different endowments, different values.

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parties have heterogenous value systems and political agendas, there is less reason for them to rely on each other's statements about whether a state with which they interacted was cooperative. But the principal import of homogeneity lies in its relation to the parties' ability to play reciprocal roles across a series of interactions.

### *4. Reciprocal Roles*

Social norms are most likely to be efficient when the parties to the norm play alternate roles in their interactions. In the context of commercial transactions, this would mean they are buyers one day and sellers the next, as in the diamond exchanges studied by Lisa Bernstein.<sup>164</sup> The same can be said of other groups held up as examples of efficient property norms. Ellickson's cattle ranchers both were liable to be trespassers, if their cattle walked onto their neighbor's land, and trespasses, if their neighbor's cattle strayed onto their land.<sup>165</sup> Turning to another classic example, whalers have a highly reticulated set of norms governing possession of whales pursued by multiple vessels.<sup>166</sup> These norms prioritize the rights of vessels who gave chase, who made fast, and who ultimately brought in the whale. Over a long enough time period, any vessel is likely, at some time, to be first to give chase and first to make fast; one vessel has interests in all camps. Thus, the norm whalers have developed would be more likely to resolve the competing interests of first to chase and first to put a harpoon in, because each party internalizes the costs and benefits of both facets of the rule.

When parties alternate roles over numerous interactions, both will seek joint welfare-maximizing rules—or rather, each party will seek the rule that maximizes his individual welfare, which in the reciprocal roles scenario will also happen to be the socially optimal rule. As a result, transactors will actually seek efficient norms, rather than engage in strategic and opportunistic behavior.<sup>167</sup>

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164. See generally Bernstein, *Opting Out*, *supra* note 155.

165. See ELLICKSON, *supra* note 125, at 54 (“[M]ost residents expect to be on both the giving and the receiving ends of trespass incidents.”).

166. See *Ghen v. Rich*, 8 F. 159, 159-60 (D. Mass. 1881); *Swift v. Gifford*, 23 F. Cas. 558, 560 (D. Mass. 1872) (No. 13,696).

167. See Epstein, *supra* note 13, at 12 (“There is therefore a constant incentive shared by all parties to get the rule right. But there is only a short-term interest of one party to get it wrong ....”).

Reciprocity is, of course, a version of the famous “veil of ignorance.”<sup>168</sup> The veil illustrates that socially efficient rules can be made when individuals put aside their knowledge of what particular role they will have in society. In reality, it is hard to step behind the veil because one knows what role one plays. Reciprocity is as close as it gets because it is when one plays all relevant roles. Still, complete reciprocity will be rare—for example, some whalers are better at spotting the whale, some better at sinking in the harpoon—and thus the different rules of possession will disparately impact them based on the differences in their talents.

Again, these factors are interrelated. Reciprocity is another way of describing a homogeneity of interests. It is also facilitated by thick interactions. One cannot have reciprocity without at least two transactions, and the larger the number of transactions, the more likely that roles will average out.

##### *5. Insiders vs. Outsiders*

Groups may develop norms that increase their own welfare at the expense of outsiders by externalizing costs onto them. Even those scholars most optimistic about the welfare-maximizing potential of customs would apply them only to the groups in which they arise and to those with preexisting relationships with the group.<sup>169</sup> The possibility of externalities raises two issues. The first is about assessing the efficiency of customs. Even robust and popular norms may be inefficient when the welfare of the larger society is taken into account. This remains a possibility unless the custom is truly universal, or no meaningful difference between participants and nonparticipants exists. The second point deals with the scope of a custom. The externality concern suggests that one should be cautious about legalizing a custom, and particularly cautious about binding nonparticipants who may be its victims.

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168. See Epstein, *supra* note 87, at 126 (arguing that custom should be followed when “there are repeat and reciprocal interactions between the same parties,” because in such situations the parties, standing behind the “veil of ignorance, ... have every incentive incrementally to find the best set of accommodations to advance their joint welfare”); see also JOHN RAWLS, A THEORY OF JUSTICE 137 (1971).

169. See *supra* Part II.A.

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### III. ASSESSING THE EFFICIENCY OF INTERNATIONAL CUSTOMS

Customary practices *can* be efficient, but whether they should be given legal recognition depends on whether they are *likely* to be efficient, especially in comparison to alternative sources of norms. This Part examines whether international custom has the hallmarks of efficiency discussed in Part II. It draws on the optimistic accounts of custom to see whether the circumstances favoring the development of welfare-maximizing norms obtain in the international context. If the custom skeptics are right—if custom does not, under the right circumstances, develop reliably towards efficiency—the welfarist case for CIL would be even weaker than presented here. Before these questions are fully explored, a few words should be said about some recent literature that argues CIL norms are efficient.

#### A. *Efficient Custom Literature*

A few recent articles have used game-theoretic models to show CIL can be efficient;<sup>170</sup> that is to say, gains to cooperation and Nash equilibria exist in at least some of the games nations play and CIL can help nations realize those gains.<sup>171</sup> These articles are important contributions to international law scholarship, and a few words should be said about how this Article differs. This Article does not doubt that international custom could in theory be efficient, or that many CIL rules are in fact efficient. However, unlike in common law, where the efficiency of customary norms is a rebuttable presumption and thus the obligation of the norms is itself contingent, CIL doctrine makes a much stronger implicit claim about the efficiency of international custom. Because CIL automatically legalizes custom, the relevant question is not whether customs will

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170. See Francesco Parisi & Nita Ghei, *The Role of Reciprocity in International Law*, 36 CORNELL INT'L L.J. 93, 122-23 (2003). See generally George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT'L L. 541 (2005); Swaine, *supra* note 24.

171. An exception is Posner, *supra* note 8. Treating maximization of global individual welfare as the goal of CIL, Posner concludes that the institutional conditions for meeting this goal—such as governments that are perfect agents for their populations—do not exist. *Id.* at 541-43.

sometimes be efficient, but whether the net effects on states' welfare justify their automatic legalization.

Thus, where this Article parts company with the recent literature is on the question of whether the circumstances that would support efficient norms could be said to broadly obtain. For example, Parisi and Ghei use a game theory model to show that, because CIL norms are generally reciprocal—applying equally to all parties—they should be expected to improve states' net welfare.<sup>172</sup> They recognize that in addition to reciprocity, efficient norms require that two other conditions obtain—"role reversibility and repeat interactions."<sup>173</sup> Similarly, Norman and Trachtman note that the heterogeneity among players and other factors reduce the likelihood of efficient outcomes.<sup>174</sup> This Article is in accord with all the aforementioned analysis; the question is what role these circumstances obtain among states in the contexts that give rise to customary norms. This Article argues that heterogeneity, low interaction frequency, and nonreciprocity obtain to a significant degree, and perhaps to a greater degree than the earlier papers suggest.

### *B. A World Community?*

The set of nations in the world in some ways resembles the kind of decentralized group whose interactions might give rise to efficient norms. The group is composed of a finite number of identifiable parties. Each party is aware of the existence and identities of all the others. Indeed, nations grant each other recognition, creating at least some minimal legal relationship and the possibility of further interactions. Moreover, nations sometimes benefit from cooperating with each other, and can expect to have opportunities for cooperation in the future. This could make a reputation for compliance with group norms at least somewhat valuable.<sup>175</sup> States' interests in

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172. See Parisi & Ghei, *supra* note 170, at 122-23.

173. *Id.* at 105, 115.

174. See Norman & Trachtman, *supra* note 170, at 541, 554-55.

175. This is not intended to defend reputation as an effective or reliable enforcement mechanism in international law. Reputation is but one of many things states care about, and a good reputation does not always have a positive value. Some states, for example, might value a reputation as an unpredictable, "make my day" rogue. See Andrew T. Guzman, *A Compliance-based Theory of International Law*, 90 CAL. L. REV. 1823, 1847-51 (2002) (arguing that, though reputation drives compliance with CIL, this does not mean that states value

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reputation facilitate the emergence of norms by creating a nonlegal enforcement mechanism: the fact of noncompliance, if known, hurts reputation. Moreover, states can engage in informal self-help.

Yet relationships are subject specific. Barge owners have a relationship with tugboat owners in regard to the towing of barges; the custom of the latter as to, say, employment contracts, would hardly be within the ambit of the barge-tug relationship. Other relationships, like the family, have a broader scope, and are treated as such by law. Similarly, the scope of international relationships varies. At a minimum, one can expect most states to have a relationship with regard to diplomatic relations. Yet not all nations have equally thick relations with each other regarding matters of security, extradition, and so forth.

A more thorough consideration of the factors thought to promote the emergence of welfare-maximizing norms shows that, at least today, many do not generally obtain.

### *C. Group Size*

There are roughly two hundred nations on Earth.<sup>176</sup> The United Nations has 192 member states; it had 51 at its creation in 1945, and around 144 halfway through its history in 1975.<sup>177</sup> The number of nations has grown by nearly four hundred percent over the past sixty years—faster than the number of people on earth.<sup>178</sup> This does not mean that today's larger number of states precludes the

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reputation to the exclusion of other interests, only that reputation is among the things states value).

176. The United States recognizes 193 sovereign states—the Vatican, recognized by the United States, has chosen to not join the United Nations. See U.S. Department of State, Independent States in the World, <http://www.state.gov/s/inr/rls/4250.htm> (last visited Nov. 24, 2006). Taiwan is not recognized by the United States nor a member of the U.N., though it once was. Furthermore, numerous entities like Gaza and Northern Cyprus have all of the characteristics of states (albeit weak ones), and, in the former instance, substantial international recognition. See Abraham Bell, *Astrategies of Sovereignty: Or, What Is Gaza?* (unpublished manuscript, available at <http://www.law.uchicago.edu/files/int-law/bell.pdf> (last visited Nov. 24, 2006)).

177. See Department of Public Information, United Nations Growth in United Nations Membership, 1945-2005, <http://www.un.org/Overview/growth.htm> (last visited Nov. 24, 2006); United Nations, List of Member States, <http://www.un.org/Overview/unmember.html> (last visited Nov. 24, 2006).

178. See U.S. Census Bureau, World Population Information, <http://www.census.gov/ipc/www/world.html> (last visited Nov. 24, 2006).

possibility of welfare-maximizing custom.<sup>179</sup> The theory of customs' efficiency does not in itself dictate what group size counts as "too large." However, at the margin, increases in group size weaken the ability of groups to produce and maintain welfare-maximizing norms.<sup>180</sup> As the number of nations in the world increases, it becomes less *likely* that international customary norms will be efficient.<sup>181</sup> Although we do not know whether additional nations are marginal or inframarginal, the rapid growth in group size should constitute grounds for caution in transforming custom into CIL.

Increases in group size make monitoring more costly and create information asymmetries between pairs of states when they interact. There are simply more members to observe, which suggests violations will more often go undetected—this is the typical story of a move from a face-to-face to an anonymous society. Whether a breach occurred is judged by observing states. But each state is now confronted with many more situations to judge without any increase in resources for doing so. Indeed, increases in the number of states often accompany decreases in the size and presumably the resources of preexisting states.

The information and monitoring problems associated with growth in state size will be less true of subject-matter areas in which violations principally harm one or a few countries and are in some way self-evident, such as assaults on ambassadors. In such scenarios, the likelihood that violations will be detected does not substantially change with changes in group size; however, dissemination of the information about the violation becomes impaired as group size increases. Increases in size will be particularly problematic in contexts where the violation is "victimless" in the sense that a small injury results to many or all nations. This is especially true of

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179. See Guzman, *supra* note 1, at 129 (arguing that international cooperation is possible despite the large number of states and that arguments to the contrary are "overstated"); Parisi & Ghei, *supra* note 170, at 123 (same). *But see* Norman & Trachtman, *supra* note 170, at 555-56 (discussing "different ways in which increasing the number of players reduces the likelihood of cooperation").

180. See *supra* Part II.C.1.

181. Several scholars have noted that the rapid growth in the number of nations since World War II places strains on CIL. See, e.g., Michael D. Ramsey, *The Empirical Dilemma of International Law*, 41 SANDIEGO L. REV. 1243, 1247-48 (2004) (arguing that the growth in the number of nations makes CIL norms harder to identify because the practices of many more states must be explored "before any claims can be made about universal practice," and that "the sheer volume of this enterprise ... is daunting").

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human rights norms, the violation of which can be entirely internal to a state and thus unobservable to outsiders.

### *D. Repeat Transactions*

Most nations have some kind of interaction with most other nations. But the density and quality of these transactions varies greatly across nations and across subject matters. Take the law of armed reprisal, for example. Mexico may have some transactions with the United States on this subject. But reprisal is not an area where the United States interacts with Swaziland. Israel has dealings of a military nature with all of its neighbors, but not with Belgium. In regard to the *thickness* of transactions, Mexico's dealings with other nations vis-à-vis armed reprisal are quite thin; Israel's are quite thick, but still limited to a certain subgroup of states.

To take a starker example, landlocked states have no interactions with other states with respect to the law of the sea. They may have opinions about it, but cannot transform them into conduct, the stuff from which custom is formed. Nations that share a common waterway will interact very frequently, almost constantly, regarding its management. But that does not mean they will have any interactions with other sets of riparian states—the experience of the states that share the Danube is different from that of the states which share the Rio Grande.

If one were to map these interactions by connecting pairs of nations with a line each time they interacted in regard to a subject matter, one would see not a seamless web tying together a cohesive “international community,” but a collection of distinct (but often overlapping) groups. The cohesiveness of the groups would also vary considerably. Some pairs of states would have no connections. Others would be connected by thin lines, some by thick lines—representing a repeated course of dealing.

Interactions are not easily quantifiable because a state *not* doing something—fishing in a certain area, for example—could be a behavior for the purposes of developing custom. To the extent customs impose negative rather than positive obligations, one would expect the relevant interactions to be largely invisible. One could, however, measure *opportunities* for interaction if certain observables correlate

with a higher likelihood of interactions—for example, the size and range of a nation's fishing fleet.

In CIL, each nation may have participated in the relevant behavior on only a few occasions. Indeed, with many areas of IL, occasions to participate would be few and far between. If the stakes on any one occasion are not particularly high, it is easy to imagine states repeating their or other states' prior practice even if the practice is not joint welfare enhancing. The cost to each state of adhering to the past practice will be small if the situation rarely arises. One could imagine this cost being lower than the combined cost of thinking of a new practice and the reputational penalty for defecting from a perceived customary norm. Although the latter cost should not be overestimated, it could, in low-stakes situations, exceed compliance costs, especially because the costs of an inefficient norm in a low-frequency context are time discounted, whereas reputational costs are incurred immediately.

### *E. Homogeneity*

As with group size, it is hard to say how much heterogeneity is “too much.” Heterogeneity is also difficult to quantify because, among other things, it occurs along many dimensions. Still, the group of states in the world varies greatly along every potentially relevant dimension, and this heterogeneity has increased over time. There are many kinds of value diversity. People in different nations vary greatly in their attitudes to moral, social, and political issues.<sup>182</sup> States have a wide range of regime types, including federal republic, parliamentary democracy, communist tyranny, absolute monarchy, constitutional monarchy, liberal democracy, theocracy, military dictatorship, and military-backed authoritarianism. National religious beliefs include Catholicism, various types of Protestantism, Sunni Islam, Shiite Islam, various types of Eastern Orthodoxy, Shinto, Hinduism, Judaism, Buddhism, and secularism; some states incorporate religion, others do not. In addition to value diversity there is an even broader range of heterogeneity in the

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182. See World Values Survey, Inglehart-Welzel Cultural Map of the World, available at <http://www.worldvaluessurvey.org> (follow “Inglehart-Welzel Cultural Map of the World” hyperlink).

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material circumstances and abilities of states. Nations range widely in economic wealth,<sup>183</sup> military power,<sup>184</sup> geographic circumstances, and natural resources endowments.<sup>185</sup> Moreover, productivity levels and standards of living have been diverging worldwide in the last century.<sup>186</sup>

Like increasing group size, increasing heterogeneity creates monitoring and informational problems. It brings with it, among many other things, more official languages, as well as an increase in the types of legal systems in use. These things may seem trivial, but they vastly increase the cost of something as simple as figuring out what a nation's law on a particular matter is.<sup>187</sup> Value heterogeneity exacerbates the problem. Because nations have several fundamentally different and often antagonistic normative perspectives, one nation accusing another of violating a custom will mean little to countries with antagonistic values. Venezuela accusing the United States of violating international law, for example, may harm the United States' reputation with Cuba, but not with Australia. The different values-communities do not trade in the same reputational currency.

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183. Gross Domestic Product (GDP) ranges from the United States' \$12,360,000,000,000 to Tokelau's \$1,500,000. See *Rank Order—GDP (Purchasing Power Parity)*, in CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK (2006), available at <https://www.cia.gov/cia/publications/factbook/rankorder/2001rank.html>. GDP per capita ranges from Bermuda's \$69,900 to East Timor's \$400. See *Rank Order—GDP Per Capita (PPP)*, in CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK (2006), available at <https://www.cia.gov/cia/publications/factbook/rankorder/2004rank.html>.

184. Some nations have the power to destroy the world; others have less than enough power to keep internal order. In monetary terms, the United States spends roughly \$518,100,000,000 annually on its military; Sao Tome and Principe spends \$581,700. See *RANK ORDER—MILITARY EXPENDITURES—DOLLAR FIGURES*, in CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK (2006), available at <https://www.cia.gov/cia/publications/factbook/rankorder/2067rank.html>.

185. See, e.g., STATISTICS DIV., UNITED NATIONS, ENERGY BALANCES AND ELECTRICITY PROFILES (2002) (presenting data on heterogeneity of national energy production and consumption); Statistics Div., United Nations, Water Resources: Long Term Annual Average, <http://unstats.un.org/unsd/environment/waterresources.htm> (last updated June 2005) (presenting statistics on disparities in fresh water endowments of nations).

186. See Lant Pritchett, *Divergence, Big Time*, 11 J. ECON. PERSP. 3, 3 (1997).

187. See Ramsey, *supra* note 181, at 1246-48 (describing the empirical difficulties of ascertaining state practice).

*F. Reciprocal Roles*

The reciprocity of roles will vary greatly across contexts. In some contexts, states play symmetrical roles. For example, a state may be as likely to send as to receive diplomats. States sharing a common sea might have similar propensities to overfish and to resist overfishing. On the other hand, a lack of symmetry exists across many legal contexts. Many nations are much more likely to be borrowers than lenders. Although most states could be military aggressors and military targets, many states are much more likely to be one rather than the other: there are repeat aggressors, and repeat victims. A nation with universal military supremacy, like the United States, will usually, if not always, be an aggressor. Dictatorships are more likely to be aggressors than democracies.<sup>188</sup> Even with two nations equally likely to be aggressor and victim, one might be more likely to be a repeat winner (Britain, for example), the other, a repeat loser (Poland, for example). Obviously such states would favor different norms.

*G. Problems of Custom Formation*

It has been suggested by custom optimists that if customary practices arise under conditions unfavorable to their formation, one should expect them to nonetheless be efficient.<sup>189</sup> In other words, any custom that emerges will be efficient; when circumstances do not favor the creation of efficient custom, no custom will emerge. This Article does not suggest that many inefficient customs will emerge; only that some will, and this may be a relatively high proportion of all customs. This Part will suggest two reasons why emergence and efficiency are at least partially independent questions. This explains why, in circumstances that do not favor efficient custom, one may sometimes find inefficient customs rather than an absence of customs.

Recall that “custom” for the purposes of CIL need not be universal; rather, CIL makes the customs of some nations binding on all.<sup>190</sup>

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188. See John Norton Moore, *Beyond the Democratic Peace: Solving the War Puzzle*, 44 VA. J. INT'L L. 341, 360-65 (2004).

189. See Epstein, *supra* note 13, at 14-15.

190. See *supra* note 37 and accompanying text.

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A *subglobal* group of nations might possess the relevant characteristics for an efficient customary practice to develop. Yet a customary practice arising among such a subgroup is not necessarily welfare improving as applied to the broader group of world states. And nothing in the analysis in the Part above precludes the development of customs by some group of states that improves the welfare of participating states *at the expense of* nonparticipating ones. Because CIL does not require participation by all nations, and does not provide for an easy opt-out, it may elevate norms that are efficient as between some states to a level of generality at which they are no longer efficient.

Second, changed circumstances account for much of what can render customs welfare reducing. Assume that a welfare-enhancing custom develops among nations. As more diverse nations join the group, the norm that increased joint welfare for the original group might no longer do so for the expanded group. At this point, the norm could collapse because of open and persistent violation. Yet if the stakes in any one interaction were small enough, or the penalties imposed by other states on defectors high enough, the custom could persist despite its inefficiency.<sup>191</sup>

### *H. The Problem of Codified Custom*

Some multilateral treaties purport to codify or restate preexisting custom. Treaties are presumably welfare maximizing under the demanding Pareto criterion: they have the unanimous consent of the parties to the treaty, and thus presumably make all parties better off. Yet some of these treaties involve areas of custom that in the account presented here would not be expected to be efficient.<sup>192</sup>

This demands an explanation. First, not all multilateral treaties that purport to codify preexisting custom actually do so; often they legislate as much as they restate.<sup>193</sup> Claims made by commentators

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191. See *supra* text accompanying notes 139-45.

192. See Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 564 (1995) (noting that the Nuremberg Tribunal held the Hague Convention and the Third Geneva Convention to be declaratory of CIL). It has also been argued that parts of the Rome Statute of the International Criminal Court codify custom.

193. See Guzman, *supra* note 1, at 164 ("It will often be difficult to know if treaties are meant to codify custom or establish some alternative rule.").

or international organizations about a treaty's declaratory status are not necessarily true. (Indeed, given the difficulty of exiting a custom and the ease of exiting treaties, pure codification would have limited utility.) Second, most treaties that do codify custom also create new rules.<sup>194</sup> If one is making a treaty to govern an area previously governed only partially by CIL norms, it may make sense—some potential signatories may demand—that the treaty lock-on or clearly state what has not been changed. Thus even if the codified custom is inefficient, standing by itself, its inclusion in the treaty may be necessary to the adoption of the legislated portions. Third, multilateral treaties may not have any expectation of enforcement, and so codifying inefficient custom brings no added costs. Fourth, even multilateral treaties are rarely global, while CIL presumptively is. A CIL norm that may be globally inefficient could in theory become efficient if even a few nations are excluded. Finally, this Article does not suggest that all CIL norms reduce states' welfare. Rather, the more modest contention is that the predictors of efficient custom do not generally apply in the international setting. Nonetheless, particular norms may in fact be welfare promoting, even if just through fortuity. Indeed, the most famous and settled examples of treaties that codify international law involve areas where the analysis presented here suggests efficiency is actually likely.<sup>195</sup>

### *I. Summary*

A brief consideration of the circumstances thought to encourage the development of welfare-enhancing norms casts doubt on their robustness in the international context. Although this suggests that few customs will develop at all, it also has cautionary implications

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194. *See, e.g.*, Convention on the Continental Shelf, Apr. 29, 1958, 499 U.N.T.S. 311; United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 reporter's note 2 (1987) ("The International Law Commission, engaged in codifying and developing the law of the sea during the years 1950-56, avoided a clear position as to whether the continental shelf provisions in its draft convention were codifying customary law or proposing a new development.").

195. *See* Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95; Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N.T.S. 261; Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

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for the efficiency of those customs that do come into being. In the absence of small group size, homogeneity and symmetric roles, thick transactions, and the confinement of the norm to those who made it, it is quite plausible for customs to be socially undesirable. Thus the reasons one might think customs generate good norms do not strongly obtain in the context of CIL. The extent to which these factors do or do not obtain varies heavily across areas of law and groups of nations, suggesting that little can be said about the efficiency of CIL norms in the abstract. Whether a custom should be suspect depends heavily on the area of law.

Because the discussion is entirely qualitative, it cannot be known for certain how the current international context measures up, and one is left with impressionistic comparisons to other norm contexts. It is certainly plausible that the number of nations is small enough to support efficient customs. On the other hand, on most issues the degree of heterogeneity and nonreciprocity seems far higher than for most norm groups. This is far from a certain case for the efficiency of international customs. The international environment is such that the mere existence of a customary practice should not be taken as evidence of the custom's social desirability.

Stronger statements can be made at the margins. An increase in group size and heterogeneity, or decreases in reciprocity of roles, all weaken the likelihood of customs being socially optimal. All of these changes have occurred in the past fifty years.<sup>196</sup> Norms theory would suggest that, as a result, CIL would have become both thinner and less efficient during this period. Surprisingly, the rapid growth in group size and so forth has been contemporaneous with increasingly broad and ambitious claims about CIL, both positive and normative.<sup>197</sup> The understanding of when and why customary norms might be socially desirable suggests that in times when there are dramatic changes in these variables, a cautious approach should be taken to the legalization of emerging customs and the continued

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196. Arguably, decreases in the cost of transportation and communication have increased the density of international interactions, though "fast-paced world" claims are hard to evaluate, and vary greatly from subject area to subject area and from state to state.

197. Cf. Randall Peerenboom, *Human Rights and Rule of Law: What's the Relationship?*, 36 GEO. J. INT'L L. 809, 876 (2005) (noting that there is "an expanding body of customary international law").

treatment of existing CIL norms as law—at least until it becomes more apparent whether the changes are occurring at the margin.

#### IV. IMPLICATIONS FOR CIL DOCTRINE

##### A. *What Alternative to CIL?*

When scholars of custom speak of norms being inefficient, they can mean one of two things. The stronger claim is that custom can actually reduce aggregate welfare.<sup>198</sup> In other words, it is not merely suboptimal in the sense that it fails to achieve a Pareto-superior Nash equilibrium. Rather, it actually reduces net welfare compared to the situation where the custom is simply abandoned. This does not mean no one benefits from it, but only that the benefits to the winners are exceeded by the costs to the losers. The weaker claim is that customs may fail to achieve *optimal* results,<sup>199</sup> that is, there are stable equilibria with higher net welfare than the customary rule achieves. This Part will discuss the applicability of both understandings. It does not take a position on which is the better way to think about the efficiency of custom, as the literature is itself inconclusive on whether custom will develop the optimal rule or simply a welfare-improving one.

In the former sense, when customs are said to be inefficient, it is in relation to some superior source of norms. If there are no alternatives to CIL, its “inefficiency” is meaningless, because it is impossible to improve on it. Thus it is important to specify the alternatives that may be superior, from a state welfare perspective, to CIL. In private law, the judge or jury—rather than custom—determines what constitutes reasonable conduct and thus what constitutes a violation of the legal norm.<sup>200</sup> Courts and custom are alternative institutions for assessing a practice’s efficiency.<sup>201</sup> The common law’s moderate custom skepticism reflects the view that,

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198. See, e.g., POSNER, *supra* note 126, at 169-71 (discussing the giving of unwanted gifts).

199. See, e.g., Cooter, *supra* note 132, at 1687-88; Mahoney & Sanchirico, *supra* note 123, at 2048-51. *But see* ELLICKSON, *supra* note 125, at 167 (“[M]embers of a close-knit group develop and maintain norms whose content serves to maximize the aggregate welfare that members obtain in their workaday affairs with one another.”).

200. See *supra* Part I.B.

201. See Epstein, *supra* note 13, at 1-2.

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because the fact-finder can be informed both by the custom and by other information, it can selectively legalize only the efficient customs.<sup>202</sup> In this view, an independent judicial determination of what should be the legal standard will have better welfare effects than a CIL-style blanket incorporation. So in private custom, “inefficient” means relative to the norms that would be promulgated by courts. Similarly, the welfare effects of CIL must be evaluated in comparison to the alternative institutions.

### *1. No Custom*

Even custom optimists agree that the sometimes “inefficient” informal norms reduce group welfare relative to a situation of no custom at all.<sup>203</sup> This is a standard and intuitive way to evaluate the efficiency of a norm—comparing a world with the norm to one without. The previous Part argued that under the circumstances that obtain between nations, there is little reason to think that the norms that would emerge would increase joint welfare. If custom is inefficient in this strong sense, simply abandoning it and leaving the question unregulated would improve welfare.<sup>204</sup>

### *2. Treaties*

Custom and treaties are coequal sources of law. Treaties, unlike custom, are presumptively Pareto efficient, since they require the explicit consent of all their members. However, there is some authority suggesting that treaties are trumped by a contrary subsequent custom.<sup>205</sup> The analysis of the previous Part shows that

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202. Hayek would object that the fact-finder will not be equipped to assess the efficiency of the custom. See HAYEK, *supra* note 125, at 12. Practices can be efficient for reasons not readily evident to outsiders, or even participants. Indeed, if custom is a method of encoding large amounts of diffuse information into a readily implementable norm—a method of economizing on information—then it will either be impossible for the fact-finder to fully reconstruct the efficiency rationale for the custom, or the costs of doing so would swamp the benefits of resolving the dispute.

203. See *supra* Part II.A.

204. True, in a trivial sense “no custom” can be said to be a custom with the content “*nations can do whatever they want.*”

205. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 102 reporter’s note 4 (1987) (“Provisions in international agreements are superseded by principles of customary law that develop subsequently.”).

as between custom and treaty, the latter is certainly more likely to produce welfare-maximizing norms, and should never yield to the former. Of course, situations where a custom conflicts with a treaty will be rare,<sup>206</sup> in which case it is again a choice between custom or no custom.

### 3. *Adjudication*

Questions about the application of CIL increasingly arise in judicial settings. International custom can be an issue in cases before an international tribunal, such as the International Court of Justice or various war crimes tribunals; ad hoc arbitral bodies; or national courts. In such situations the alternative norm-creating institution is the court.

Common law judges are entrusted to weed out inefficient customs and incorporate efficient ones. Thus one alternative to international custom is the standard one—courts. Indeed, in international law, where the correlates of efficient custom are particularly weak, one would think that a combination of judge-made rules and selectively-incorporated custom would be even more likely to out-perform pure custom. This suggests that courts should be as free to ignore international customs as they are to disregard industry norms.<sup>207</sup>

Such selective incorporation can be implemented simply through judges trying to figure out whether a particular custom improves welfare and, if so, whether a still better rule can be devised by the court. Or the court could apply Cooter's "structural adjudication," incorporating only those customary norms that developed under conditions that suggest they are welfare promoting.<sup>208</sup> Of course, nations might not wish to give international adjudicators such broad authority to make common law. And international judges may differ from domestic ones in their ability to screen out welfare-reducing norms or devise welfare-improving ones. Yet, at least for judges and juries in the United States, who are allowed to impose their view of

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206. *See id.* (noting the rarity of such situations, but suggesting they can occur in important contexts and predicting they will become more common).

207. Eyal Benvenisti has argued that the ICJ has actually behaved like a traditional common law court, ignoring inefficient state practices and instead instituting welfare-enhancing norms of its own creation. *See* BENVENISTI, *supra* note 8, at 203-04.

208. *See supra* note 33 and accompanying text.

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reasonableness in the face of contrary private custom, their independent determination seems to be an attractive alternate source of obligation to international custom.

### *4. Special Custom*

From an efficiency perspective, international law's treatment of general and special custom gets things backwards. Recall that the default level of analysis for CIL is the world, the most general level possible. Customs will be more likely to serve social welfare when they emerge from and are applied within groups that are small and homogenous, and have thick and reciprocal interactions between members. CIL, then, seeks to find and apply customs on the level where they are *least* likely to be efficient. Special custom has almost no place in CIL. It should be the core of CIL.

Because special custom is more likely to be welfare maximizing—for the subset of nations to which it applies—CIL should begin with and focus on the customary practices of subsets of nations. Moreover, special custom should trump general custom when the two conflict because of our greater confidence in the efficiency of the former. Making the legalization of behavior regularities track their likely efficiency would, to be sure, require a major reorientation of CIL. Instead of a monolithic body of “customary international law,” CIL should consist of a collection of subglobal customary regimes. These could be narrow or broad, defined along one dimension or a combination of dimensions, such as subject matter, geographic region, or the states' economic, political, ethnic, or religious characteristics. Of course, this is exactly how custom is operationalized in domestic law. In private law, courts are more ready to legalize custom when the custom arose within a tight-knit group and can only be applied within it.<sup>209</sup> When commercial custom is in question, courts look separately to the custom of separate economic and geographic groups.<sup>210</sup>

Of course, special customs should govern relations only within the relevant subgroups. They provide no answer to disputes between

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209. See *Ghen v. Rich*, 8 F. 159, 161-62 (D. Mass. 1881).

210. Cf. *Gillette*, *supra* note 70, at 714 (“[A] purely national custom within the seller's jurisdiction would not apply to a contract concluded with a buyer from another jurisdiction.”).

members of different subgroups. Furthermore, there may not be a special custom dealing with the question because of the ease of codifying subglobal customs into treaties. But this just means the alternate institution to global custom is subglobal treaties. The incompleteness of special custom would not necessarily be something to lament. Current CIL doctrine provides a legal answer to more questions, but there is less reason to trust that answer than there is with special custom. Special custom provides fewer answers with a higher degree of confidence. Unless there is a particular value in global homogeneity, there is no reason to think that the former approach is preferable.<sup>211</sup>

### *B. Persistent Objectors*

The theory of customary efficiency developed in private law scholarship argues for a more robust version of the persistent objector rule. The persistent objector doctrine in CIL makes states' opting out of an emerging customary norm difficult.<sup>212</sup> States must make their objections known openly and clearly during the norm's creation. Like with adverse possession, an interruption in a state's hostile posture to the norm is thought to foreclose its persistent objector status.<sup>213</sup>

The existence of objectors in itself shows some heterogeneity within the group. Objection can be strategic or sincere. If group members play reciprocal roles in repeat interactions, little strategic objection to emerging norms would exist—and if roles are not reciprocal, norms that emerge from the group are already suspect.

As has been seen, few, if any, international customs are truly universal. This raises the possibility that the customary practices impose externalities on nonparticipants. Custom can do this even

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211. Sometimes having a single standard will be valuable in itself. In coordination games, having all parties adhere to the same rule can be more important than the particular content of the rule. See generally Thomas Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229 (2004) (arguing that many international disputes, such as those about boundaries, are multi-equilibria games where a definite rule allowing coordination on an outcome has a value in itself). The analysis of this Article does not extend to such norms. Instead, it focuses on norms that appear to respond to problems of cooperation.

212. See *supra* notes 52-53 and accompanying text.

213. See *supra* note 54 and accompanying text.

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when it does not bind the nonparticipants, but surely it has far greater potential to impose externalities when the customary practices will bind outsiders. Thus some objector doctrine is necessary to shield against norms that impose harmful externalities. The persistent-objector doctrine treats some objectors as at least acquiescent participants if their objection is not systematic enough. This effectively lowers the number of active participants required for a behavioral regularity to be considered general enough to become CIL, and thus invites inefficient norms.

In private law, group customs may sometimes be enforced against dissident members of the group.<sup>214</sup> Yet for members of most small groups, exit is possible. Thus the dissenter's decision to remain within the group can be seen as evidence that the costs of the norm do not outweigh the benefits of membership. Yet CIL is cast on a global scale; with no exit option from the world community, persistent objection is the most a persistent objector can do.

The important question should be not whether a nation objected, but whether it participated in the norm. If the persistent objector has excluded itself from the norm—from its costs and benefits—then even under the optimistic theory of custom there would not be reason to think that applying the custom to the objector would increase social welfare. If the persistent objector could have but did not participate in the conduct from which the custom arose, then the existence of the custom does not suggest that it would be efficient as applied against the objector. The harder question arises when a state's adherence to an emerging norm is imperfect or sporadic. Cases of partial participation inevitably pose difficult line-drawing problems. But there seems little justification for the strict persistent-objector doctrine, which requires early and constant objection. This seems to denigrate the value of experience, which is what custom is built on. A decision to opt out after first participating in the conduct should have the same effect as such a decision made at the outset.

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214. *Cf.* Gillette, *supra* note 70, at 714-15 (explaining, for instance, that “a novice in the trade could be charged with a custom that existed internationally, notwithstanding personal ignorance of its existence”).

*C. New States*

CIL's treatment of new states cannot be reconciled with the welfarist accounts of custom. Customs at best improve the welfare of a group and those in bargaining relationships with group members.<sup>215</sup> Applying customs to those who did not have an opportunity to participate in their formation,<sup>216</sup> either directly or through their contractual dealings with direct participants, is not efficient.<sup>217</sup> Yet under the conventional view of CIL, new states are bound by all customary norms that exist when they come into being.<sup>218</sup>

New states obviously did not participate in the development of existing customs. Nor could they conceivably have bargained with those states that did—nonexistence creates insurmountable transaction costs. If states were fungible—that is, if the group was homogenous and members played symmetric roles—a custom that was good for existing states presumably would also be good for the expanded group, including new states. The circumstances discussed in Part III, however, show that at least on the level of global custom, there is no reason to think existing states' customary practices will also serve the interests of future states. New states may have preferences quite distinct from preexisting states. Indeed, since new states will almost always be formed out of preexisting states, the interests of current and future states are predictably antagonistic to some extent.

Thus even the optimistic welfarist case for custom would not extend it to new states.<sup>219</sup> The new state issue is not peripheral to CIL: a substantial majority of currently existing states are “new” in that they came into existence in the past sixty years, and a sizable minority were born in the past fifteen years.<sup>220</sup> Exempting new

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215. See LANDES & POSNER, *supra* note 125, at 27, 107 (discussing the efficiency of customs with “voluntary transactions” and for those in “a preexisting voluntary relationship”).

216. See Epstein, *supra* note 87, at 87 (“One obvious limitation [on the scope of custom], accepted even by defenders of customary standards, is that they do not bind strangers.”).

217. See Epstein, *supra* note 13, at 4-5.

218. See *supra* note 55 and accompanying text.

219. States that did not object to a developing custom because they did not engage in the relevant area of conduct when the custom developed raised similar issues.

220. See *Field Listing—Independence*, in CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK (2006), available at <https://www.cia.gov/cia/publications/factbook/fields/2088.html>

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states from preexisting customs would obviously fracture CIL's efforts at universalism. Of course, exempting new states from existing rules of CIL would not mean that new states could not join these customs. New states should be able to join customs the way the preexisting states did—by engaging in the customary practices.<sup>221</sup>

### *D. Instant Custom, Soft Law, and State Practice*

There has been an increasing tendency in IL to treat declarations, proclamations, votes at the U.N. General Assembly, and similar manifestations of sentiment as equivalent to state action. This has been called “soft law,” or “instant custom,” because these kind of instruments can be quickly produced, without waiting for the circumstances they contemplate to transpire.<sup>222</sup> This is part of a broader move to elevate *opinio juris* over state practice.

None of the stories about why evolved custom would be efficient supports the legalization of instant custom. The value of custom comes from encoding lessons learned through experience, which must have a basis in practice. Custom advances by states trying on, rejecting, and modifying various norms until an equilibrium is reached. This requires multiple rounds of interaction.

Actions are costly in a way that statements are not. Indeed, statements and votes offer a broad array of material from which one might infer custom precisely because these activities are so cheap. When states develop norms through practice, the customs will, in the optimistic account, incorporate information about both the costs and benefits of the norm.<sup>223</sup> The normative allure of custom comes from its ability to encode large amounts of diffuse information. The kind of knowledge custom synthesizes is situational—that is, it is the aggregation of numerous judgments about the costs and benefits of given conduct in defined circumstances. All of this information is

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(providing a list of independence dates).

221. It is sometimes suggested that new states “consent” to all existing CIL through their decision to become states. However, the decision to become a state simply means that the advantages of statehood are higher than the costs of being bound by CIL norms. This does not prove that extending customs to new states improves welfare.

222. See Guzman, *supra* note 1, at 157.

223. See *supra* Part II.A.

missing from “soft law” and “instant custom.” Thus instant custom has the weakness of advisory opinions, and state practice the strength of case-by-case adjudication. Indeed, without state practice one is no longer in the realm of custom. “Instant custom” is really just legislation by another name. Instant custom is not necessarily inefficient; however, its efficiency cannot be defended through the traditional arguments about the efficiency of custom. Because custom combines the knowledge of group members over time, it can claim access to hidden wisdom, whereas legislation must be defended on its own merits.

### *E. NGOs*

By monitoring and publicly reporting on the activities of all countries, nongovernmental organizations (NGOs) may reduce the informational problems caused by the increase in group size and heterogeneity. Such groups focus particularly on areas in which direct monitoring by other states is most difficult, such as human rights and environmental issues. Some such groups, like the Red Cross, have been given such a task by treaty.<sup>224</sup> These groups raise funds in many Western states, allowing them to employ staffs with considerable expertise in many countries and to mount extensive research efforts. One could imagine such groups providing a global informational currency that would make the group of world states work more like a close-knit community. Their reports could provide an informationally level playing field.

While NGOs have produced some benefits in this regard, they are limited by the very problems of heterogeneity and group size that they could conceivably solve. NGOs, like states, have scarce resources, and thus must select which states to which they will devote their attention; even the most globally minded groups must ignore many countries.<sup>225</sup> Moreover, some places are more remote and dangerous than others, making it more difficult for NGOs to operate there. The problem is of course exacerbated by the differen-

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224. Int'l Comm. of the Red Cross, Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (1864), available at <http://www.icrc.org/ihl.nsf/FULL/120?OpenDocument>.

225. See, e.g., HUMAN RIGHTS WATCH, WORLD REPORT 2005: EVENTS OF 2004, available at <http://www.hrw.org/wr2k5/wr2005.pdf>.

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tial cooperation various nations offer. Most importantly, for NGO reports to serve as a global informational currency, they would have to be regarded by all states as entirely impartial and apolitical. If the organizations are thought to have ideological preferences, the information they produce loses much of its value. Information that is perceived as biased will affect reputation (or esteem) only among those nations sympathetic to the NGO.

In short, decreasing costs of travel and communication have made it easier for nongovernmental actors to play a monitoring role. In principle this could make the nations of the world more like a close-knit group for efficient norm purposes. But currently it is not clear if these groups have the resources or the perceived impartiality to make this possible.

### V. A NEW APPROACH TO LEGALIZING STATE PRACTICE

This Article has shown that the treatment of custom in international law differs greatly from common law,<sup>226</sup> and from what would be suggested by the social norms literature on efficient customs.<sup>227</sup> In particular, CIL's global approach seeks to identify and apply custom on the level at which it is least likely to be efficient. Custom's ability to improve social welfare will vary across subject areas, geographic areas, and other fault lines. This Part illustrates how one might reorient CIL along these dimensions, and offers some examples.

#### A. Structural Adjudication

Structural adjudication is a way to tailor existing CIL along lines likely to correspond with efficiency.<sup>228</sup> Once a CIL norm has been identified through the standard criteria—general practice and *opinio juris*<sup>229</sup>—an additional set of questions would be asked about the circumstances in which the custom developed. The inquiry would focus on whether the norm emerged in a context that would support efficient norms. Thus one would look at the number of

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226. See *supra* Part I.

227. See *supra* Part III.

228. See generally Cooter, *supra* note 33.

229. See *supra* notes 39-40 and accompanying text.

nations involved, their degree of homogeneity, the density of their interactions, and the reciprocity of their roles. Customs would only be given legal status when they arose in an environment conducive to the production of efficient norms.

### *B. Diplomatic Relations*

The law of diplomatic relations deals with ambassadorial contacts between nations, and includes such issues as ambassadorial immunity, diplomatic pouches, and the extraterritoriality of embassies. It is one of the most venerable fields of CIL; the principal norms have been around for at least several centuries.<sup>230</sup> These customs enjoy perhaps the greatest compliance of any CIL norms. Host nations generally refrain from violating diplomatic protections even in times of conflict with the sending state, or in the face of significant popular pressure.<sup>231</sup> Unlike many CIL norms, the law of diplomatic relations has long enjoyed recognition and enforcement by domestic courts.

The group size here is substantial in that all nations engage in diplomatic relations. However, interactions between states in this area are relatively thick. Diplomatic ties are a constant, ongoing matter between sending and receiving states. Indeed, the purpose of sending and receiving diplomats is to maintain constant contact with other nations. Moreover, nations have diplomatic ties with a broad spectrum of other nations—no major subgroups of states primarily engage in diplomatic relations between themselves.

Perhaps most importantly, diplomatic relations is an area in which homogeneity and reciprocity is high. All nations both send

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230. Much of this customary law was codified in the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, and domestically in the United States through the Diplomatic Relations Act, 22 U.S.C. §§ 254a to 254c-1, 254d to 254e, 256 to 258a (2000). Clearly, however, the relevant customary norms developed and attained legal status long before codification. See *767 Third Ave. Assocs. v. Permanent Mission of Zaire to United Nations*, 988 F.2d 295, 300 (2d Cir. 1993) (“[T]he Vienna Convention codified longstanding principles of customary international law with respect to diplomatic relations ...”). The preamble of the Vienna Convention both recognizes its roots in “ancient” CIL norms, and “[a]ffirm[s] that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the ... Convention.” Vienna Convention on Diplomatic Relations, *supra*, at 96.

231. See Goldsmith & Posner, *supra* note 18, at 1151 (observing that “the CIL of ambassadorial immunity ... has always been considered one of the most robust rules of CIL”).

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and receive ambassadors to and from a large number of countries.<sup>232</sup> There are no states that just send, and no states that just receive. Indeed, sending and receiving go together, and thus states have the proper incentives to develop norms that are neither too protective of diplomats nor too dangerous. Moreover, each state sends approximately one ambassador to each other state. Although the size of the entire diplomatic mission varies greatly, a small state both sends and receives small delegations. Thus all nations have roughly homogenous stakes—one ambassador, more or less.<sup>233</sup>

### C. War

The laws regarding the use of force—both the rules about when states can resort to hostilities and what means they may use once they begin—are perhaps the most high profile and the most controversial in international law. Though treaties are very important in this area, CIL is invoked repeatedly in these contexts. Yet there is little reason to believe customs relating to war would be efficient on a global scale.

Most nations are not in a position to war with most other nations; they have neither the means nor the resources to do so. With occasional exceptions, a nation's use of force will be against territorial neighbors. Thus practice relating to the use of force naturally breaks down into the practices of relatively discrete subglobal groups. This is another way of saying that any given state has very thick interactions regarding the use of force with only a few

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232. Hostile nations are less likely to have diplomatic relations between each other than friendly nations are. See generally Robert Jervis, *Theories of War in an Era of Leading-Power Peace: Presidential Address, American Political Science Association, 2001*, 96 AM. POL. SCI. REV. 1 (2002) (discussing how the most developed states in the world—the United States, western Europe, and Japan—form a security community among which war, and presumably, nondiplomatic relations, is unthinkable because of the costs). This itself limits the scope of the diplomatic immunity norms to situations where they are least likely to come under serious pressure.

233. Even here, there are asymmetries and heterogeneities. Not all nations send and receive ambassadors to all other nations, with the cost of maintaining a mission being a significant constraint for many poor countries. Indeed, even the United States does not maintain an embassy in every country. Cf. Directory & Search Engine of the World's Embassies & Consulates, <http://www.embassyworld.com/embassy/directory.htm> (follow hyperlinks under “United States Embassies Worldwide”). Faced with cost constraints, nations send ambassadors to states with whom they have the closest or most valuable relations.

other states. Most states have no interactions regarding the use of force with most other states.

Moreover, reciprocity is highly imperfect. Although all nations may at some point be aggressor and victim, the odds of a given nation playing each role are rarely even. There are repeat aggressors and repeat defenders. One may start with the famous observation about democracies rarely fighting other democracies<sup>234</sup> and dictatorships often fighting each other, but role-specification in practice can be even more precise.<sup>235</sup> Furthermore, nations can have some idea in advance which role they will be playing more often; this of course is not independent of the decisions of other states. In addition, the vast discrepancies in military power make some nations likely winners and others likely losers.

Some subgroups are more homogenous than others. Western European nations share a common culture and religious heritage. They also have relatively evenly matched militaries, and for many centuries were regularly, if not constantly, at war. Under such circumstances, one can imagine efficient norms emerging among these states. By contrast, the Arab states and Israel, though constantly at war, differ greatly in religion, culture, and military ability. One would not expect their interactions to result in norms that increase joint welfare. Thus it is difficult to see how generally efficient norms could emerge in this area. However, war could be an area rich in special customs.

#### *D. Human Rights*

Human rights law expands the scope of international law beyond the relations of states to include relations of states with individuals. It posits that a state has *international* legal duties directly to people, including its own nationals.<sup>236</sup> Moreover, just as human rights doctrine seeks to directly endow all individuals with interna-

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234. See, e.g., Bruce Russett, *The Fact of Democratic Peace*, in *DEBATING THE DEMOCRATIC PEACE* 58 (Michael E. Brown et al. eds, 3d ed. 1999).

235. For example, though it is a democracy, the United States is relatively quite likely to be an aggressor. Recent events are proof of this.

236. Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., at 2, U.N. Doc. A/810 (Dec. 10, 1948), available at <http://www.unhchr.ch/udhr/lang/eng.pdf>.

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tional legal rights, it also seeks to make individuals personally liable for violations of CIL.

Much of human rights law is a product of treaties, but it is not limited to them.<sup>237</sup> Customary human rights norms are said to develop through the recognition of a right by a large number of nations either in their municipal law or their diplomatic pronouncements. When this threshold is reached, all nations are said to be obligated to afford their nationals that right.

To the extent the CIL process can be expected to generate efficient norms, it is through repeated interactions between players. The higher the density of interaction, the stronger the claim for efficiency. With human rights law, no reason exists to expect the “customary” development of such law to move towards efficiency, because it is not at all based on substantive interactions between nations. The accounts of customary efficiency do not explain why regularities in the separate human rights practices of states should be elevated to the status of international obligation. By any account, custom is a social phenomenon. To be sure, in the Hayekian account customs are good because they incorporate the diffuse information available to a multitude of individual actors.<sup>238</sup> But they do this through a process of *interactions* among the disparate elements, with each actor bringing his private information to bear on each interaction. Custom can arise from repeated transactions between pairs of atomistic actors and grow to coordinate the interactions of a complex web of actors. In the spontaneous order model, customs develop towards efficiency, because in each separate transaction one of the parties to the transaction would defect from a practice not advantageous to him.<sup>239</sup> The practices that persist are those that both sides of a transaction have deemed advantageous. Thus judges can be confident that, in legalizing a customary norm, they are merely enforcing a rule developed by the parties themselves in their mutual dealings.

Human rights lack this crucial mutuality. Human rights norms do not arise from dealings between states. Rather, they are the sum

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237. See David Weissbrodt & Muria Kruger, *Current Developments—Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901, 913 (2003).

238. See *supra* notes 135-36 and accompanying text.

239. See HAYEK, *supra* note 131, at 37-40, 75-88 (explaining spontaneous ordering).

of the entirely individual actions of each state, not with respect to other states but with respect to itself. Thus their utility as a means of social ordering on the international level is entirely untested. The crucial tension between competing private interests whose resolution suggests an efficient outcome is missing. State *A* and state *B* do not have competing interests as to their separate treatment of their own nationals.

This means that a series of purely private decisions outside the context of interaction is not a Hayekian “ordering” at all. The private practice lacks socially normative content. If, as the consequence of numerous private decisions, nobody smokes cigarettes at home, it is hard to see why a court should prevent someone from having a cigarette at home should they choose to do so. Yet an observation that no one smokes in a workplace might provide some support for a court to uphold the termination of someone employed under a for-cause contract who begins to smoke on the job.

One may object that all states interact with each other constantly by expressing approval or disapproval of conduct. Even states removed from the actual conduct that forms custom participate in it through their expressions of praise and blame. This broad view of “interaction” confuses primary and secondary conduct. The “gossip” among states about the propriety of a given course of conduct may be the *enforcement mechanism* for norm violation.<sup>240</sup> That is, it is part of the price of not following the custom, and will be reflected, along with all other cost and benefit information, in a state’s decision about how to act. But decisions made at the point of action incorporate the fullest range of information. Moreover, only action by states that play reciprocal roles helps to build efficient norms, because such nations will face both the costs and benefits of the custom.<sup>241</sup> Nations offering *opinions*, however, may never be on either side of the custom, and thus their judgments more likely would be affected by exogenous strategic considerations, such as ideological sympathy, military alliance, or ethnic solidarity.

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240. See *supra* note 175 and accompanying text.

241. See *supra* Part III.F.

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### CONCLUSION

Law sometimes adopts norms developed through informal, diffuse processes because such customs, under certain circumstances, improve the welfare of the group in which they developed. Thus even if the wisdom of a custom is not evident on its face, it may have a strong presumption in favor of it. However, international customs develop in a context lacking the features that direct the development of group norms toward efficiency. The absence of homogeneity, repeat dealings, and reciprocal roles in many international settings should significantly reduce one's confidence that CIL norms are welfare improving.

Of course, this does not *prove* that international customs are inefficient, either as a group or individually. And it says nothing about whether they are normatively desirable by some other criteria, such as morality. Rather, it merely shows that the customary origin of international norms is no assurance of their beneficence. Still, this is an important point, as international law legalizes customary norms without any independent inquiry into their desirability. Moreover, international law adopts customs much more readily than private law, although customs in the latter context have a much greater indicia of efficiency than in the former.

The social norms literature on efficient custom has cautionary implications for CIL in its current broad form. But it also suggests that certain international contexts will be more likely to produce efficient norms than others. This offers numerous possibilities for reorganizing CIL around efficient norms. The factors supporting efficient custom might exist among certain subglobal communities of nations—these communities might be regional, economic, or even epistemic. And efficient custom will be more likely to arise in relation to certain substantive issues, such as diplomatic relations, and unlikely to arise in regard to issues such as war. This suggests that the central error of CIL is global and transsubstantive in nature. One does not think that the industry customs of commodity traders should be binding on all other commercial actors. Nor should one think that the practices of a large group of nations would be efficient when applied to *all* nations. Instead of seeking to establish a single uniform rule of CIL, the task of international

lawyers should be to search for areas of law and groups of states that generate welfare-enhancing customs.

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