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## Customary International Law: An Instrument Choice Perspective

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## ARTICLES

### CUSTOMARY INTERNATIONAL LAW: AN INSTRUMENT CHOICE PERSPECTIVE

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#### I. INTRODUCTION

Contemporary international lawmaking is characterized by the rapid growth of new “soft law” instruments and a decline in the conclusion of

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new treaties.<sup>1</sup> The future of customary international law (CIL) in this changing landscape is unclear. This uncertainty is reflected in the burgeoning interdisciplinary literature on legalized international cooperation.

Scholars have scrutinized the design of international agreements, as well as the relationship between soft law and treaties. To a large extent, they have framed their inquiries in terms of when states choose particular treaty design features or instead opt for nonbinding forms of legal cooperation. But these studies focus on only one form of hard law—treaties—and cooperation through formal international institutions. Far less attention has been paid to custom, the other traditional form of binding international law.<sup>2</sup> Other scholars have dismissed CIL as increasingly irrelevant,<sup>3</sup> in part because treaties have codified many legal rules that were traditionally regulated by custom,<sup>4</sup> in part because treaties offer putative advantages over custom, such as precision in language,<sup>5</sup> and in part because custom is plagued by doctrinal confusion.<sup>6</sup> Absent from these studies is any discussion of whether—and under what circumstances—states might actually *prefer* custom over treaties or soft law. This article

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1. See Jean Galbraith & David Zaring, *Soft Law As Foreign Relations Law*, 99 CORNELL L. REV. 735, 745–55 (2014); Joost Pauwelyn, Ramses A. Wessel & Jan Wouters, *When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking*, 25 EUR. J. INT'L L. 733 (2014); Harold Hongju Koh, *Remarks: Twenty-First-Century International Lawmaking*, 101 GEO. L.J. 725, 740–46 (2013).

2. A recent stocktaking of two decades of international law and international relations scholarship highlights the “persistent neglect” of custom as a “manifest weakness” of the field as a whole. Jeffrey L. Dunoff & Mark A. Pollack, *Reviewing Two Decades of IL/IR Scholarship: What We’ve Learned, What’s Next*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 175 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013) [hereinafter INTERDISCIPLINARY PERSPECTIVES].

3. See Andrew T. Guzman & Jerome Hsiang, *Reinvigorating Customary International Law*, in CUSTOM’S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD 275 (Curtis A. Bradley ed., 2016) [hereinafter CUSTOM’S FUTURE] (“For decades now, some legal commentators have suggested that customary international law (CIL) is dying. Looking out at the world, one might be excused for agreeing with them.”); J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT’L L. 449, 452 (2000) (arguing that the customary international law is on the decline); but see José E. Alvarez, *A Bit on Custom*, 42 N.Y.U. J. INT’L L. & POL. 17, 20 (2009) [hereinafter Alvarez, *A Bit on Custom*] (arguing that “the rumored ‘demise’ of non-treaty sources of international law has been vastly exaggerated”).

4. See, e.g., Joel P. Trachtman, *The Growing Obsolescence of Customary International Law*, in CUSTOM’S FUTURE, *supra* note 3, at 172.

5. See Timothy Meyer, *Codifying Custom*, 160 U. PA. L. REV. 995, 1000 (2012) [hereinafter Meyer, *Codifying Custom*] (“[C]odification allows states to specify more precisely what customary international law requires, thereby facilitating deeper cooperation and avoiding costly disputes over vague legal rules.”); SERGE SUR, INTERNATIONAL LAW, POWER, SECURITY AND JUSTICE 171 (2010) (“Nowadays there is a tendency to mistrust custom because of its imprecision. . . . Does not [the] remarkable growth of treaties, the servant of international law, slowly lead custom down the path to comfortable retirement?”).

6. The International Law Commission has recently embarked upon an effort to clarify many of the doctrinal rules governing custom. See Sir Michael Wood (Special Rapporteur), *Third Report on Identification of Customary International Law*, U.N. Doc. A/CN.4/682 (Mar. 27, 2015).

fills that gap in the literature, offering an instrument choice perspective on CIL.

Scholars who employ a rational choice paradigm have devoted significant attention to both treaties and nonbinding norms, and to their interrelationship. In the realm of treaties, studies have analyzed many aspects of the design of international agreements, from the relationship between treaty form and substance, to the institutions and monitoring mechanisms that treaties create, to the flexibility tools that negotiators use to manage the risks of treaty-based cooperation.<sup>7</sup> A different strand of rationalist scholarship explains when and why states choose nonbinding norms and the tradeoffs between soft and hard law. These studies measure “legalization” not as a binary choice, but as a continuum measured by the degrees of obligation, precision and delegation in the arrangements that states negotiate.<sup>8</sup> Scholars using this legalization framework have examined the often complex relationship between binding and nonbinding instruments in issue areas including security, environmental protection, trade, and the regulation of transnational corporations.<sup>9</sup>

A core contribution that links these studies is their focus on instrument choice.<sup>10</sup> An instrument choice framework assumes that rational states choose the type of legalized cooperation—and the norms and design features associated with it—that furthers their own interests. Although some versions of the framework assume that nations only pursue short-term material gains, more capacious and realistic approaches are fully compatible with the claim that states select legal instruments and their design attributes to advance a long-term preference for upholding international commitments.

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7. See, e.g., BARBARA KOREMENOS, *THE CONTINENT OF INTERNATIONAL LAW: EXPLAINING AGREEMENT DESIGN* 99–192 (forthcoming 2016); Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 579, 581–82 (2005); Barbara Koremenos, Charles Lipson & Duncan Snidal, *The Rational Design of International Institutions*, 55 INT'L ORG. 761, 762 (2001) [hereinafter Koremenos, Lipson & Snidal, *Rational Design of International Institutions*]; Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581, 582 (2005); Laurence R. Helfer, *Flexibility in International Agreements*, in INTERDISCIPLINARY PERSPECTIVES, *supra* note 2, at 176–79.

8. See, e.g., Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 421–22 (2000).

9. See, e.g., ANDREW T. GUZMAN & TIMOTHY L. MEYER, *GOLDILOCKS GLOBALISM: THE RISE OF SOFT LAW IN INTERNATIONAL GOVERNANCE* (forthcoming 2016); Gregory C. Shaffer & Mark A. Pollack, *Hard Versus Soft Law in International Security*, 52 BOS. C. L. REV. 1147, 1149–50 (2011); Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 753–98 (2010); Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 173 (2010); Harri Kalimo & Tim Staal, “Softness” in *International Instruments—The Case of Transnational Corporations*, 41 SYRACUSE J. INT'L L. & COM. 257, 262 (2014); Jon Birger Skjærseth et al., *Soft Law, Hard Law, and Effective Implementation of International Environmental Norms*, 6 GLOB. ENVTL. POL. 104, 105–06 (2006).

10. For an early and influential discussion of instrument choice in international cooperation, see Jonathan B. Weiner, *Global Environmental Regulations: Instrument Choice in Legal Context*, 108 YALE L.J. 677, 704–09 (1999).

Strikingly, however, the rational design, legalization, and instrument choice scholarship has all but ignored CIL. Numerous studies of international lawmaking barely mention custom, lump it together with soft law, or view it as a less binding form of commitment than treaties.<sup>11</sup> More specifically, these accounts fail to consider the distinctive design features of CIL or whether and when states might choose custom as their preferred legal instrument.<sup>12</sup>

An instrument choice perspective offers three interrelated insights that reveal custom's continuing relevance to contemporary international lawmaking. First, the perspective identifies the distinctive design elements that distinguish CIL from treaties and soft law. Second, instrument choice illuminates the constraints that limit states' use of custom to particular types of cooperation problems. And third, the approach predicts that states, in these constraints, will continue to prefer custom over treaties and soft law when custom's design features or its substantive norms offer advantages over treaties or soft law.

Before proceeding, we offer a few qualifications and caveats. First, in line with standard rationalist accounts of international cooperation, we view states as the primary actors. This does not imply that the individuals and institutions within states—executive branch officials, legislatures, civil society groups, and so forth—do not influence the selection of custom over treaties or soft law. Our focus, however, is on the dynamics of instrument choice at an international level, where the preferences of these actors have been aggregated and incorporated into the positions states adopt

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11. See, e.g., Andrew Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 119 (2005) (asking whether CIL is irrelevant today because "modern international relations have made the treaty a more important tool, relative to CIL, than it has been in the past, and there are myriad ways for states to cooperate through soft law instruments that fall short of treaties"); Edward T. Swaine, *Rational Custom*, 52 DUKE L.J. 559, 621 (2002) ("[C]ustomary international law, like informal agreements, may allow states a relatively moderate means of credibly committing themselves, while at the same time permitting less costly escape when the circumstances demand it."); Barbara Koremenos et al., *Rational Design: Looking Back to Move Forward*, 55 INT'L ORG. 1051, 1078 (2001) (noting that the editors of a special issue on rational design refer to CIL only to note that custom should be codified "to make it more precise and to ensure that the expectations it entails are widely understood"); Hiram Chodosh, *An Interpretive Theory of International Law: The Distinction Between Treaty and Customary Law*, 28 VAND. J. TRANSNAT'L L. 973, 1012 (1995) (questioning whether custom is a form of soft law).

12. A partial exception is Pierre-Hugues Verdier & Erik Voeten, *Precedent, Compliance and Change in Customary International Law: An Explanatory Theory*, 108 AM. J. INT'L L. 389, 395–401 (2014). Verdier and Voeten develop a positive theory of how CIL changes over time, but do not explain, as we do in this article, whether and why states choose custom over treaties or soft law. A few other scholars have applied a rational choice approach to custom, primarily focusing on the issue of state compliance with CIL. See generally JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005); Guzman, *Saving Customary International Law*, *supra* note 11; George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT'L L. 541, 543 (2005); Swaine, *supra* note 11. These scholars have not considered custom's distinctive design features, nor applied an instrument choice perspective to identify when states prefer custom over treaties and soft law.

vis-à-vis one another. We encourage other scholars to explore the micro-foundations of instrument choice, in particular when and why different domestic actors express a preference for custom over international conventions and nonbinding norms, and how those preferences are translated into official state policy.

Second, we make a simplifying assumption that nations intentionally select one international instrument over another. This assumption—that states “choose” custom, rather than having custom imposed upon them or having it develop as an essentially unconscious process—is borne out by the examples discussed in Part IV. We also recognize, however, that powerful nations have a greater ability than weaker states to control the content of CIL, and we take account of this fact in our analysis.

A third preliminary observation concerns our description of custom’s “design features.” We use this term to refer to the attributes or characteristics of CIL itself, not to specific tools or mechanisms, such as treaty exit and escape clauses that states can select, discard, or modify when negotiating written international instruments.<sup>13</sup> A state that chooses custom over treaties or soft law is expressing a preference for an instrument with characteristics that cannot be changed or are very difficult to modify. This comparative lack of flexibility helps us to explain why CIL is limited to particular types of cooperation problems—what we label as “custom’s domains”—and to identify when custom’s design features and substantive norms have advantages for one or more states over those of treaties and soft law.

The remainder of this Article proceeds as follows. We begin in Part II by considering custom’s design features, which we distinguish from the canonical elements of custom (state practice and *opinio juris*) and the individual doctrines associated with CIL. Specifically, we contend that, as an ideal-type, custom is non-negotiated, unwritten, and universal, three characteristics that distinguish CIL from both treaties and soft law, which are almost always negotiated, written, and rarely universal either in formation or application.<sup>14</sup> These design features help to explain some of custom’s peculiar doctrinal characteristics, and they cut across the doctrinal divide which is said to distinguish “traditional” and “modern” custom.<sup>15</sup>

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13. Rational design scholars generally refer to design features in the latter sense. But they also recognize that some tools and mechanisms relating to the selection of institutional forms or legal instruments are “not open to design choice because of technical considerations or shared perceptions.” Koremenos, Lipson & Snidal, *Rational Design of International Institutions*, *supra* note 7, at 770.

14. Legal “bindingness” also distinguishes custom from soft law. To be sure, a state’s preference for binding or “hard” norms also informs instrument choice, as do factors such as the variable cost of reaching an agreement using different instruments. These aspects of instrument choice have been analyzed by other scholars. *See, e.g.*, Abbott & Snidal, *supra* note 8, at 426–30. We put these characteristics aside to focus instead on those attributes that distinguish CIL from *both* treaties and soft law.

15. The traditional approach identifies custom inductively, primarily from state practice. Modern custom, in contrast, is derived deductively and relies heavily on assertions of *opinio juris*. Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary*

Part III considers the constraints that limit states' recourse to CIL to particular types of cooperation problems or "domains." Although custom's design features make it ill-suited to resolve many transborder public goods or collective action problems,<sup>16</sup> we argue that states can nonetheless generate custom in a range of potentially important contexts. Drawing upon numerous historical and contemporary examples, we show that the design features discussed in Part II facilitate custom's formation primarily in three situations: when all states benefit from a customary rule with low distributional costs, when powerful nations impose a custom on weaker states, and when states seek to entrench shared normative values. Outside of these three domains—or where there is overlap among them—custom is much less likely to form.

Part IV considers custom's future in an international legal landscape dominated by multilateral treaties and soft law initiatives. We argue that states select CIL as their instrument of choice (within the constraints imposed by custom's domains) when its substantive norms or its design features confer advantages over those of soft law or treaties. For example, states may use custom to "unbundle" certain negotiated aspects of multilateral conventions, especially those that preclude reservations. A state could decline to become a party to such a treaty yet profess that some or most of its provisions (in particular those it favors) are binding as CIL. Drawing from the law of the sea, international economic law, human rights, the laws of war, and other substantive issue areas, Part IV provides numerous contemporary examples in which states prefer custom to treaties or soft law, based on either its substantive norms or design features. Accordingly, custom remains relevant even in the age of soft law and treaties, so long as states act within the constraints imposed by custom's domains. Part V concludes.

## II. THE DESIGN FEATURES OF CUSTOMARY INTERNATIONAL LAW

This Part identifies three design features—custom's universality, its unwritten nature, and its non-negotiated character—that are essential structural characteristics of CIL, which differentiate it from treaties and soft law as a form of international cooperation. We distill these characteristics from the extensive legal literature on custom as a source of international law, in both its traditional and modern guises.

We acknowledge at the outset that these three design features (universal, unwritten, and non-negotiated) are ideal types, and that treaties and soft law share these features to a limited degree. However, if one views

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*International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 758–59 (2001) [hereinafter Roberts, *Traditional and Modern Approaches*]; but see Stefan Talmon, *Determining Customary International Law: The ICJ's Methodology Between Induction, Deduction and Assertion*, 26 EUR. J. INT'L L. 417, 430–34 (2015) (disagreeing with the distinction).

16. See generally Daniel Bodansky, *What's in a Concept? Global Public Goods, International Law, and Legitimacy*, 23 EUR. J. INT'L L. 651 (2012); SCOTT BARRETT, *WHY COOPERATE?: THE INCENTIVE TO SUPPLY GLOBAL PUBLIC GOODS* (2007); TODD SANDLER, *GLOBAL COLLECTIVE ACTION* (2004).

each attribute along a spectrum, there can be little doubt that custom occupies the high end of the spectrum for each variable as compared to treaties and soft law. Moreover, custom's design features are fixed. Although states are largely free to select the design features of treaties and soft law that best suit their purposes, they generally lack the power to do so with respect to custom.<sup>17</sup> In the discussion that follows, we first address each characteristic separately and then consider potential objections to this typology.

### A. *Universal*

Customary law aspires to universality in both its formation and application. Article 38 of the International Court of Justice (ICJ) provides the canonical definition of custom, as “a general practice accepted as law.”<sup>18</sup> As the word “general” suggests, the practice of all nations is potentially relevant to the formation of custom. States may choose to negotiate treaties and soft law instruments with only a select group of states. By contrast, participation in the formation of custom is in principle open to all nations,<sup>19</sup> even if powerful or specially affected countries often have more control over its development than do weaker or less interested states.<sup>20</sup> Even for regional custom (discussed below), all states within the region may participate in the practice that gives rise to a legal obligation.

This formulation of the state practice requirement reflects a normative commitment to facilitating the creation of legal rules in which all nations participate and that, in turn, apply to all nations.<sup>21</sup> Consider how this compares with other sources. Treaties achieve universality, if at all, only after decades of arduous country by country ratification.<sup>22</sup> Indicia of wide-

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17. See *supra* note 13 and accompanying text.

18. Statute of the International Court of Justice, art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 1060; see also Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. RED CROSS 175, 179 (2005); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (AM. LAW INST. 1987).

19. See MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES: A MANUAL ON THE THEORY AND PRACTICE OF THE INTERRELATION OF SOURCES 62 (2d ed. 1997) (“All States participate as equals in the formative process of customary law . . . .”); MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES 75 (1999) (“[A]ll States, from the weakest to the most powerful, have an equal entitlement to participate in the process of customary international law.”).

20. See *infra* notes 30 and 102.

21. E.g., C. G. WEERAMANTRY, UNIVERSALISING INTERNATIONAL LAW 226 (2004); ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 4 (1971); see also Anthea Roberts, *Righting Wrongs or Wronging Rights? The United States and Human Rights Post-September 11*, 15 EUR. J. INT'L L. 721, 737–38 (2004).

22. The Third and Fourth Geneva Conventions are rare examples of universal ratification, a feat that required more than half a century to accomplish. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287. No human rights treaty has achieved this result, even those that enshrine *jus cogens* norms such as genocide and torture.



spread state support for soft law are found in more diverse sources, such as votes for resolutions in international organizations, endorsements by government officials, campaigns by civil society groups, and nonbinding agreements. Yet there is no accepted method of evaluating these practices to determine the extensiveness of international support for nonbinding norms.

For custom, in contrast, it is widely agreed that a universal rule arises even when many or even most states do nothing. These nations are said to “tacitly accept” or “acquiesce” in an emerging rule; their consent may be “inferred” from silence,<sup>23</sup> if their consent is in fact required.<sup>24</sup> These assumptions, which make the development of universal custom markedly easier, hold true for both traditional and modern forms of custom. “Traditionally, customary law has been made by a few interested states for all.”<sup>25</sup> The process unfolds inductively, building up from specific examples of affirmative practice. “The awareness and opinions of other states that take no overt position are rarely considered.”<sup>26</sup> Modern custom flips this analysis, applying a deductive process that begins with assertions of *opinio juris* rather than discrete instances of practice.<sup>27</sup> The result in either case is the same: a universally applicable binding rule of international law.<sup>28</sup>

Three legal doctrines buttress custom’s universal aspirations: the position of new states, the status of persistent objectors, and assertions of regional custom. Each of these doctrines, properly understood, reinforces custom’s universalist tendencies.

First, it is “widely accepted that a new State is bound by all rules of general customary international law which existed at the time that State came into being,” although such a state had no opportunity to support, acquiesce in, or oppose these preexisting customs.<sup>29</sup> The rationales offered to justify this rule range from a benign desire to preserve stability in international relations to a nefarious effort to shackle “uncivilized” peoples emerging from colonialism to legal rules previously developed by and benefiting Western powers.<sup>30</sup> Whatever the explanation, there has been little

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23. DAVID BEDERMAN, *CUSTOM AS A SOURCE OF LAW* 140, 166 (2010); As Bederman succinctly explains, “for global custom, silence means acceptance of a new rule.” *Id.* at 154; I.C. MacGibbon, *The Scope of Acquiescence in International Law*, 31 BRIT. Y.B. INT’L L. 143, 151 (1954).

24. Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT’L L. 529, 531 (1993).

25. *Id.* at 538.

26. *Id.* at 537.

27. Roberts, *Traditional and Modern Approaches*, *supra* note 15, at 758.

28. States do sometimes use multilateral treaties to displace or change customary international law. We discuss the “competitive” relationship between custom and treaties in Part III. *See also* VILLIGER, *supra* note 19, at 151–66; Meyer, *Codifying Custom*, *supra* note 5, at 1001 (“States seek to codify customary rules that benefit their interests as a way to define and capture those rules.”).

29. BYERS, *supra* note 19, at 145.

30. *Cf.* Kelly, *supra* note 3, at 510 (asserting that “universal norms were imposed on non-Western societies under the guise of a minimum standard of civilization while imperial

if any pushback against this doctrine from the dozens of new nations that have emerged since the end of the Second World War.<sup>31</sup> When paired with the well-settled (although recently challenged) prohibition on unilateral withdrawal from extant custom,<sup>32</sup> the result is a marked geographic expansion of customary law's reach.

The second legal doctrine, the persistent objector, arose to alleviate the anxieties of positivist scholars, who were troubled by the notion that states could be bound through acquiescence rather than express consent.<sup>33</sup> According to the doctrine's canonical definition, a nation that regularly and vociferously opposes an emerging custom will, if the new rule eventually forms, not be bound by the rule in its relations with other states.<sup>34</sup> Consistent with the rules applicable to the formation of custom, the option to object is open to all nations.

If states regularly staked out positions as persistent objectors, our claim that universal application is one of custom's distinctive features would be questionable. In fact, although most courts and commentators now accept the persistent objector concept in principle,<sup>35</sup> its application in practice is both exceedingly rare and difficult to sustain in those few instances when such an objection is raised.<sup>36</sup>

Why might this be the case? One answer is found in the principle of reciprocity, which disadvantages putative objectors by forcing them to bear the new custom's burdens without enjoying its benefits. As Michael Byers has illustrated with an example from the law of the sea, "[e]ven the most powerful of the maritime States—the United States, the United Kingdom and Japan—eventually abandoned their persistent objection to the development of the twelve-mile territorial sea as a rule of customary international law."<sup>37</sup> They did so "at least partly as a result of coastal fishing and security concerns. Although foreign fishing vessels and spy ships were able to operate just outside the three-mile limits of the persistently objecting States, the objecting States' vessels were excluded from waters

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expansion into Africa and Asia continued"); D'AMATO, *supra* note 21, at 270 (stating that custom is "applicable generally" and its importance is "rooted in the desire of the international community for order and security").

31. See UNITED NATIONS, GROWTH IN UNITED NATIONS MEMBERSHIP, 1945-PRESENT (last visited Aug. 15, 2016), <http://www.un.org/en/members/growth.shtml>.

32. Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 204 (2010) ("[A] nation may have some ability to opt out of a CIL rule by persistent objection to the rule before the time of its formation . . . but once the rule becomes established, nations . . . never have the right to withdraw unilaterally from it.").

33. For a succinct intellectual history of the doctrine, see *id.* at 233–39.

34. BYERS, *supra* note 19, at 180.

35. INTERNATIONAL LAW ASSOCIATION COMMITTEE ON FORMATION OF CUSTOMARY (GENERAL) INTERNATIONAL LAW 27 (2000) [hereinafter "ILA REPORT"] ("Although some authors question the existence of this rule, most accept it as part of current international law.").

36. *E.g.*, BEDERMAN, *supra* note 23, at 155; BYERS, *supra* note 19, at 181.

37. BYERS, *supra* note 19, at 181.

within twelve miles of other States' coastlines."<sup>38</sup> Reciprocity, in other words, systematically discourages persistent objection to emerging customs that involve reciprocal rights and obligations. Thus, in practice, the doctrine of persistent objectors poses little if any impediment to custom's applicability to all nations.<sup>39</sup>

A third doctrine reinforcing custom's universality is the presumption against regional custom. Commentators have long asserted that a custom can, in principle, be restricted to a geographically linked group of countries. Such a rule would bind only the states in that area, leaving nations elsewhere unaffected. If regional custom were a common source of international legal obligation, it would cast doubt on our universality claim. Examples are few and far between, not the least because the ICJ has actively discouraged the formation of regional custom.

In the *Asylum Case*,<sup>40</sup> the World Court considered Colombia's allegation that a Latin American custom required Peru to grant safe passage to an individual to whom Colombia had granted political asylum. The ICJ rejected this claim, reasoning that a state's silence in response to an emerging regional custom was to be construed as an objection. This is precisely the opposite of the rule governing global custom, where silence is equated with acquiescence. Why, David Bederman pointedly asks, "did the World Court change the calculus of consent for regional custom in *The Asylum Case*?" His answer:

One can only conclude that the Court wished to suppress regional custom, and there is no more effective way to do so than to declare a presumption that fundamentally disrupts the formation of such regional practices. [The ICJ] was concerned that development of distinctive bodies of regional rules—not just for Latin America, but perhaps also for Europe, Africa, and Asia—might unduly interfere with the universal aspirations of international law.<sup>41</sup>

The use of procedural rules that discouraged regional custom thus "preserved the ICJ's prerogative to declare the content of customary international law . . . for the benefit of . . . the global community at large."<sup>42</sup>

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38. *Id.*

39. Reciprocity does not explain the paucity of persistent objections to emerging customary human rights norms, for which an objecting state may have little if any interest in whether other nations follow the norm or not. Objection to such norms may be difficult to sustain for another reason—sustained pressure from international human rights bodies and campaigns by civil society groups. Such efforts eventually led to the abolition of the juvenile death penalty in the United States notwithstanding that country's persistent objection to that norm. See, e.g., Scott Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 993–95 (2008); Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 DUKE L.J. 485, 536 (2002).

40. *Asylum Case (Colom. v. Peru)*, Judgment, 1950 I.C.J. 266, 276–77 (Nov. 20).

41. BEDERMAN, *supra* note 23, at 152.

42. *Id.* at 153.

### B. Unwritten

A second feature that distinguishes custom from treaties and nonbinding norms is that custom is an unwritten form of law. In a review of international law sources in the early years of the 20th century, Lassa Oppenheim asserted that “[t]he rules of the present international law are to a great extent not written rules, but based on custom.”<sup>43</sup> Numerous recent studies concur that custom is unwritten law, some even labeling this as one of custom’s “defining characteristics.”<sup>44</sup>

In contrast, the vast majority of treaties are memorialized. Drafts are circulated and marked up during negotiations, ultimately leading to the adoption of a final authoritative text that is opened for signature. Several rules and institutional features of the international legal system provide strong incentives for states to put their agreements in writing. The Vienna Convention on the Law of Treaties (VCLT)—and the benefits of its many default rules—apply only to written treaties, a limitation intended to promote predictability and legal certainty and reduce future interpretive disputes.<sup>45</sup> In addition, treaties cannot be entrusted to a depository or included in published compendia such as the United Nations Treaty Series unless they are in written form.<sup>46</sup> Finally, some national laws require treaties to be memorialized for various purposes.<sup>47</sup>

Nonbinding norms too are overwhelmingly written. Dinah Shelton’s authoritative treatise identifies two types of soft law—primary and secondary—both of which are embodied in written instruments. Shelton defines primary soft law as “those normative texts not adopted in treaty form that are addressed to the international community as a whole or to the entire membership of the adopting institution or organization.”<sup>48</sup> Examples in-

43. Lassa Oppenheim, *The Science of International Law: Its Task and Method*, 2 AM. J. INT’L L. 313, 315 (1908).

44. Roy M. Mersky & Jonathan Pratter, *A Comment on the Ways and Means of Researching Customary International Law: A Half-Century After the International Law Commission’s Work*, 24 INT’L J. LEGAL INFO. 302, 303 (1996); see also EDUARDO JIMÉNEZ DE ARÉCHAGA, *General Course in Public International Law*, in INTERNATIONAL LAW IN THE PAST THIRD OF A CENTURY 12 (1979) (defining customary international law as “unwritten law”); ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS 196–203* (1958) (describing the growth of “written law” at the expense of custom); HUGH THIRLWAY, *INTERNATIONAL CUSTOMARY LAW AND CODIFICATION* (1972) (“[T]he essence of customary law is that it is *lex non-scripta* . . . .”); VILLIGER, *supra* note 19, at 15, 102–03 (defining customary law as “unwritten” or “*jus non-scriptum*”); ILA REPORT, *supra* note 35, at 63 (“[T]he essence of customary law is that it is the unwritten manifestation of the will of the international community as a whole . . . .”).

45. Vienna Convention on the Law of Treaties, art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331.

46. Treaty Section of the Office of Legal Affairs, *Treaty Handbook*, at 3, 71–72, U.N. Sales No. E.12.V.1 (2012).

47. See, e.g., Case Act, 1 U.S.C. § 112b (2012).

48. Dinah Shelton, *Commentary and Conclusions*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 449, 449–50 (Dinah Shelton ed., 2000) [hereinafter COMMITMENT AND COMPLIANCE]; see *id.* at 450–51 (citing examples).

clude the U.N. Standard Minimum Rules for the Treatment of Prisoners, the U.N. Standard Minimum Rules for the Administration of Juvenile Justice, the Declaration on Rights of Indigenous Peoples, and declarations adopted at the close of U.N.-sponsored human rights conferences.<sup>49</sup> Secondary soft law includes “the recommendations and general comments of international human rights supervisory organs, the jurisprudence of courts and commissions, decisions of special rapporteurs and other ad hoc bodies, and the resolutions of political organs of international organizations applying primary norms.”<sup>50</sup> These illustrations reveal that primary and secondary soft law come in many shapes and sizes, but one feature that unites all of these examples is their written form.

To be sure, written documents often provide evidence—sometimes the best evidence—of state practice and *opinio juris*. Yet, references to written materials to prove these elements does not transform custom into written law. Rather, they further underscore the differences between custom on the one hand, and treaties and soft law on the other.

First, custom is a “norm without a [formal] act, at least, without a founding act, where you might hope to find its origin and from which you might be able to derive its authority.”<sup>51</sup> Proving the existence of custom cannot, unlike most treaties and nonbinding norms, be done by consulting a single authoritative text. Rather, a putative rule must be pieced together from numerous sources—official publications, historical records, newspaper articles, and so forth—in dozens of nations.<sup>52</sup> Diligent researchers may identify these materials relatively easily for the few industrialized nations that publish digests of state practice, but the task is far more difficult elsewhere. And even for governments with large and sophisticated international law departments, “customary practices are often not formally recorded at all.”<sup>53</sup>

In addition, some treaties codify existing customary rules or crystalize the formation of new custom, with the result that the same norm exists in both sources of international law. This overlap between treaties and custom does not, however, render the latter as written law. To the contrary,

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49. *Id.* at 450–52.

50. *Id.* at 452.

51. Mersky & Pratter, *supra* note 44, at 303–04 (quoting and translating Serge Sur, *Sources du Droit International—La Coutume*, 13 JURISCLASSEUR DU DROIT INTERNATIONAL 4 (1989) (Fr.)); see also BEDERMAN, *supra* note 23, at 164 (“CIL norms do not . . . ever have textual determinacy [unless and until they are] codified or embedded in authoritative decisions.”); Maurice H. Mendelson, *The Formation of Customary International Law*, 272 RECUEIL DES COURS 155, 172 (1998) (“[T]he characteristic of [custom] is that it is not just unwritten, it is informal.”).

52. See, e.g., MALCOLM N. SHAW, INTERNATIONAL LAW 78 (5th ed. 2003) (“[T]he obvious way to find out how countries are behaving is to read the newspapers, consult historical records, listen to what government authorities are saying, and peruse the many official publications.”).

53. BEDERMAN, *supra* note 23, at 145.

treaty and custom remain separate sources of obligation.<sup>54</sup> As we later explain, the enduring separation of these sources is particularly important for non-ratifying countries and for state parties that later withdraw from a treaty that embodies a customary rule.

### C. *Non-negotiated*

A third distinctive characteristic of custom is that it is not negotiated in the manner of treaties and soft law. Commentators describe the practice that produces custom as “informal, haphazard, not deliberate, even partly unintentional and fortuitous” as well as “unstructured and slow.”<sup>55</sup> Even scholars who perceive some order in this chaos characterize custom as emerging from a “struggle for law reflected in exchanges of signals, cues, bids, and responses”<sup>56</sup> among states “competing in a marketplace of rules.”<sup>57</sup> Custom, in other words, is formed by iterated claims and defenses in which some “groups of states may ‘bid’ new norms, while others may object, and yet other countries may simply remain silent and so acquiesce.”<sup>58</sup>

This process does not involve negotiation, which is commonly defined as a “formal discussion between people who are trying to reach an agreement.”<sup>59</sup> Custom is not produced by a formal discussion or exchange of views. In fact, the state practice that serves as its basis may not even be motivated by a desire to reach an agreement.<sup>60</sup>

Many negotiations over legal instruments involve another element as well, bargaining. Negotiation over treaties, for example, often involves competing demands and concessions in which the parties trade various aspects of the form and substance of the agreement. Consider multilateral

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54. KAROL WOLFKE, *CUSTOM IN PRESENT INTERNATIONAL LAW* 71 (2d ed. 1993); R.Y. Jennings, *The Progressive Development of International Law and Its Codification*, 24 BRIT. Y.B. INT'L L. 301, 303–04 (1947); see also North Sea Continental Shelf Case (Den./Neth. v. Ger.), 1969 I.C.J. 3, ¶ 71 (Feb. 20) (inferring the existence of a general custom from a treaty “is not lightly to be regarded as having been attained”).

55. See, e.g., LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 34 (2d ed. 1979); see also Meyer, *Codifying Custom*, *supra* note 5, at 1023; DANIEL BODANSKY, *THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW* 192, 203 (2010) [hereinafter BODANSKY, *ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW*]; GOLDSMITH & POSNER, *supra* note 12, at 37.

56. BEDERMAN, *supra* note 23, at 165 (citing Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 725 (1988)).

57. *Id.* at 150.

58. *Id.* at 143.

59. *Negotiation*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/negotiation> (last visited Aug. 15, 2016); cf. *Negotiation*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining “negotiation” as “a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter”).

60. E.g., Bradley & Gulati, *supra* note 32, at 204 (“[T]he rules of CIL do not arise from express negotiation.”).

conventions that regulate global public goods or club goods.<sup>61</sup> Most of these agreements contain carefully crafted compromises, often hashed out in exquisite detail among cross-cutting alliances.<sup>62</sup> A group of states may give up a preferred position in one section of a treaty (or in one treaty in a nested treaty regime, such as the WTO) in exchange for benefits in another section. Or a party may agree to less favorable substantive rules only if those rules are phrased very broadly or if the treaty includes express exit or escape clauses.<sup>63</sup> These exchanges expand the zone of agreement, facilitating the resolution of “[m]ultilateral coordination problems [that] cannot easily be solved in the informal, unstructured, and decentralized manner typically associated with customary international law.”<sup>64</sup>

Custom also generally arises on a rule by rule basis. State practice and *opinio juris* focus on a single, discrete legal issue, often expressed at a high level of generality, rather than a fully fleshed-out group of norms with carefully delineated contours and exceptions. This partly reflects the largely unwritten nature of custom, which increases the cost and reduces the efficacy of establishing multiple, related customs at the same time. But it also makes custom a useful tool for general international rules that eschew country-specific or case-specific tailoring. As Bradley and Gulati assert with reference to the custom of diplomatic immunity, “[i]f nations can assume that the same rules of diplomatic immunity apply, no matter where, then there will be no need to negotiate specific rules every time a diplomatic mission is established in a new country.”<sup>65</sup>

One potential objection to our claim that custom is non-negotiated arises from the widely-held view that U.N. General Assembly resolutions are evidence of customary international law. These resolutions are sometimes the subject of intensive negotiations among dozens of countries, including on-the-record debates, bargaining among state representatives, and attempts to reach agreement on a written text. In 2013, for example, the General Assembly adopted a resolution on data privacy<sup>66</sup> that was the product of extensive negotiations. States that engage in widespread data collection were especially active in these negotiations and succeeded in weakening the resolution’s final language.<sup>67</sup>

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61. See RICHARD CORNES & TODD SANDLER, *THE THEORY OF EXTERNALITIES, PUBLIC GOODS, AND CLUB GOODS* 347 (2d ed. 1996) (defining a “club good” as a good characterized by “the sharing of an excludable (rivalrous) public good”).

62. E.g., BYERS, *supra* note 19, at 169–70 (describing treaties as “set[ting] out a series of closely related rights and obligations in written form”).

63. Laurence R. Helfer, *Exiting Custom: Analogies to Treaty Withdrawals*, 21 *DUKE J. COMP. & INT’L L.* 65, 71 (2010) (describing treaties as “package deals that embody hard-fought compromises among government negotiators”).

64. GOLDSMITH & POSNER, *supra* note 12, at 37.

65. Bradley & Gulati, *supra* note 32, at 247.

66. G.A. Res. 68/167, U.N. Doc. A/RES/68/167 (Dec. 18, 2013).

67. See Dominic Rushe, *UN Advances Surveillance Resolution Reaffirming “Human Right to Privacy,”* *THE GUARDIAN* (Nov. 26, 2013), <http://www.theguardian.com/world/2013/nov/26/un-surveillance-resolution-human-right-privacy>.

If such resolutions were in themselves binding as CIL, our claim about that source's distinctive features would be difficult to sustain. Although a few scholars have asserted that some General Assembly resolutions create "instant custom,"<sup>68</sup> such a claim is now discredited. Rather, it is widely agreed that General Assembly resolutions provide only evidence of CIL, with the weight of that evidence dependent upon factors such as voting patterns, express reference to custom in the text, and, most importantly, whether legal norms referred to in the resolution are subsequently reinforced by other indicia of state practice and *opinio juris*.<sup>69</sup> In addition, structural limitations constrain opportunities for negotiation of General Assembly resolutions. The Assembly and its Main Committee include all U.N. members. Negotiation on this scale is unwieldy, reducing the ability of individual states to influence the drafting of language that describes the resolution's relationship to extant or emerging custom.<sup>70</sup>

A second potential objection to custom as non-negotiated relates to the use of treaties as evidence of custom.<sup>71</sup> Some treaties are intended to codify preexisting custom, thereby rendering it less vague by memorializing it.<sup>72</sup> Such treaties may then serve as evidence of the content of the customary norm, meaning that the negotiation of the treaty is potentially also a negotiation about the content of custom.<sup>73</sup> Yet states have an incentive to continue to promote the customary norm even after the conclusion of the treaty because the norm binds all states, even those not party to the treaty.<sup>74</sup>

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68. See, e.g., Bin Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law?*, 5 INDIAN J. INT'L L. 23 (1965). See generally F. Blaine Sloan, *The Binding Force of a 'Recommendation' of the General Assembly of the United Nations*, 25 BRIT. Y.B. INT'L L. 1, 18–21 (1948) (discussing whether U.N. General Assembly Resolutions are binding as customary international law); F. Blaine Sloan, *General Assembly Resolutions Revisited (Forty Years Later)*, 58 BRIT. Y.B. INT'L L. 39, 68–77 (1987) (discussing how U.N. General Assembly Resolutions contribute to the formation and development of customary international law).

69. E.g., D'AMATO, *supra* note 21, at 78–79; Bruno Simma, *International Human Rights and General International Law: A Comparative Analysis*, in IV-2 COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 153, 217 (1993); WOLFKE, *supra* note 54, at 83–85; Michael P. Scharf, *Seizing the "Grotian Moment": Accelerated Formation of Customary International Law in Times of Fundamental Change*, 43 CORNELL INT'L L.J. 439, 447 (2010).

70. See Stephen M. Schwebel, *The Effect of Resolutions of the U.N. General Assembly on Customary International Law*, 73 AM. SOC'Y INT'L L. PROC. 301, 302 (1979) (noting that U.N. General Assembly votes are often cast "casually" and without the intention that the "resolution is law").

71. See generally VILLIGER, *supra* note 19 (exploring in detail the relationship between custom and treaties).

72. See Meyer, *Codifying Custom*, *supra* note 5, at 1000.

73. Cf. *id.* at 1022 (arguing that "states use treaties, and the explicit bargaining processes through which treaties are made, to shape customary rules in a way that works to their individual benefit").

74. See *infra* text at notes 175–76 (describing the relationship between treaties and custom).



Other treaties aim to facilitate the development of new customary norms. Still other agreements both restate existing custom and include provisions that may crystalize into custom, in part through their inclusion in the treaty. The VCLT is a well-known example. To the extent that treaties such as the VCLT are adopted with the purpose of facilitating the formation of new custom, the negotiation of the treaty is potentially also an indirect negotiation of the customary norm.

Seen from this perspective, the distinction between custom and treaties may seem quite thin, particularly with regard to the comparatively non-negotiated character of custom. José Alvarez succinctly captures this view, arguing that many multilateral codification conferences are “international law-making fora for the purposes of not one but two potential sources of international obligation”—treaty-making and “the elaboration of codified custom.”<sup>75</sup> Aware of this double function, states participating in such conferences employ “conscious stratagems for reaffirming, modifying, or elaborating codified custom.”<sup>76</sup> This new form of creating custom, Alvarez contends, “responds to states’ contemporary needs for a more rapid, less vague, and deliberative process for the establishment of preferably written and clear global rules.”<sup>77</sup>

Nevertheless, like General Assembly resolutions, treaty norms do not automatically become custom. As Robert Jennings has observed, “the very fact of changing the law from an unwritten source to a written source is in itself inevitably a major change.”<sup>78</sup> Accordingly, the argument that treaty provisions reflect preexisting or subsequently formed custom is often contested or based on evidence found in multiple legal instruments. The purported duty to prevent transboundary pollution, for example, is based in part on certain treaty clauses, but also rests on soft law documents such as recommendations of the Organization for Economic Cooperation and Development, the Stockholm and Rio Declarations, and U.N. General Assembly Resolutions, among other sources. As a result, whether customary international law in fact imposes such a duty remains contested.<sup>79</sup>

To the extent that treaties do articulate customary norms it is often because they reflect preexisting norms of customary law, like *pacta sunt servada*. The subsequent treaty does not render the preexisting custom negotiated. To the contrary, the act of codification often changes the content of rule for the treaty but not for its customary law antecedent. Codification treaties generally “lay down the customary rule in a more precise and systematic manner,” and the “[j]us scriptum may cure omissions, eliminate

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75. JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 390 (2005) [hereinafter ALVAREZ, *INTERNATIONAL ORGANIZATIONS*].

76. *Id.*

77. *Id.* at 387.

78. See VILLIGER, *supra* note 19, at 103 (quoting R.Y. Jennings, *What is International Law and How Do We Tell It When We See It?* in 37 SCHWEIZERISCHES JAHRBUCH FÜR INTERNATIONALS RECHT 57, 62 (1981)).

79. Daniel Bodansky, *Customary (and not so Customary) International Environmental Law*, 3 *IND. J. GLOBAL LEGAL STUD.* 105, 110–11 (1995).

anachronisms, introduce recent doctrinal findings, or even consider the eventual enforcement (or adjudication) of the written rule. As a result, codification contains a *creative element* and regularly entails a certain amount of change.”<sup>80</sup>

Moreover, the kinds of treaties that are generally cited as evidence of custom tend to have a somewhat less negotiated character. Many are drafted or negotiated under the auspices of an international organization such as the United Nations General Assembly (through a referral to the International Law Commission). The involvement of international organizations tends to expand the number of states involved,<sup>81</sup> increase the presence of NGOs, involve high levels of openness, and increase the importance of independent experts—all of which reduces the ability of particular states to control the outcome.<sup>82</sup> Nevertheless, some of the treaties that emerge from this process are highly negotiated, including the U.N. Convention on the Law of Sea and the Rome Statute establishing the International Criminal Court. Consistent with their negotiated character, neither permits reservations, and both have proven to be especially controversial evidence of customary international law.<sup>83</sup>

We anticipate a number of objections to our claim that CIL has three essential structural characteristics, which we label as custom’s design features. Positivist international law scholars may protest that we give insufficient attention to state practice, *opinio juris*, and canonical legal doctrines associated with CIL. We agree that these topics are central to understanding when states choose custom over treaties and soft law. However, we see these doctrines—both in their traditional form and as re-envisioned by modern approaches to custom—as products of the three overarching attributes we identify. Indeed, analyzing custom from the perspective of its design features illuminates potential explanations for longstanding areas of doctrinal confusion, as well as topics, such as the persistent objector and the presumption against regional custom that garner significant attention in legal treatises but are rarely followed in practice.

Other commentators may challenge our claim that the three design features accurately characterize CIL or distinguish it from treaties and soft law. Some customary rules are, after all, memorialized in written docu-

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80. VILLIGER, *supra* note 19, at 104 (citations omitted).

81. ALVAREZ, INTERNATIONAL ORGANIZATIONS, *supra* note 75, at 276 (“Invitations to join in multilateral treaty-making efforts [by international organizations] are today regarded as matters of sovereign right, unless the treaty is intended to be of merely regional interest.”).

82. *See id.* at 277.

83. *See, e.g.,* David Sheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability Under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 BERKELEY J. INT’L L. 334, 348–53 (2011) (“The Rome Statute is a negotiated treaty of considerable complexity designed to govern only the ICC. The Rome Statute in its entirety was never intended to reflect customary international law. Relatively few of the provisions of the Rome Statute merit that rigorous categorization.”); *see also infra* text at notes 181–82 (discussing controversy about using some provisions of the U.N. Convention on the Law of the Sea as evidence of customary international law).

ments, and some nonbinding instruments are adopted by international organizations with little if any negotiation among member states. Our overarching response to this critique is to reiterate that custom's three distinctive attributes are not rigid, binary categories. We have been careful to describe custom as universal, unwritten, and non-negotiated *in relation to* treaties and soft law. If all three norms were located along a spectrum that runs, for example, from fully non-negotiated at one end to entirely negotiated at the other, custom would be much closer to one pole than the other two legal norms. The same is true for the other two characteristics. Our contention is that these differences, even if they are differences in degree rather than in kind, are empirically accurate, legally consequential and (as we now discuss) illuminate constraints on the creation of CIL that help to explain why custom has emerged in some areas of interstate cooperation but not others.

### III. CUSTOM'S DOMAINS

The foregoing section described three distinctive design features of CIL—it is universal, unwritten, and non-negotiated. Because these characteristics are relatively fixed and cannot be manipulated to the same extent as the design elements of treaties and soft law,<sup>84</sup> the characteristics constrain when states can turn to custom to create international law. Given these constraints, we argue that CIL forms primarily in three domains—when all nations benefit from a general legal norm with low distributional costs, when powerful countries make visible and sustained commitments to a legal norm, and when states seek to entrench shared normative values. The significance of each of the three distinctive design features varies context to context, but all three features are important to understanding custom's domains.

#### A. *Custom that Benefits All States*

States will use a non-negotiated, universal, and unwritten form of legalized cooperation to create rules from which all states benefit. Because such rules advantage all nations in relatively equal measure regardless of their size, economic might, or military power, they have few distributional consequences and reinforce the foundational principle of sovereign equality.<sup>85</sup>

The three distinctive features of custom identified in Part II facilitate the generation of this category of international norms. Negotiation is unnecessary because states benefit from the rules as such without the need to make specific demands and concessions. Unwritten practice suffices to engender consensus about general rules that lack tailored or detailed provisions. Indeed, the unwritten character of custom helps to secure states'

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84. See *supra* note 13 and accompanying text.

85. Customary rules that benefit all states may, of course, disadvantage many non-state entities including private individuals and firms, colonies, indigenous peoples, political entities that aspire to statehood, or parties who trade with government entities.

agreement to a legal norm articulated at a high level of generality by deferring potential disputes over specific interpretations or applications. Universality means that states can predict that other nations will be bound to the rule, which may constrain self-interested behavior in the future when some states face strong incentives to defect.

All-states-benefit custom often arises from areas of interstate behavior that were previously unregulated by any international rules, and it is comprised of legal norms that are articulated at a high level of generality. Many venerable rules of international law have these qualities.<sup>86</sup> For example, all nations gain from having predetermined methods of communicating with each other through representatives without the fear of arrest or civil suits related to the officials' duties. Customary law thus provides for the immunity of diplomats and consular officials. Other examples include *pacta sunt servanda*, territorial prescriptive jurisdiction, the prohibition of piracy, and the immunity of states from suit in foreign courts over sovereign or public acts (*jure imperii*).<sup>87</sup> Two additional illustrations from the law of the sea and outer space help to illuminate the contours of this category of custom.

Consider the *mare liberum* principle, first espoused by Hugo Grotius, which has long protected freedom of navigation over the world's oceans. As Sir William Scott wrote in an early 19th century court case rejecting British efforts to enforce a domestic ban on the slave trade against foreign vessels, the universal appeal of *mare liberum* was an important justification for its acceptance as custom:

all nations being equal, all have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation. In places where no local authority exists, where the subjects of all states meet upon a footing of entire equality and independence, no one state, or any of its subjects, has a right to assume or exercise authority over the subjects of another.<sup>88</sup>

A similar rationale undergirds the countervailing custom that the flag state has sole jurisdiction over vessels that sail on the high seas under its badge of nationality. As one commentator has explained, the benefits accruing to all nations from the *mare liberum* and flag state rules were "mutually reinforcing," aiding the formation of both customs:

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86. Anthony D'Amato describes this aspect of custom when he notes that the customary rules "probably better reflect the national interests of all the states" than does international legislation; and that many rules of international law "help reinforce the territorial sovereignty of states," and "the validity of the entire body of international rules is reinforced by the consensus that the rules are in the subjects' best interests." D'AMATO, *supra* note 21, at 29–31. Using game theory, all-states-benefit custom can be analogized to custom that arises from "coordination games." See GOLDSMITH & POSNER, *supra* note 12, at 32–35, 54–58.

87. Jurisdictional Immunities of the State (Ger. v. It.), 2012 I.C.J. 99, 143 (Feb. 3).

88. Le Louis (1817) 165 Eng. Rep. 1464, 1475.

reciprocal respect for the exclusive jurisdiction of states over their ships provided a sort of state-to-state equality of opportunity. All states met upon equal footing on the high seas and could make free use of the sea for maximum benefit, but no state could independently impose its legislative will upon the modalities of use.<sup>89</sup>

Turning from the oceans to the heavens, the universal recognition that “outer space is unsusceptible to national or private appropriation” aided rapid acceptance of the non-appropriation principle—a prohibition of territorial occupation or acquisition—as the customary ground norm for future activities in space.<sup>90</sup> The principle has benefitted all states, facilitating “the orderly development of space activities for more than forty years and . . . effectively prevent[ing] a colonial race in the high frontier.”<sup>91</sup> To be sure, disagreements have arisen at the margins, in particular over the upper extent of the earth’s atmosphere. But consistent with our theory, the contending positions over these boundary issues have been advanced, and compromises achieved, via multilateral treaties and soft law, not by challenges to the customary non-appropriation principle as such.<sup>92</sup>

In sum, the all-states-benefit principle explains the formation of many foundational rules of customary international law. But it also sheds light on why custom plays only a limited role in other areas of interstate cooperation. Many important problems faced by the international community involve difficult and contentious questions of how to distribute the benefits and burdens of cooperation among differently situated states. If governments perceive that distributive effects of an international rule are high, unwritten and non-negotiated custom will serve as a poor alternative to treaties and soft law, where specific quid pro quo trade-offs can be worked out, or finely-tuned language can be negotiated, to suit all parties at the table. Climate change and other global environmental problems are prime examples. In these contexts, to the extent that custom forms at all, it will do so around highly abstract norms that leave distributive questions to future negotiations. For example, customary rules of international environmental law tend to be extremely broad and open-ended—what Dan Bodansky describes as a “common ethical framework.”<sup>93</sup> They also tend to be derived from soft law and treaties, which allow states to shape rules with distributional consequences in mind.<sup>94</sup>

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89. Michael A. Becker, *The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea*, 46 HARV. INT’L L.J. 131, 169 (2005).

90. Zachos A. Paliouras, *The Non-Appropriation Principle: The Grundnorm of International Space Law*, 27 LEIDEN J. INT’L L. 37, 54 (2014).

91. *Id.*

92. *Id.* at 51–53 (analyzing the 1976 Bogota Declaration in which eight equatorial states asserted sovereignty over the geostationary earth orbit, but arguing that the Declaration violates preexisting customary law and is contrary to the Outer Space Treaty).

93. BODANSKY, ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 55, at 203.

94. *Id.*

As explained above, the unwritten character of all-states-benefit custom means that the resulting legal rules are often amorphous and malleable. This facilitates widespread initial agreement to a rule, while also giving states leeway to assert their preferred interpretation when applying that rule to specific contexts or new circumstances. To be sure, no rule is entirely free from distributional consequences. As general rules become increasingly particularized in response to these claims, however, distributional issues often become more acute. Custom's distinctive features make it far less useful for resolving these distributional controversies. Instead, states attempt to resolve these concerns through treaty negotiations and codification exercises. Consistent with the argument advanced here, Tim Meyer has shown that efforts to codify preexisting custom is "often driven by distributional concerns."<sup>95</sup> This highlights an important corollary to our theory—over time, all-states-benefit custom tends to become more contentious as it is applied to new circumstances, increasing the likelihood that states will turn to treaty-making or codification to resolve disagreements over the norm. As we explain in Part IV, however, all-states-benefit custom remains relevant even after norms have been codified.

The history of sovereign immunity illustrates this trajectory. Early domestic suits against foreign states were often brought against state-owned maritime vessels. The doctrine of absolute immunity thus benefited countries with large navies and merchant marines, which were immune from suit.<sup>96</sup> On the other hand, private firms and individuals in these countries often had potential claims against foreign vessels, so these states bore the burden as well as the benefit of an absolute immunity rule. As states became more significant economic actors in first part of the 20th Century, the economic importance of state immunity rules increased, which magnified existing distributional effects and generated new ones. The benefits accruing to governments that nationalized private industries and the "State trading activities" of the Soviet Union and other socialist nations were particular concerns.<sup>97</sup> In part as a result, many states abandoned ab-

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95. Meyer, *Codifying Custom*, *supra* note 5, at 1001.

96. *Jurisdiction of Municipal Courts over Foreign States in Actions Arising out of Their Commercial Activities*, 40 *YALE L.J.* 786, 786 n.2 (1931) [hereinafter *Jurisdiction of Municipal Courts*] ("The doctrine [of absolute immunity] has had its principal development in suits in admiralty."). Not surprisingly, the United States and the United Kingdom—both strong naval powers—were also slow to abandon absolute immunity. *Id.* at 786. After World War I, the United States had the world's largest merchant marine fleet. See Allan A. Arnold, *Merchant Marine*, in *THE UNITED STATES IN THE FIRST WORLD WAR: AN ENCYCLOPEDIA* 378, 380 (Anne Cipriano Venzon ed., 1999). In 1926, the Supreme Court held that state-owned vessels engaged in commercial trading were entitled to immunity. *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562, 574 (1926). Recent scholarship has identified small capitalists as the early adopters of the restrictive approach. See Pierre-Hugues Verdier & Erik Voeten, *How Does Customary International Law Change? The Case of State Immunity*, 59 *INT'L STUD. Q.* 209, 214 (2015).

97. XIAODONG YANG, *STATE IMMUNITY IN INTERNATIONAL LAW* 19–20 (2012); see also THEODORE R. GIUTTARI, *THE AMERICAN LAW OF SOVEREIGN IMMUNITY: AN ANALYSIS OF LEGAL INTERPRETATION* 63–64 (1970) (describing the shift away from absolute immunity as a result of nationalization of key industries during World War I, the post-war tendency

solute immunity in favor of a restrictive rule, which does not protect the commercial activities of foreign sovereigns. Consistent with our claim, although the absolute immunity arose with little dissent, the shift to restrictive immunity remains contested after more than a century. As one Chinese author recently explained, “developing countries, to better protect their own national interests, should continue to adhere to the principle of absolute immunity and should not follow the footsteps of the developed countries to accept the restrictive approach.”<sup>98</sup>

The heightened salience of distributional costs and the collapse of consensus around absolute immunity also coincided with the growth of treaties governing this topic.<sup>99</sup> Unable to secure acceptance of restrictive immunity as a customary rule, proponents of that approach turned to bilateral or regional agreements.<sup>100</sup> Efforts to codify restrictive immunity in a global treaty have been less successful. A U.N. convention endorsing that approach was adopted in 2004, but has yet to enter into force.<sup>101</sup>

### B. Hegemonic Custom

The non-negotiated, universal, and unwritten characteristics of custom also facilitate efforts by powerful states to create international rules that bind all nations. We label these rules as hegemonic custom. That powerful states play an important or even dispositive role in the formation of CIL is not a new observation,<sup>102</sup> but no other scholar has (to our knowledge)

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of countries to direct or participate in their nation’s business and economic affairs, and the “relative success of the Russian Revolution”); *Jurisdiction of Municipal Courts*, *supra* note 96, at 786 (“The increased participation of States in enterprises formerly confined to private persons has led to a growing pressure for modification of the rules exempting foreign states from the jurisdiction of municipal courts.”).

98. Dahai Qi, *State Immunity, China and Its Shifting Position*, 7 CHINESE J. INT’L L. 307, 324 (2008).

99. See YANG, *supra* note 97, at 444–46 (providing a general overview of various treaties that touched on sovereign immunity); Derek Asiedu-Akrofi, *Central Bank Immunity and the Inadequacy of the Restrictive Immunity Approach*, 28 CAN. Y.B. INT’L L. 263, 272–73 (1990) (stating that the absolute immunity theory declined “as a result of developments in international trade.”); Verdier & Voeten, *supra* note 96, at 214–15 (presenting data showing an increase in states adopting the restrictive theory of immunity, which includes states “enter[ing] into bilateral or small multilateral treaties”).

100. GIUTTARI, *supra* note 97, at 316–17 (describing the Brussels Convention of 1926, post-World War II bilateral friendship, commerce and navigation treaties, and the 1958 United Nations Convention on the High Seas); see also James Crawford, *Execution of Judgments and Foreign Sovereign Immunity*, 75 AM. J. INT’L L. 820, 820–21 (1981) (examining bilateral and regional agreements regarding sovereign immunity since “no comprehensive treaty on state immunity” exists).

101. Convention on the Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, Annex, U.N. Doc. A/RES/59/38 (Dec. 2, 2004).

102. See, e.g., CHARLES DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 153–63 (P.E. Corbett trans.) (rev. ed. 1968); WOLFKE, *supra* note 54, at 78; BYERS, *supra* note 19, at 129–203; Charney, *supra* note 24, at 537; ILA REPORT, *supra* note 35, at 26; James Gathii, *War’s Legacy in International Investment Law*, 11 INT’L COMMUNITY L. REV. 353, 363–66 (2009); see also GOLDSMITH & POSNER, *supra* note 12, at 28–29, 52–53 (arguing that some forms of CIL are best understood in terms of coercion).

linked the role of power to custom's distinctive design features or used it to develop a theory of instrument choice for custom. Below we discuss a number of variations of hegemonic custom, identify the conditions that make it more or less likely to be accepted by other nations, and analyze when powerful states turn to treaties and soft law to bolster their efforts to promote a desired customary rule. Before proceeding, we emphasize that we do not take a position on the normative desirability of hegemonic norm creation, focusing instead on its relationship to custom's distinctive characteristics. We take up normative issues in the paper's conclusion.

It is hardly surprising that powerful nations advance international rules that further their interests regardless of whether those rules benefit other countries. Yet given custom's universal scope and the ability of all states to object to the formation of an emerging norm, one might assume that attempts by hegemonies to instantiate a preferred rule or practice as binding law would be doomed to failure. In fact, less powerful nations have sometimes embraced or at least acquiesced in campaigns for new customary rules by one or more powerful nations.

Perhaps the best examples involve the law of the sea. President Truman issued a proclamation in September 1945 claiming for the United States jurisdiction and control over its continental shelf, including beyond its territorial sea.<sup>103</sup> Because that area of the seabed was then part of the high seas and thus available for exploitation by all, the Truman Proclamation had significant distributional consequences. Yet coastal states quickly emulated the Proclamation and asserted sovereignty over their respective continental shelves.<sup>104</sup> Perhaps more surprisingly, landlocked nations also rapidly accepted the norm. The speed with which the custom crystallized was striking. As one commentator pithily noted, "the Truman proclamation was revolutionary in 1945 but *passé* by 1958."<sup>105</sup>

What explains the rapid and universal acceptance of this new legal norm, advanced by the world's most powerful maritime nation, without formal negotiations or carefully delineated treaty texts? The timing—just after the end of the Second World War—was propitious. Many nations were still recovering from that conflict and others become economically or politically dependent on the United States during the Cold War's first decade. Both trends discouraged efforts to "challenge the [Truman] doctrine or reveal its flaws."<sup>106</sup> In addition, the new rule's distributional costs were somewhat uncertain. Most countries lacked the resources or technological knowhow to exploit the continental shelf (by drilling for oil, for example).

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103. Proclamation No. 2667, 10 Fed. Reg. 12,303 (Sept. 28, 1945).

104. MICHAEL P. SCHARF, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE: RECOGNIZING GROTIAN MOMENTS 115–17 (2013) [hereinafter SCHARF, CUSTOMARY INTERNATIONAL LAW].

105. James A. Green, 63 INT'L & COMP. L.Q. 781, 782 (2014) (reviewing SCHARF, CUSTOMARY INTERNATIONAL LAW, *supra* note 104).

106. SCHARF, CUSTOMARY INTERNATIONAL LAW, *supra* note 104, at 116 (quoting SUZETTE V. SUAREZ, THE OUTER LIMITS OF THE CONTINENTAL SHELF: LEGAL ASPECTS OF THEIR ESTABLISHMENT 28 (2008)) (citations omitted).



But such distributional costs that could be identified were partly mitigated by Truman's promise to issue leases to foreign corporations. Arguably the most important explanation for the doctrine's acceptance, however, was the claim by other coastal states—including two veto-wielding permanent members of the recently-created U.N. Security Council—that asserting sovereignty over their respective continental shelves was permitted by customary international law.<sup>107</sup>

The credible, visible commitments to the new custom by these nations yielded a better outcome for all states than the uncertainty of no agreement, even if some governments would have preferred a different rule (in other words, there are distributional consequences in selecting a particular rule). Game theorists label this as a “battle of the sexes.”<sup>108</sup> Ed Swaine has applied this analysis to the formation of new custom. He argues that “it is at these early stages where credible commitments, backed by reputational investment in the customary international law regime, may usefully diminish uncertainty and allow coordination to be attained more rapidly and with less friction.”<sup>109</sup> Announcing a customary rule “permits a state to commit to one of the equilibria and to have its representation regarded as binding.”<sup>110</sup> Although Swaine does not limit his analysis to a particular type of nation, his example—the development of the three-mile territorial sea—concerns a rule backed by two powerful maritime countries, England and the United States.<sup>111</sup>

We extend Swaine's insight by explaining how custom's distinctive features facilitate the formation of hegemonic custom in a battle of the sexes situation. A hegemon's credible public commitment to a new legal rule on a take-it-or-leave-it basis may convince other governments that they are unlikely to obtain a more favorable rule through a treaty or soft law. Weaker states in particular may conclude that resistance is not worth the effort (since, by definition, the proffered custom is better than none), or they may see little reason to try to improve the rule through negotiations in which the powerful state may have an even stronger hand. For the new custom's proponents, this method of international norm creation is often faster and less onerous than either formal treaty-making processes or breaching existing rules. Although the “continual, overt exercise of power” is possible, it is also costly, providing hegemons with a strong incentive to legalize interstate relations in “settled rules.”<sup>112</sup>

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107. *Id.* at 117 (noting declarations by Britain and Mexico).

108. This game is characterized by two equilibrium outcomes, one of which is preferred by each of the players. Yet the players in a battle of the sexes also share a common interest in avoiding a particular outcome: non-cooperation. Arthur A. Stein, *Coordination and Collaboration: Regimes in an Anarchic World*, in *INTERNATIONAL REGIMES* 115, 120 (Stephen D. Krasner ed., 1983).

109. Swaine, *Rational Custom*, *supra* note 11, at 599.

110. *Id.*

111. *Id.* at 601–02.

112. Abbott & Snidal, *supra* note 8, at 448.

Another type of hegemonic custom concerns rules espoused during periods when a relatively small number of powerful nations dominated international society, a state of affairs that reached its apogee in the late 19th and early 20th century and continued, to a diminishing extent, until the end of colonialism in the 1960s. Commentators have rightly emphasized how the international rules of this period systematically harmed or ignored non-European nations and peoples. However, there were also battles over custom among the Western states. Britain's efforts to outlaw the transatlantic slave trade is the most prominent example.

Beginning in the early 1800s, Britain deployed a multi-prong strategy to stamp out the slave trade. It asserted a unilateral right to interdict vessels on the high seas, seized vessels carrying human chattel from Africa to the Americas, and sought to establish a basis in treaties and customary international law for proscribing the slave trade and enforcing that ban via interdiction.<sup>113</sup> The outcome of these efforts, by the end of the 19th century, was a customary law prohibition on the slave trade that extended to states that had not ratified treaties proscribing that practice and, by analogy to piracy, permitted any nation to seize slaving ships.<sup>114</sup>

Unlike the Truman Proclamation, however, Britain's ultimately successful campaign against the slave trade required sustained legal and diplomatic efforts lasting over half a century. These efforts paired the negotiation of bilateral and multilateral treaties with other European powers and the United States with soft law declarations and assertions of customary international law. The early years of the campaign met with stiff resistance. The first bilateral treaties Britain secured did not authorize interdiction, and a key British court decision in 1817 held that searching vessels on the high seas infringed the exclusive jurisdiction of flag states.<sup>115</sup> The result, as Michael Byers has explained, was that the British government failed in its initial "attempt to assert a putative new right of customary international law against a nonconsenting state."<sup>116</sup>

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113. See Becker, *supra* note 89, at 208–10; Michael Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 AM. J. INT'L L. 526, 534–36 (2004) [hereinafter Byers, *Policing the High Seas*].

114. For different positions on the date when this CIL rule crystalized, see Byers, *Policing the High Seas*, *supra* note 113, at 534, 536; Jenny S. Martinez, *International Courts and the U.S. Constitution: Reexamining the History*, 159 U. PA. L. REV. 1069, 1123 (2010–2011); MYERS S. McDUGAL & WILLIAM T. BURKE, *THE PUBLIC ORDER OF THE OCEANS—A CONTEMPORARY INTERNATIONAL LAW OF THE SEA* 882 (1962).

115. *Le Louis*, (1817) 165 Eng. Rep. 1464, 1478–79. An 1825 decision of the U.S. Supreme Court was even more explicit. *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825). Chief Justice Marshall characterized the slave trade as "abhorrent," but held that it "has been sanctioned in modern times by the laws of all nations who possess distant colonies" and "has claimed all the sanction which could be derived from long usage, and general acquiescence." *Id.* at 115. Thus, Marshall explained, "[t]hat trade could not be considered as contrary to the law of nations." *Id.*

116. Byers, *Policing the High Seas*, *supra* note 113, at 535; see also Martinez, *supra* note 114, at 1114 ("Between 1818 and 1824, it was the opinion of most, though not all, commentators and judges that, although the slave trade might be contrary to natural law, the general and customary law of nations still allowed the slave trade.").

This failure did not, however, lead Britain to abandon its effort to secure a universally applicable rule. Although the later treaties it negotiated outlawed the trade and provided a limited right of interdiction, these agreements did not bind nonparties.<sup>117</sup> Nevertheless, British ships continued to interdict the vessels of nations that were lawfully transporting African slaves across the Atlantic.<sup>118</sup> By these actions, Britain sought “to convert the[ ] practice of vigilante justice into a lawful act in accord with the larger framework of the public order of the oceans” and “a universally accepted legal norm.”<sup>119</sup> The government did so by a clever recasting of slave trade as an act of piracy, a longstanding crime under customary international law that all nations were authorized to prevent and punish.<sup>120</sup>

In sum, “[t]he history of the British attempt to ban the transatlantic slave trade demonstrates how very difficult it is to achieve a customary international law right of interdiction on the high seas.”<sup>121</sup> That such a custom arose notwithstanding the hurdles to its formation is due in large part to the sedulous campaign waged by the world’s then most powerful maritime nation. To be sure, other factors aided the formation of the custom, most notably that “enforcing the prescription . . . became less contentious and more widely accepted when few states had a competing interest in favor of preserving the practice.”<sup>122</sup> Yet as scholars have shown, the slave trade did not collapse under its own weight. To the contrary, governments and firms only abjured the lucrative practice in response to a massive transnational social movement and sustained political and legal pressure by abolitionist nations, most notably Britain, that reframed what had been viewed as an economic transaction in humanitarian terms.<sup>123</sup>

Most important for our purposes, custom’s distinctive features aided Britain’s efforts to eradicate the slave trade. The government sought a universal ban, a result more easily achieved via a customary rule than by a series of bilateral and plurilateral treaties with varying terms that, in any event, did not bind nonparties. These gaps in treaty coverage were a genuine concern. As Noora Arajärvi has recently written, “many (dominant) countries, which were not party to the treaties, for instance Spain, continued to exercise the slave trade” during the middle decades of the 19th century.<sup>124</sup> This sheds additional light on the references to the slave trade as piracy in the compacts that Britain negotiated. Although these provi-

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117. Byers, *Policing the High Seas*, *supra* note 113, at 535.

118. Becker, *supra* note 89, at 209.

119. *Id.* at 208, 210.

120. Byers, *Policing the High Seas*, *supra* note 113, at 536.

121. *Id.*

122. Becker, *supra* note 89, at 210.

123. *E.g.*, ADAM HOCHSCHILD, BURY THE CHAINS: PROPHETS AND REBELS IN THE FIGHT TO FREE AN EMPIRE’S SLAVES (2006); JENNY S. MARTINEZ, THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW (2012).

124. NOORA ARAJÄRVI, THE CHANGING NATURE OF CUSTOMARY INTERNATIONAL LAW: METHODS OF INTERPRETING THE CONCEPT OF CUSTOM IN INTERNATIONAL CRIMINAL TRIBUNALS 36 (2014).

sions were “couched within an essentially contractual agreement,” they had a broader aim: “extending the right of visitation to vessels from non-consenting states” and thus facilitating the formation of a new custom.<sup>125</sup> Britain’s interdiction of vessels on the high seas and its assertions of a legal right to interdict—both unwritten practices—were crucial to maintaining pressure on non-parties to renounce the slave trade. Finally, for nations reluctant to sign a treaty, negotiations were of little use; unilateral actions and assertions of legal rights were far more important.

The Truman Proclamation and the abolition of the slave trade are examples of successful hegemonic custom. Powerful nations do not, however, always prevail in their efforts to promote a new international rule. To the contrary, the rapid increase in the number of nations and in the diversity of their interests following the Second World War has eroded—although not entirely eliminated—the creation of hegemonic custom.

Demands by the United States and other capital-exporting nations for full compensation for expropriated alien property provides a classic example. The U.S. position was most famously asserted by U.S. Secretary of State Cordell Hull in a letter to the government of Mexico in the late 1930s. In response to Mexico’s expropriation of property owned by U.S. nationals, Hull, coining the doctrine that was to bear his name, asserted that under customary international law “no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefor.”<sup>126</sup> According to some scholars,

Secretary of State Hull accurately presented the then current position in international law in 1938 when he wrote his famous letter to the Mexican Government . . . . Even though the Soviet Union and Latin American countries had challenged the rule before that time, it appears that the overwhelming practice and the prevailing legal opinion supported Hull’s position.”<sup>127</sup>

If there was consensus regarding the standard of full compensation, however, it was short lived. By the 1960s, the objections of Latin American states were joined by those of newly independent countries in Africa

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125. Byers, *Policing the High Seas*, *supra* note 113, at 536. For further discussion of Britain’s strategy of using treaties to facilitate the development of custom, see Martinez, *supra* note 114, at 1118 & n.293.

126. The Secretary of State to the Mexican Ambassador (Castillo Nájera) (Washington, D.C., July 21, 1938), in 5 FOREIGN RELATIONS OF THE UNITED STATES, DIPLOMATIC PAPERS 1938, 687 (1956).

127. Rudolf Dolzer, *New Foundations of the Law of Expropriation of Alien Property*, 75 AM. J. INT’L L. 553, 558 (1981). For a contrary view about the Hull doctrine’s status as custom at the time it was articulated, see Oscar Schachter, Editorial Comment, *Compensation for Expropriation*, 78 AM. J. INT’L L. 121, 122–23 (1984).

and Asia, which together turned to the U.N. General Assembly to assert a legal rule that was far more favorable to expropriating nations.<sup>128</sup>

Yet the most extreme position advocated by capital-importing countries did not prevail. Latin American nations had long advocated a competing legal rule—the Calvo doctrine—which held that “aliens are not entitled to rights and privileges not accorded nationals, and that therefore they may seek redress for grievances only before the local authorities,” not via international arbitration or diplomatic protection.<sup>129</sup> Since custom did not limit a government’s power to seize the property of citizens, this national treatment standard gave expropriating states a legal justification for not compensating foreigners either.<sup>130</sup> Over time, however, expropriating countries abandoned this extreme position and accepted “that compensation must be paid for expropriated alien property as a matter of international law.”<sup>131</sup> The amount of such compensation has remained contested, however, which helps to explain why the United States and European nations have successfully championed the Hull doctrine in a dense web of bilateral investment treaties, which now themselves are cited as evidence of CIL.<sup>132</sup>

### C. Normative Custom

States also use custom to entrench other-regarding values or goals in international law. We refer to this as “normative custom,” which we broadly define to include an assertion of a customary rule that is plausibly advanced as salutary for the international legal system as a whole, even if the rule has distributional costs. The other-regarding character of normative custom distinguishes it most obviously from hegemonic custom—although the two categories may overlap, as illustrated by the divergent motivations for abolishing the slave trade, discussed above. We do not, however, endorse any external standard for assessing whether a putatively other-regarding custom is in fact generally desirable.<sup>133</sup> Rather, such claims will succeed or fail depending on whether other states and non-state actors accept the asserted normative custom as genuinely other-regarding. Although open-ended, this capacious conception of normative

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128. See Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT’L L. 639, 646–48 (1998).

129. DONALD R. SHEA, *THE CALVO CLAUSE* 19 (1955).

130. See Bernardo M. Cremades, *Disputes Arising out of Foreign Direct Investment in Latin America: A New Look at the Calvo Doctrine and Other Jurisdictional Issues*, 59 DISP. RESOL. J. 78, 81 (2004); see also JAMES THUO GATHII, *WAR, COMMERCE, AND INTERNATIONAL LAW* 157 (2010) (citation omitted) (“[T]he Calvo clause was predicated on the view that there did not exist a universal or international standard of justice that alien investors were entitled to under customary international law.”).

131. Dolzer, *supra* note 127, at 561–62.

132. See Alvarez, *A Bit on Custom*, *supra* note 3, at 61–69.

133. For a recent effort to identify such an external standard, see STEVEN R. RATNER, *THE THIN JUSTICE OF INTERNATIONAL LAW: A MORAL RECKONING OF THE LAW OF NATIONS* 64–99 (2015) (identifying principles of justice to evaluate international legal rules as the preservation of peace and the protection of human rights).

custom intuitively captures one important way that states raise and contest claims about custom in the international legal order.

As with all-states-benefit and hegemonic custom, it is custom's characteristics as unwritten, universal, and non-negotiated that make it a useful instrument for states seeking to entrench a particular normative standard of conduct in the international legal order. First, normative custom is conducive to development through non-negotiated, tacit agreement. If for all-states-benefit custom there is no reason for any particular state to object, and if for hegemonic custom such objection would be futile, in the case of normative custom, there are political and moral impediments to contestation. Stated another way, normative custom develops through tacit consent if other nations feel morally or politically compelled not to speak out against it. Unlike all-states-benefit custom, there may be high distributional costs to the rules of normative custom, but the costs of contesting the rule are even higher.

Genocide and the death penalty provide useful opposing examples. A 1946 U.N. General Assembly Resolution prohibits genocide.<sup>134</sup> The resolution was adopted by a unanimous vote and no state representative publicly maintained that genocide was permissible under international law.<sup>135</sup> Now consider the death penalty. Many human rights advocates and some states have argued that customary international law prohibits capital punishment. But, many other governments publically refute the existence of such a custom, and some openly continue to impose and carry out death sentences, thereby preventing the norm from becoming custom through tacit consent.<sup>136</sup> At some point, the combination of active endorsement and tacit consent may become so widespread that a custom will form except for a handful of persistent objector countries. For now, however, the death penalty is not prohibited under CIL.

States seeking to develop normative custom may also be drawn to custom's universal applicability, such as its ability to bind new states not in existence when the norm developed and its ban on unilateral withdrawal.<sup>137</sup> In addition, some customary rules have attained the status of *jus cogens*—non-derogable rules that can only be changed by another rule of the same stature.<sup>138</sup> States seeking to develop the normative bona fides

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134. G.A. Res. 96 (I), The Crime of Genocide (Dec. 11, 1946).

135. See WILLIAM SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 44–45 (2000).

136. Press Release, General Assembly, In Third Committee, Special Rapporteur on Torture Calls on States to Seriously Reconsider Whether Death Penalty Amounts to Cruel, Inhuman Treatment, U.N. Press Release GA/SHC/4046 (Oct. 23, 2012) (noting opposition voiced by the United States, Singapore, Egypt, and other countries); see also Laurence E. Rothenberg, *International Law, U.S. Sovereignty, and the Death Penalty*, 35 GEO. J. INT'L L. 547, 555–56 (2003–2004) (arguing that customary international law does not prohibit the death penalty, in part because seventy-eight states permit the death penalty).

137. See generally Jacob Katz Cogan, *Noncompliance and the International Rule of Law*, 31 YALE J. INT'L L. 189 (2006) (discussing custom's ban on unilateral withdrawal).

138. See Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT'L L. 331, 335–39 (2009).

of a customary rule would be especially drawn to these features, which help entrench the norm and make it valid against all nations in ways that treaties and soft law do not.

Universality is also attractive for normative custom. States motivated by other-regarding values likely want the norms they espouse to be accepted as broadly and deeply as possible. Anthea Roberts captures this desire when analyzing custom that is derived from treaties: “Where the treaty precedes the custom, the movement to custom often reflects recognition of, or a desire to recognize, the core commitments as non-revocable and binding on all states, thereby increasing their obligatory nature or scope.”<sup>139</sup> The same is true of normative custom more generally.

Consider the well-known example of the prohibition on torture. The Convention against Torture is widely, but not universally, ratified.<sup>140</sup> For states that favor a global torture ban, instantiating such a ban in custom binds all nations, and does not permit states to withdraw unilaterally, as does the Convention. Some may challenge these assertions, citing the persistent objector doctrine. Yet even if that doctrine remains available in theory, its application to the prohibition on torture is especially unlikely. The torture ban embodies very widely-held values, and it would be costly for states to explicitly and openly reject such a prohibition. Theodor Meron makes a similar observation about the normative anchoring effect of custom when describing the dual protection of humanitarian norms: “[The] consensus that the Geneva Conventions are declaratory of customary international law would strengthen the moral claim of the international community for their observance because it would emphasize their humanitarian underpinnings and deep roots in tradition and community values.”<sup>141</sup>

Current controversies surrounding data privacy and mass surveillance offer a different example—the potential emergence of new normative custom.<sup>142</sup> Concerns about internet privacy and the collection of data have been increasingly voiced by states and civil society organizations in various multilateral venues. The U.N. General Assembly adopted two strongly worded and widely supported resolutions on “the right to privacy in the digital age” in 2013 and 2014.<sup>143</sup> The Office of the U.N. High Commissioner for Human Rights issued a report in June 2014 expressing strong support for protecting data privacy and serious concern with mass surveil-

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139. Anthea Roberts, *Who Killed Article 38(1)(b)? A Reply to Bradley & Gulati*, 21 *DUKE J. COMP. & INT'L L.* 173, 176–77 (2010).

140. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

141. Theodor Meron, *The Geneva Conventions as Customary Law*, 81 *AM. J. INT'L L.* 348, 350 (1987).

142. Monika Zalnieriute, *An International Constitutional Moment for Data Privacy in the Times of Mass-Surveillance*, 23 *INT'L J.L. & INFO. TECH.* 99, 101–03 (2015).

143. G.A. Res. 69/166 (Dec. 18, 2014); G.A. Res. 68/167 (Dec. 18, 2013).

lance and retention of personal data.<sup>144</sup> Most recently, in March 2015, the U.N. Human Rights Council adopted by consensus a resolution—supported by 55 co-sponsors from different regions—appointing a new special rapporteur to gather information on these same topics.<sup>145</sup>

Regional and national developments are bolstering these emerging norms.<sup>146</sup> Domestic legislation in a growing number of countries provides a right to data privacy.<sup>147</sup> In a landmark ruling in 2014, the European Court of Justice invalidated the EU’s Data Retention Directive as an infringement of the right to private life and protection of personal data.<sup>148</sup> The following year, special representatives of the OSCE, OAS, and African Union jointly condemned “[u]ntargeted or ‘mass’ surveillance [as] inherently disproportionate and . . . a violation of the rights to privacy and freedom of expression,”<sup>149</sup> and the Special Rapporteur of the Inter-American Commission on Human Rights called on the United States “to introduce strong reforms to the NSA telephone metadata collection program.”<sup>150</sup>

Much of the debate surrounding data privacy focuses on the application of existing human rights norms to online settings, but it is framed in a way that reiterates the legally binding nature of these norms.<sup>151</sup> Some

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144. U.N. High Commissioner for Human Rights, *The Right to Privacy in the Digital Age*, U.N. Doc. A/HRC/27/37 (June 30, 2014).

145. G.A. Res. A/HRC/28/L.27 (Mar. 24, 2015).

146. See, e.g., Edward J. Snowden, Op-Ed., *The World Says No to Surveillance*, N.Y. TIMES (June 4, 2015), [http://www.nytimes.com/2015/06/05/opinion/edward-snowden-the-world-says-no-to-surveillance.html?\\_r=0](http://www.nytimes.com/2015/06/05/opinion/edward-snowden-the-world-says-no-to-surveillance.html?_r=0) (noting that “institutions across Europe have ruled [mass surveillance] laws and operations [to be] illegal and imposed new restrictions on future activities”).

147. Zalnieriute, *supra* note 142, at 116–20.

148. Joined Cases C-293/1 & C-594/12, *Dig. Rights Ir. and Seitlinger v. Minister for Comm., Marine and Nat. Res.*, 2014 E.C.R. I-23; see also Marie-Pierre Granger & Kristina Irion, *The Court of Justice and the Data Retention Directive in Digital Rights Ireland: Telling Off the EU Legislator and Teaching a Lesson in Privacy and Data Protection*, 39 EUR. L. REV. 835, 841–49 (2014).

149. U.N. Special Rapporteur on Freedom of Opinion and Expression et al., *Joint Declaration on Freedom of Expression and Responses to Conflict Situations*, ¶ 8(a) (May 4, 2015), <http://www.osce.org/fom/154846>.

150. Press Release, Office of the Special Rapporteur of the Inter-American Commission on Human Rights [IACHR], The Office of the Special Rapporteur of the IACHR Calls on the United States to Introduce Strong Reforms to the NSA Telephone Metadata Collection Program, U.N. Press Release R 50/15 (May 14, 2015).

151. See, e.g., Claude Moraes (Rapporteur), Eur. Parl. Comm. on C.L., Just. and Home Aff., *Draft Report on the US NSA Surveillance Programme, Surveillance Bodies in Various Member States and Their Impact on EU Citizens’ Fundamental Rights and on Transatlantic Cooperation in Justice and Home Affairs*, at 11, 2013/2188(INI) (Aug. 1, 2014), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML%2BCOMPARL%2BBPE-526.085%2B02%2BDOC%2BPDF%2BV0//EN> (noting that mass surveillance may violate the right to privacy, and other rights protected by the European Convention on Human Rights); Ryan Goodman, *International Law on Mass Foreign Surveillance: A Response to Ben Wittes and Ashley Deeks*, JUST SECURITY (Mar. 26, 2014, 12:01 PM), <http://justsecurity.org/8569/international-law-mass-foreign-surveillance-response-ben-wittes-ashley-deeks> (arguing



commentators have gone further, arguing that extant international custom specifically protects a right of data privacy.<sup>152</sup> Whether states ultimately recognize customary law restrictions on mass data and surveillance will depend in part on whether data privacy is widely understood as a fundamental right, such that the political or moral costs of objecting to such a rule are too high to incur. We thus expect any custom that emerges from this process to rely heavily on tacit consent, with some governments taking strongly supportive positions and others acquiescing. Such a custom is also likely to be vague, deferring many questions about specific applications of the norm.

A possible impediment to the emergence of a data privacy custom would be objections by nations which, as a result of their more advanced technological capabilities, will incur higher costs of international regulation. Such opposition may, however, be weakened or even defused if a group of relatively powerful states actively supports the custom—a dynamic suggested by recent sparring over data privacy resolutions in the United Nations.<sup>153</sup> Hegemons may also turn to custom for a different reason—because they disagree with the capacious soft law norms advocated by human rights NGOs and experts and seek to develop competing (and more state-friendly) legal rules regarding data privacy.

#### D. Custom's Overlapping Domains

Extrapolating from the design features that constrain the formation of CIL, this Section has argued that custom has three principal domains: norms that benefit all states, norms backed by visible commitments from powerful nations, and custom that reflects shared normative values. International norms or potential norms that fall outside these domains are not well-suited for regulation via custom. For example, when a custom becomes increasingly distributional in effect, or when it loses the backing of a powerful (enough) hegemon, states are likely to shift to more negotiated forms of international cooperation. The shift from absolute to restrictive immunity is an example of the first, and the decline of the Hull doctrine due to opposition from newly independent states is an illustration of the second.

What we have labeled as domains might, however, also be conceptualized as a set of overlapping and interactive factors that tend to make the formation of custom more likely. For example, even if a putative custom-

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that mass foreign surveillance may violate the right to privacy under customary international law).

152. See Zalnieriute, *supra* note 142, at 116–20, 132.

153. Germany and Brazil are two relatively powerful nations that supported robust data privacy norms by sponsoring the 2013 U.N. General Assembly resolution on digital privacy. The United States supported the resolution, but only after it unsuccessfully lobbied for weaker language. Jonathan Horowitz & Sarah Knuckey, *Major New United Nations Report Rebukes Five Eyes' Attempts to Weaken Digital Privacy Rights*, JUST SECURITY (July 23, 2014, 9:19 AM), <http://justsecurity.org/13158/major-united-nations-report-rebukes-eyes-attempts-weaken-digital-privacy-rights/>.

ary norm has distributional impact, a stronger, visible commitment from powerful countries may nevertheless spur its formation. All other things equal, the stronger the distributional effect, the greater the projection of power required.

Hegemons may also spur the formation of international rules that reflect deeply held normative values even if those rules also have distributional consequences. The Nuremberg Tribunal provides an illustration of such a hybrid hegemonic-normative custom. Together, the Tribunal and the Charter that created it,<sup>154</sup> their reception by states, and the subsequent affirmation of their principles by the U.N. General Assembly,<sup>155</sup> established individual criminal responsibility as part of CIL.<sup>156</sup> These developments were unquestionably driven by the visible commitments of the victors of World War II—the United States, France, the United Kingdom and the Soviet Union.<sup>157</sup> The Nuremberg Tribunal corresponded to widely-held normative values: the atrocities committed in World War II were unprecedented in scale and brutality, generating universal condemnation and widespread sense that perpetrators should be held legally accountable.<sup>158</sup>

The influential *Tadić* decision by the International Criminal Tribunal for the former Yugoslavia (ICTY)<sup>159</sup> illustrates how a hybrid normative-hegemonic custom can arise notwithstanding its potential distributional effects. The ICTY Appeals Chamber in that case held that war crimes liability for grave breaches of the Geneva Conventions applies not only to armed conflicts between states but also to internal and non-international armed conflicts.<sup>160</sup> The judges purported to simply restate a preexisting customary rule, but the evidence they cited for that proposition was very thin.<sup>161</sup> The decision did, however, prompt subsequent state practice that crystalized into customary international law.<sup>162</sup>

*Tadić* unquestionably had a normative component, which the Appeals Chamber emphasized in asserting that civilians in all types of armed conflicts should be protected from egregious conduct such as rape, torture, or

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154. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, art. 1, Aug. 8, 1945, 82 U.N.T.S. 280.

155. G.A. Res. 3, at 3(I) (Feb. 13, 1946).

156. See Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT'L L.J. 1, 13–15 (2002); SCHARF, CUSTOMARY INTERNATIONAL LAW, *supra* note 104, at 64–68.

157. See SCHARF, CUSTOMARY INTERNATIONAL LAW, *supra* note 104, at 64–66.

158. See Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2556 (1991) (noting that prosecutions in an international court were justified because the conduct “offended humanity itself”).

159. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

160. *Id.* ¶ 77.

161. *Id.*; see, e.g., Geoffrey Watson, *The Humanitarian Law of the Yugoslavia War Crimes Tribunal: Jurisdiction in Prosecutor v. Tadić*, 36 VA. J. INT'L L. 687, 699 (1996).

162. SCHARF, CUSTOMARY INTERNATIONAL LAW, *supra* note 104, at 151–52.

the wanton destruction of hospitals.<sup>163</sup> Yet, the *Tadić* rule also imposes greater costs on states that regularly experience civil wars or other armed conflicts within their borders. Under the *Tadić* rule, these states face potential war crimes prosecutions for their conduct in such conflicts; without the *Tadić* rule, they did not. This may explain the earlier opposition of developing countries to war crimes liability in non-international armed conflicts.<sup>164</sup> In addition, countries such as China, India, Pakistan, and Russia opposed incorporating the *Tadić* rule into the International Criminal Court Statute in 1998.<sup>165</sup> Ultimately, this position was rejected, and the U.N. Security Council later endorsed the *Tadić* rule (at least tacitly) in resolutions concerning international crimes committed in Libya,<sup>166</sup> Sierra Leone,<sup>167</sup> and Rwanda.<sup>168</sup> By 2011, opposition to *Tadić* had dissipated further, with India, China, and Russia all voting in favor of a U.N. Security Council resolution asking the ICC to investigate the “serious violations of international humanitarian law” committed during the civil war in Libya.<sup>169</sup> No government criticized the referral on the grounds that potential war crimes had been committed during a non-international armed conflict.<sup>170</sup> According to one commentator, this silence may reflect a desire by developing countries to avoid “pick[ing] a fight with an institution established by the powerful Security Council.”<sup>171</sup> In sum, the distributional consequences of *Tadić* were overcome by the confluence of normative and hegemonic support for the rule as international custom.

#### IV. THE FUTURE OF CUSTOM IN AN AGE OF SOFT LAW AND TREATIES

Having described custom’s unique features and mapped its domains, we turn to a discussion of custom’s relationship to treaties and soft law. This relationship might be understood as complementary: custom can be seen as a fungible form of “soft” hard law or “hard” soft law that exists on a continuum between soft law and treaties. Such a framing suggests that

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163. Prosecutor v. *Tadić*, Case No. IT-94-1, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 97 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

164. Allison Marston Danner, *When Courts Make Law: How International Criminal Tribunals Recast the Laws of War*, 59 VAND. L. REV. 1, 45 (2006) (“The political losers from the ICTY’s revision of the laws of war appear to be developing countries. Their hostility to extending the rules to civil wars is manifest in the records from the 1949 and 1974–77 Diplomatic Conferences.”).

165. See Preparatory Comm. on the Establishment of an Int’l Criminal Court, Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, at 16, U.N. Doc. A/50/22 (Sept. 6, 1995); SCHARF, CUSTOMARY INTERNATIONAL LAW, *supra* note 104, at 151–52.

166. S.C. Res. 1970, ¶¶ 4–8 (Feb. 26, 2011).

167. S.C. Res. 1315, ¶¶ 7–8 (Aug. 14, 2000).

168. S.C. Res. 955, annex (Nov. 8, 1994).

169. S.C. Res. 1970 (Feb. 26, 2011).

170. See SCHARF, CUSTOMARY INTERNATIONAL LAW, *supra* note 104, at 152–53.

171. *Id.* at 153 (quoting Danner, *supra* note 164, at 44).

custom may be rendered obsolete as unwritten international norms are codified and soft law grows in scope and complexity.<sup>172</sup>

We recognize that custom sometimes functions as a complement to treaties or soft law, as the literatures on legalization and instrument choice at times suggest. But, the distinctive (and less malleable) characteristics of custom, as compared to soft law and treaties, create continuing incentives for states to choose custom over the other legal instruments if doing so advances their respective national interests or shapes the content, scope, or application of international rules in ways that favor them. If this account is correct, the demand for custom will not be affected by whether a particular subject area becomes more heavily populated by treaties and/or soft law.

We argue that there are two overarching rationales for states to choose custom over treaties and/or soft law: preferable substantive norms or preferable design features. States dissatisfied with the content of non-binding norms or treaty provisions might, for example, attempt to develop alternative customary rules with different substantive obligations. Or states might agree with the substance of a treaty or soft law, but turn to custom because of its distinctive design features, such as its preclusion of the ability to “opt-out” by non-ratifications, treaty withdrawals, or reservations.

We represent the two dimensions of the choice between custom on the one hand and treaties and soft law in Figure 1 below. The legal instruments that are alternatives to custom appear on the x-axis, and the two rationales for states to choose custom are listed on the y-axis. The diagram depicts custom that arises later in time than treaties or soft law.<sup>173</sup> We focus on this temporal relationship because we view it as a more significant challenge to custom’s continuing relevance to international cooperation. To be sure, as Tim Meyer has shown, custom that develops first may lead states that prefer codified legal norms to advocate, for example, for ILC-generated conventions or draft articles.<sup>174</sup> Yet if states continue to prefer custom—even in areas replete with treaties or nonbinding norms—such a choice casts doubt on predictions of custom’s demise in an age of soft law and treaties, and on commentators who discount CIL’s role in international cooperation.

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172. See Trachtman, *The Growing Obsolescence of Customary International Law*, *supra* note 4, at 174 (“CIL is largely superseded by treaty law and other codification; that is, only in very few circumstances are there CIL rules of law that have not been reflected in treaty or other codification.”); VILLIGER, *supra* note 19, at 151 (citation omitted) (discussing the view that “multilateral conventions tend to drive out customary law”).

173. We acknowledge, of course, that it can sometimes be difficult to determine whether a custom crystallized before or after a treaty embodying the same or similar norms. See *North Sea Continental Shelf Case* (Den./Neth. v. Ger.), 1969 I.C.J. Rep. 3, ¶ 44 (Feb. 20).

174. See Meyer, *Codifying Custom*, *supra* note 5, at 1025 (arguing that states sometimes codify custom in order to change its terms); see also Laurence R. Helfer & Timothy Meyer, *The Evolution of Codification: A Principal-Agent Theory of the International Law Commission’s Influence*, in *CUSTOM’S FUTURE*, *supra* note 3, at 314–22 (documenting the increasing prevalence of non-treaty ILC outputs).

FIGURE 1: TYPOLOGY OF ADVANTAGES OF CUSTOM OVER TREATIES/SOFT LAW

	Design features	Substantive norms
Treaties	<ul style="list-style-type: none"> <li>• Geneva Conventions for the Protection of Victims of War, as CIL, bind states parties that reserve to or withdraw from the Conventions</li> <li>• Provisions of multilateral treaties, such as the Convention on the International Sale of Goods and the VCLT, bind non-parties as CIL</li> <li>• U.S., a non-party to UNCLOS, asserts that selected UNCLOS provisions reflect CIL</li> </ul>	<ul style="list-style-type: none"> <li>• Common heritage of mankind principle, as CIL, supplants 1958 Geneva High Seas Convention on the exploitation of non-living resources on the deep seabed</li> <li>• In <i>Tadić</i>, ICTY extends war crimes to non-international armed conflicts; U.N. members later accept this as CIL</li> <li>• Claims that CIL permits humanitarian intervention even if not authorized by the U.N. Charter and the Security Council</li> </ul>
Soft law	<ul style="list-style-type: none"> <li>• Advocates of a global ban on antipersonnel landmines argue that the ban is CIL; U.S. and other retentionist nations accept only nonbinding pledges toward such a ban</li> <li>• Dispute over whether 2002 ASEAN Declaration on South China Sea is CIL and limits China's activities there</li> </ul>	<ul style="list-style-type: none"> <li>• U.K. reasserts right to unilateral humanitarian intervention as CIL in Syria and rejects the soft law R2P principle</li> <li>• CIL competes with nonbinding World Bank Guidelines over standard of compensation for expropriated alien property</li> </ul>

#### A. Custom's Advantages over Treaties: Design Features

The top left box illustrates situations in which states turn to custom to modify or obviate the design features of preexisting international agreements. A prominent illustration of custom that competes with treaty design features is the protection of civilians in CIL and also in the 1949 Geneva Conventions for the Protection of Victims of War. Theodor Meron has argued that the protection of civilians in customary law is important in part because custom, unlike the Geneva Conventions, does not permit unilateral withdrawal and because "reservations to the Conventions may not affect the obligations of the parties under provisions reflecting customary law to which they would be subject independently of the Conventions."<sup>175</sup> Meron also notes that "as customary law, the norms expressed in the Conventions might be subject to a process of interpretation

175. Meron, *supra* note 141, at 349.

different from that which applies to treaties”<sup>176</sup>—a further indication of custom’s continuing relevance.

The protection of civilians is a hard case for our theory because the Geneva Conventions have been universally ratified, which some might claim renders custom irrelevant. More common but still supportive examples are multilateral agreements—such as the Convention on the International Sale of Goods and the Vienna Convention on the Law of Treaties—at least some provisions of which are accepted as having attained the status of CIL, thus permitting their application to countries that have refrained from ratifying those instruments.<sup>177</sup>

A different use of custom to work around treaty design features is provided by the United States’ relationship to the U.N. Convention on the Law of the Sea (UNCLOS). The United States played a lead role in negotiating UNCLOS, but has never ratified the Convention. It has, however, consistently maintained that *some* aspects of the Convention—in particular, those concerning freedom of navigation—reflect customary international law.<sup>178</sup> Critically for our purposes, the United States recognizes that the navigation rules embodied in these two sources of law are substantively the same.<sup>179</sup> However, because UNCLOS does not permit reservations,<sup>180</sup> it precludes treaty parties from opting out from any of its substantive provisions—including provisions, such as UNCLOS’ dispute settlement clauses, to which the United States objects. By remaining outside of the Convention while selectively adhering to some of its provisions as custom, the United States is, controversially, using CIL to pick and choose those aspects of UNCLOS that benefit it while avoiding the concomitant burdens of provisions it disfavors<sup>181</sup>—

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176. *Id.*

177. See LARRY A. DiMATTEO, LUCIEN J. DHOOGHE, STEPHANIE GREENE, VIRGINIA G. MAURER & MARISA ANNE PAGNATTARO, *INTERNATIONAL SALES LAW: A CRITICAL ANALYSIS OF CISG JURISPRUDENCE* 13–18 (2005). For example, the United States is a non-party to the VCLT but accepts many of its core provisions as customary international law. See U.S. DEP’T OF STATE, *Vienna Convention on the Law of the Treaties: Frequently Asked Questions* (last visited Aug. 15, 2016), <http://www.state.gov/s/l/treaty/faqs/70139.htm> (“The United States considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties.”).

178. S. Res. 183, 114th Cong. (2015), <https://www.govtrack.us/congress/bills/114/sres183/text> (stating that the United States Government is committed to “upholding internationally lawful uses of the high seas and the Exclusive Economic Zones as well as to the related rights and freedoms in other maritime zones, including the rights of innocent passage, transit passage, and archipelagic sea lanes passage consistent with customary international law.”).

179. OFFICE OF FED. REG., STATEMENT ON UNITED STATES OCEAN POLICY, 1 PUBLIC PAPERS OF THE PRESIDENTS 378 (Mar. 10, 1983); George Haimbaugh, Jr., *Impact of the Reagan Administration on the Law of the Sea*, 46 WASH. & LEE L. REV. 151, 188 (1989).

180. United Nations Convention on the Law of the Sea art. 309, Dec. 10, 1982, 1833 U.N.T.S. 397.

181. U.S. strategy has generated vociferous objections, in particular from China. *E.g.*, James W. Houck, *Alone on a Wide Wide Sea: A National Security Rationale for Joining the Law of the Sea Convention*, 1 PENN. ST. J.L. & INT’L AFF. 1, 4 (2012) (“The Chinese have

precisely what the no reservations clause of UNCLOS was adopted to prevent.<sup>182</sup>

### B. Custom's Advantages over Treaties: Substantive Norms

The box in the upper right quadrant of Figure 1 depicts situations in which states choose custom over treaties because they prefer CIL's substantive norms.<sup>183</sup> A different area of international maritime law provides a "[s]triking example[ ] of modification" of a treaty through custom.<sup>184</sup> The 1958 Geneva Convention on the High Seas recognized the freedom of states parties to unilaterally exploit non-living resources on the deep seabed.<sup>185</sup> Yet in the years following the Convention's adoption, a competing principle—the "common heritage of mankind"—emerged and rapidly crystalized as custom.<sup>186</sup> Pursuant to this principle, a state could exploit seabed resources only when acting as an agent of the international community as a whole.<sup>187</sup> Importantly, the common heritage idea arose in part from legal claims by non-parties to the Geneva High Seas Convention, claims that would have gained little if any traction as treaty revisions, but

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boldly rejected long-standing U.S. positions on customary international law and also challenged conventional interpretations of critical UNCLOS provisions.").

182. Alan Beesley, *The Negotiating Strategy of UNCLOS III: Developing and Developed Countries as Partners: A Pattern for Future Multilateral International Conferences?*, 46 *LAW & CONT. PROBS.* 183, 185 (1983) (stating that "we did not want to make it possible . . . for a state to opt into those parts of the Convention they liked while opting out of those they did not like").

183. On the question of whether treaties may be modified by custom or whether they may only be modified by a treaty amendment or a new treaty, see VILLIGER, *supra* note 19, at 195–204. Villiger convincingly argues that new customary rules may mean that "[t]he written rule accordingly undergo[es] amendment or modification or even completely pass[es] out of use." *Id.* at 195; see also JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* 136–43 (2003). Interpretation of a treaty based on the subsequent practice of the parties, as provided for under Article 31.3(c) of the Vienna Convention on the Law of Treaties, may be at times difficult to distinguish from modification of a treaty via custom. See VILLIGER, *supra* note 19, at 201.

184. VILLIGER, *supra* note 19, at 202. For other examples of treaties that were renegotiated in light of subsequently-developed custom, see NANCY KONTOU, *THE TERMINATION AND REVISION OF TREATIES IN THE LIGHT OF NEW CUSTOMARY INTERNATIONAL LAW* 37–107 (1994).

185. Geneva Convention on the High Seas art. 24, Apr. 29, 1958, 450 U.N.T.S. 6465 (obligating states to prevent pollution resulting from "the exploitation and exploration of the seabed and its subsoil," thereby implicitly permitting such activities).

186. See Rüdiger Wolfrum, *The Principle of the Common Heritage of Mankind*, 43 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 312, 333–37 (1983). *But cf.* Christopher C. Joyner & Detlev Vagts, *The Convention on the Regulation of Antarctic Mineral Resource Activities: An Attempt to Break New Ground*, 87 *AM. J. INT'L L.* 360, 361 (1993) (book review) (questioning whether the common heritage of mankind principle had attained the status of customary international law).

187. See Wolfrum, *supra* note 186, at 316–17.

were far more salient as efforts to develop new CIL applicable to all nations.<sup>188</sup>

The *Tadić* decision, discussed above in the context of custom's overlapping domains, provides another example of the substantive advantages of a custom over treaties that regulate the same subject area. The Geneva Conventions themselves apply almost exclusively to international armed conflicts,<sup>189</sup> leaving other military hostilities largely unregulated by the laws of war (with only a few exceptions, such as Common Article 3).<sup>190</sup> In *Tadić*, the ICTY held that certain provisions in the Conventions apply to internal armed conflicts as a matter of CIL.<sup>191</sup> In effect, the decision invoked custom to expand the Geneva Conventions' substantive norms to non-international armed conflicts. In the decades that followed, states increasingly embraced *Tadić*'s substantive expansion of the customary laws of war beyond what the Geneva Conventions themselves require. Interestingly, states had previously considered and rejected precisely such an expansion when negotiating Protocols to the Geneva Conventions in the 1970s.<sup>192</sup>

Humanitarian intervention offers another illustration of this relationship. The U.N. Charter prohibits the unilateral use of force in response to humanitarian crises in the absence of U.N. Security Council authorization or plausible claims of self-defense.<sup>193</sup> Yet as recent world events have made painfully clear, U.N. Security Council approval is often blocked by political differences among that body's five veto-wielding permanent members. As discussed in greater detail below,<sup>194</sup> some states dissatisfied with the status quo have turned to customary international law, implicitly or explicitly, to justify a military response to humanitarian crises if the U.N. Security Council fails to act. Such states are, in effect, claiming that custom offers a superior substantive norm that should displace the substantive constraints of the U.N. Charter.

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188. Malta, which became a state in 1964, did not accede to the 1958 Geneva High Seas Convention and was a strong proponent of the common heritage principle. See Lieutenant Martin A. Harry, *The Deep Seabed: The Common Heritage of Mankind or Arena for Unilateral Exploitation?*, 40 NAVAL L. REV. 207, 209–10 (1992). Pardo's speech set off a chain of events, which eventually led to the conclusion of UNCLOS in 1983. See ROBERT L. FRIEDHEIM, *NEGOTIATING THE NEW OCEAN REGIME* 29–40 (1993).

189. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 75 U.N.T.S. 31.

190. *Id.* art. 3.

191. See *infra* text at notes 159–162; see also Major Timothy P. Bulman, *A Dangerous Guessing Game Disguised as Enlightened Policy: United States Law of War Obligations During Military Operations Other Than War*, 159 MIL. L. REV. 152, 162–63 (1999).

192. Danner, *supra* note 164, at 50–51.

193. See generally Vaughan Lowe & Antonios Tzanakopoulos, *Humanitarian Intervention*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2011).

194. See *infra* Part IV.D.



### C. Custom's Advantages over Soft Law: Design Features

The box on the lower left of Figure 1 depicts situations in which custom and soft law share the same substantive norms but have different design characteristics. The principal difference is obvious—CIL is legally binding and nonbinding norms are not. But there are other differences as well. Soft law is easier and faster to create and modify than custom, making it useful for situations of uncertainty and experimentation where flexibility is prized. Whether states can alter an existing customary rule without violating it is a question that has long bedeviled scholars. Deviating from soft law incurs no international legal responsibility and no (or at least lower) political and reputational costs, neatly sidestepping these difficulties.

Notwithstanding these design differences, many commentators assert that soft law's primary relationship to custom is as a precursor for hard law. As Christine Chinkin explains this view, "[o]nce a prospective norm has been formulated in soft form it can become a catalyst for the development of customary international law. To many commentators this is the *raison d'être* of soft law and its entry point into the traditional sources of law."<sup>195</sup> Implicit in this perspective is the belief that states become habituated to nonbinding norms over time, eventually accepting them as CIL. The canonical example is the path to custom followed by the rights in the nonbinding Universal Declaration of Human Rights.<sup>196</sup>

This perspective overlooks, however, the possibility of ongoing competition among states over the choice between custom and soft law. Consider, for example, the ongoing effort to ban anti-personnel land mines. The United States has signed or otherwise supported soft law instruments calling for a ban on these weapons. In 1996, the United States pledged its support for a total ban on landmines.<sup>197</sup> Five years later, it supported a nonbinding declaration that "all States should strive towards the eventual elimination of anti-personnel landmines globally,"<sup>198</sup> and, in 2014, it announced a voluntarily ban on landmines, except on the Korean Peninsula.<sup>199</sup> Yet, the United States and a small group of other countries

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195. Christine Chinkin, *Normative Development in the International Legal System*, in COMMITMENT AND COMPLIANCE, *supra* note 48, at 32.

196. See, e.g., Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 317–36 (1995–96); Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT'L & COMP. L. 1, 1–4 (1995–96).

197. See Rachel Good, *Yes We Should: Why the U.S. Should Change Its Policy Toward the 1997 Mine Ban Treaty*, 9 NW. U. J. INT'L HUM. RTS. 209, 216 (2011).

198. See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 282–83 (2005) (quoting Final Declaration by States Party to the Convention on Certain Conventional Weapons at the Second Review Conference in 2001).

199. The United States has also said that it is working toward accession of the Anti-Landmine Convention, although it has no immediate plans for ratification. See Felicia Schwartz, *U.S. Moves Closer to Compliance with Treaty Banning Land Mines*, WALL ST. J. (Sept. 23, 2014), <http://www.wsj.com/articles/u-s-moves-closer-to-compliance-with-treaty->

continue to maintain that international law does not prohibit their use of anti-personnel landmines.<sup>200</sup> Consistent with that position, these nations are not parties to the Anti-Landmine Convention.<sup>201</sup> As a result of these assertions and non-ratifications, there is no customary rule prohibiting the use of anti-personnel landmines, although some observers believe that such a rule is already in the process of developing, based in part on the large number of parties to the Convention.<sup>202</sup> The United States has been willing, in other words, to endorse only hortatory pledges in favor of eliminating landmines, while rejecting any binding international rules.

Meanwhile, advocates supporting a global ban have sought to bind these holdout states through custom,<sup>203</sup> and abolitionist nations have signaled, in changes to U.N. General Assembly resolutions, a desire to make the ban universally applicable.<sup>204</sup> Stated differently, the core design features that distinguish soft law and custom are precisely the object of contestation between countries that seek an immediate, binding prohibition on the use of anti-personnel landmines and those that seek more flexible, longer-term pledges to work voluntarily toward a reduction of those weapons.

Another possible example concerns the dispute over territorial waters in the South China Sea. China's attempt to bolster its maritime claims by constructing artificial islands and reefs has triggered vociferous objections not only from Southeast Asian nations with competing maritime claims, but also from Japan and the United States. The latter countries' officials have asserted that China is not "observ[ing] international rules" and mak-

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banning-land-mines-1411509618; Ryan Kocse, *Final Detonation: How Customary International Law Can Trigger the End of Landmines*, 103 *GEO. L.J.* 749, 776–77 (2015).

200. HENCKAERTS & DOSWALD-BECK, *supra* note 198, at 282–83. Other countries maintaining the right to use anti-personnel landmines include China, Pakistan, South Korea, and Russia. *Id.* at 282 n.12.

201. As of July 2015, the Anti-Landmine Convention has 162 State Parties. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211. Other non-parties include China, Cuba, Egypt, India, Israel, Pakistan, South Korea, and Russia. *See id.*

202. *See* HENCKAERTS & DOSWALD-BECK, *supra* note 198, at 282; Peter Herby & Kathleen Lawand, *Unacceptable Behavior: How Norms are Established*, in *BANNING LANDMINES: DISARMAMENT, CITIZEN DIPLOMACY, AND HUMAN SECURITY* 199, 207–08 (Jody Williams et al. eds., 2008); *see also* Kocse, *supra* note 199, at 770 (arguing that CIL prohibits the export of anti-personnel landmines and other specific conduct related to landmines).

203. Human Rights Watch maintains that the use of anti-personnel landmines violates customary international law. *Libya: Evidence of New Landmine Use in Tripoli*, HUMAN RIGHTS WATCH (Nov. 4, 2014), <http://www.hrw.org/news/2014/11/04/libya-evidence-new-landmine-use-tripoli>.

204. *See* Kocse, *supra* note 199, at 778–80 (quoting G.A. Res. 69/34 at 2, U.N. Doc. A/RES/69/34 (Dec. 2, 2014)) (noting that, beginning in 2010, annual U.N. General Assembly resolutions on landmines added a provision “[e]mphasizing the desirability of attracting the adherence of all States to the Convention, and determined to work strenuously towards the promotion of its universalization and norms”).

ing unilateral claims “through means other than . . . international law.”<sup>205</sup> Although the specific international obligations that China is ignoring remain unstated, one possible source of such obligations is the 2002 Declaration on the Conduct of Parties in the South China Sea, in which China and other littoral countries “undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including . . . refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features . . . .”<sup>206</sup> When adopted in 2002, the Declaration was unquestionably nonbinding.<sup>207</sup> But some commentators have suggested that it may be declaratory of an emerging regional custom.<sup>208</sup> The foreign ministry’s dismissive response to its critics, in contrast, emphasizes the lack of any binding international rule (treaty or custom) that prohibits China’s actions:

The international law has been constantly brought up by some countries when it comes to the South China Sea issue. If they did read closely the international law, then please tell us which article in the international law forbids China to carry out justified construction on its own islands and reefs?<sup>209</sup>

Assuming for purposes of argument that the governments opining on the South China Sea controversy are at least implicitly sparring over the legal status of the 2002 Declaration, the statements by Japan and the United States can be seen as a bid to legalize a substantive standard of conduct that China has expressly assented to only as a hortatory pledge that can be easily ignored. Conversely, China’s rejoinder asserts that no international rules proscribe its actions. Stated differently, the core design features that distinguish soft law and custom are precisely the object of dispute between the parties to the South China Sea dispute.

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205. Foreign Ministry Spokesperson Hua Chunying’s Regular Press Conference (June 3, 2015) [hereinafter Hua Chunying Press Conference], [http://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/t1269971.shtml](http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1269971.shtml).

206. Declaration on the Conduct of Parties in the South China Sea para. 5, Nov. 4, 2002, <http://cil.nus.edu.sg/rp/pdf/2002%20Declaration%20on%20the%20Conduct%20of%20Parties%20in%20the%20South%20China%20Sea-pdf.pdf>.

207. See Nguyen Hong Thao, *The 2002 Declaration on the Conduct of Parties in the South China Sea: A Note*, 34 OCEAN DEV. & INT’L L. 279, 281 (2003) (“The [Declaration] is not a legal instrument and thus is technically not legally binding.”); See also Robert C. Beckman, *Legal Regimes for Cooperation in the South China Sea*, in SECURITY AND INTERNATIONAL POLITICS IN THE SOUTH CHINA SEA: TOWARDS A COOPERATIVE MANAGEMENT REGIME 222, 228 (Sam Bateman & Ralf Emmers, eds., 2009) (characterizing the 2002 Declaration as confirming that territorial disputes will be resolved consistently with international law).

208. See, e.g., Wendy N. Duong, *Following the Path of Oil: The Law of the Sea or Realpolitik—What Good Does Law Do in the South China Sea Territorial Conflict?*, 30 FORDHAM INT’L L.J. 1098, 1173 (2006) (describing the 2002 Declaration as either soft or customary international law).

209. Hua Chunying Press Conference, *supra* note 205.

#### D. Custom's Advantages over Soft Law: Substantive Norms

The lower right quadrant of Figure 1 depicts situations in which CIL and soft law contain different substantive standards. States that turn to custom in these settings do so because they disagree with the content of a nonbinding norm. Consider the example of humanitarian intervention, discussed above in the context of competition between custom and the U.N. Charter. In 1999, NATO countries bombed Serbian forces in Kosovo without U.N. Security Council authorization, seeking to prevent mass atrocities against the Kosovar Albanians.<sup>210</sup> NATO's actions triggered a wave of soft law norm creation involving humanitarian intervention. The most ambitious soft law instrument, drafted by scholars and diplomats on the International Commission on Intervention and State Sovereignty (ICISS), articulated a new principle—the responsibility to protect (R2P)—that emphasized the duty of all nations to protect civilians at risk and suggested that states might, in exceptional circumstances, use force even absent U.N. Security Council approval.<sup>211</sup> In the decade that followed, proponents of R2P sought to bolster this principle and its application to a range of humanitarian crises.<sup>212</sup> However, when states themselves endorsed the R2P at the 2005 World Summit, they expressly rejected language suggesting that force could be used without U.N. Security Council authorization.<sup>213</sup>

The recent controversy over whether to use force in response to the atrocities in the civil war in Syria reveals the continuing competition among states over soft law and CIL in this area. The United Kingdom is a proponent of humanitarian intervention in Syria. The government did not, however, advance that claim by relying on the nonbinding R2P principle. Instead, it turned to custom. A 2014 letter from the Foreign and Commonwealth Office drew a sharp distinction between the “legal basis of humanitarian intervention and the concept of the responsibility to protect.”<sup>214</sup> Eschewing R2P, the United Kingdom cited prior uses of force without U.N. Security Council approval—Kosovo in 1999, the Kurds in Northern Iraq in 1991, and the no fly zones in Northern and Southern Iraq from 1991.<sup>215</sup> The United Kingdom reaffirmed this position with respect to

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210. Leslie Burton, *Kosovo: To Bomb or Not to Bomb? The Legality is the Question*, 7 ANN. SURV. INT'L & COMP. L. 49, 49 (2001); INDEP. INT'L COMM'N ON KOSOVO, KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 33–99 (2000).

211. See INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT §§ 6.28–40 (2001).

212. See, e.g., GARETH EVANS, THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITY CRIMES ONCE AND FOR ALL (2009); THE OXFORD HANDBOOK OF THE RESPONSIBILITY TO PROTECT (Alex Bellamy & Tim Dunne, eds.) (forthcoming 2016).

213. G.A. Res. 60/1, ¶¶ 138–39 (Oct. 24, 2005); see also Thomas G. Weiss, *R2P After 9/11 and the World Summit*, 24 WIS. INT'L L.J. 741, 759–60 (2006).

214. Letter from the Rt. Hon. Hugh Robertson MP, Minister of State, Foreign and Commonwealth Office, Humanitarian Intervention and the Responsibility to Protect at 5 (Jan. 14, 2014), <http://justsecurity.org/wp-content/uploads/2014/01/Letter-from-UK-Foreign-Commonwealth-Office-to-the-House-of-Commons-Foreign-Affairs-Committee-on-Humanitarian-Intervention-and-the-Responsibility-to-Protect.pdf>.

215. *Id.* at 3.

Syria, arguing that “intervention may be permitted under international law in exceptional circumstances where the U.N. Security Council is unwilling or unable to act in order to avert a humanitarian catastrophe . . . .”<sup>216</sup>

This example also illustrates a gap in the existing literature on instrument choice. In a recent study of the international security regime, Gregory Shaffer and Mark Pollack offer a lengthy analysis of humanitarian intervention. They characterize nonbinding norms, including instruments adopting R2P, as a “pathway to revising hard law,” apparently conflating custom and treaties.<sup>217</sup> But the United Kingdom’s position with respect to Syria is at odds with this approach. The United Kingdom has not framed its options as a choice between soft law and hard law; rather, it has invoked custom as an alternative to *both* the U.N. Charter and the nonbinding R2P principle. Our framework also correctly predicts *how* the United Kingdom would seek to develop this custom—by the projection of power and by raising normative arguments.

A different example involves the compensation due when a state expropriates the property of foreign investors. As we explained above when discussing hegemonic custom, in the first half of the 20th century CIL arguably reflected the Hull Doctrine requirement of “adequate, effective, and prompt” compensation.<sup>218</sup> Developing countries attempted to change this rule in the 1960s and 1970s via the adoption of several U.N. General Assembly resolutions.<sup>219</sup> By the 1980s, many commentators argued that the Hull Doctrine no longer reflected CIL.<sup>220</sup> In response, industrialized countries, led by the United States and Europe, sought to codify the doctrine in a proposed multilateral convention (that ultimately failed) and (far more successfully) in thousands of bilateral investment treaties (BITs).<sup>221</sup> At roughly the same time, the World Bank promulgated soft law Guidelines that require only “appropriate” compensation. But the Guidelines also stipulated that compensation according to the Hull Doctrine meets this standard, and they offered definitions of the key terms prompt, adequate, and effective.<sup>222</sup>

216. *Id.* The United Kingdom articulated three conditions for such intervention. *See id.* at 5.

217. Shaffer & Pollack, *Hard Versus Soft Law in International Security*, *supra* note 9, at 1221, 1277.

218. *See supra* notes 126–28 and accompanying text.

219. G.A. Res. 17/1803 ¶ 4, U.N. Doc. A/RES/1803(XVII) (Dec. 14, 1962); G.A. Res. 29/3281, U.N. Doc. A/RES/3281(XXIX) (Dec. 12, 1974); Lee Connor, Comment, *The International Law of Expropriation of Foreign-Owned Property: The Compensation Requirement and the Role of the Taking State*, 6 *LOY. L.A. INT’L & COMP. L.J.* 355, 360–62 (1983).

220. Jason Webb Yackee, *Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality*, 32 *FORDHAM INT’L L.J.* 1550, 1559–64 (2009).

221. *Id.*; *see* JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS* 97 (4th ed. 2015).

222. World Bank Guidelines on the Treatment of Foreign Direct Investment, 31 *INT’L LEGAL MATERIALS* 1379 (1992); *see also* IBRAHIM SHIHATA, *THE LEGAL TREATMENT OF FOREIGN INVESTMENT* 40–43, 63–64, 88–90, 110–12 (1993).

The United States opposed the Guidelines' more flexible approach to compensation.<sup>223</sup> In part to neutralize the influence of this soft law instrument, the United States adopted a model BIT and negotiated a series of BITs with developing countries based on that model.<sup>224</sup> Eager to attract investment, developing nations generally accepted these terms, including the Hull standard.<sup>225</sup> Today, these bilateral investment treaties are, in turn, cited as evidence of custom.<sup>226</sup> If such custom arises in the future, it will bind all states, not just those which are parties to the BITs.

In the two examples discussed above, why did the United States and the United Kingdom turn to CIL (as well as treaties) instead of engaging with the soft law precedents of the World Bank Guidelines and the R2P principle? The divergence between the substantive standards of custom and nonbinding norms is surely part of the answer. By the late 1990s, the United States had battled developing countries over expropriated property for more than half a century. It ultimately succeeded in incorporating its preferred compensation standard into numerous BITs, which it could plausibly envision being recognized as international custom. To support the World Bank Guidelines could have jeopardized this initiative, leading the Guidelines, not the Hull Doctrine, to crystalize into CIL.

A similar strategy may explain the United Kingdom's reliance on custom, rather than the R2P principle, to assert a right to unilateral humanitarian intervention when the U.N. Security Council is deadlocked. As noted above, the latter principle was developed and championed by independent experts and advocacy groups. Although states have endorsed the principle in the abstract in a few U.N. resolutions, its substantive content remains unsettled—especially with regard to whether a prior U.N. Security Council resolution authorizing force is required. By appealing to CIL rather than soft law, the United Kingdom may have been seeking to assert greater control over the normative evolution of humanitarian intervention than would be possible if it had contributed to the more open-ended and less state-centric processes of soft law development.

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223. SHIHATA, *supra* note 222, at 110 (“In particular, the U.S. note argued that the standard of compensation should be the Hull formula.”).

224. OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2012 U.S. MODEL BILATERAL INVESTMENT TREATY, <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>; *see infra* note 226.

225. *See* Andreas F. Lowenfeld, *Investment Agreements and International Law*, 42 COLUM. J. TRANSNAT'L L. 123, 127 (2003) (explaining that “[i]n droves the developing countries signed up to” BITs that included “rules concerning expropriation and compensation very close to the previously hated Hull Rule”).

226. DUNOFF, RATNER & WIPPMAN, *supra* note 221, at 96–97 (quoting *CME Czech Republic B.V. v. Czech Republic*, Final Award, Mar. 13, 2004); *see also* Lowenfeld, *supra* note 225, at 128–30; Stephen M. Schwebel, *The Influence of Bilateral Investment Treaties on Customary International Law*, 98 AM. SOC'Y INT'L L. PROC. 27, 27 (2004) (“Customary international law governing the treatment of foreign investment has been reshaped to embody the principles of law found in more than two thousand concordant bilateral investment treaties.”). The use of BITs as evidence of custom has been controversial. *See generally*, Alvarez, *A Bit on Custom*, *supra* note 3, at 24–27.

The evolving norms of humanitarian intervention also illustrate a final point about the continuing demand for custom in an age of soft law or treaties: such demand is constrained by the factors we identified in Part III. In particular, an analysis based on custom's domains suggests that, given the strong distributional effects of international rules on the use of force, the confluence of normative and hegemonic custom explains why some states are choosing CIL to create new humanitarian intervention.

The United States and the United Kingdom are powerful countries, supporting hegemonic custom. Humanitarian intervention also has a strong normative component. The United Kingdom relied in part on normative arguments in its 2013 statement on the use of force in Syria. The United Kingdom maintained that “[i]f action in the Security Council is blocked, the UK would still be permitted under international law to take exceptional measures in order to alleviate the scale of the overwhelming humanitarian catastrophe in Syria by deterring and disrupting the further use of chemical weapons by the Syrian regime. Such a legal basis is available, under the doctrine of humanitarian intervention.”<sup>227</sup> President Obama defended potential military intervention in Syria in part by asking “[w]hat message will we send if a dictator can gas hundreds of children to death in plain sight and pay no price?”<sup>228</sup> Although it is still unclear whether the confluence of hegemonic and normative pressures will lead to the formation of a new customary rule,<sup>229</sup> this example aptly illustrates not only the incentives that states have to choose custom as an alternative to treaties, but also the difficulty of operating with custom's domains.

## V. CONCLUSION

What is the place of customary international law in the changing landscape of contemporary international lawmaking? Notwithstanding widespread predictions that CIL is dying, and repeated efforts to revive or reform it, there has been surprisingly little discussion of the circumstances under which states prefer custom over either treaties or soft law.

This Article uses an instrument choice analysis to offer a novel answer to this question. We first identify the distinctive design features of custom.

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227. *Chemical Weapon Use by Syrian Regime: UK Government Legal Position* (Aug. 29, 2013), <http://i2.cdn.turner.com/cnn/2013/images/08/29/chemical-weapon-use-by-syrian-regime-uk-government-legal-position.pdf>.

228. Barack Obama, U.S. President, Speech on the U.S. Response to Syria, Aug. 31, 2013, <http://www.npr.org/2013/08/31/217610904/transcript-president-obama-turns-to-congress-on-syria>.

229. Force was not used in Syria in 2013 and the NATO bombing of Kosovo was condemned by some states, including Russia, China, and South Africa. Anne-Sophie Massa, *Does Humanitarian Intervention Serve Human Rights? The Case of Kosovo*, 1:2 AMSTERDAM L. F. 49 (2009), <http://amsterdamlawforum.org/article/view/63/120>. Russia may well have changed its position in light of the intervention in Crimea, which may, in turn, make humanitarian intervention less attractive to other countries fearful of Russia's territorial ambitions. Chris Borgen, *Kosovo, South Ossetia, and Crimea: The Legal Rhetoric of Intervention, Recognition, and Annexation*, OPINIO JURIS (Apr. 2, 2014, 8:04 PM), <http://opiniojuris.org/2014/04/02/kosovo-south-ossetia-crimea-legal-rhetoric-intervention-recognition-annexation/>.

Unlike both treaties and soft law, custom as an ideal type is universal, unwritten, and non-negotiated. These design features constrain states' recourse to CIL primarily to three domains, which we term all-states-benefit custom, hegemonic custom, and normative custom. As a broad array of examples illustrates, these three areas of cooperation are amenable to universally applicable international rules that arise without formal negotiation over their content or memorialization of their terms.

We next consider the situations in which states will continue to choose CIL in an era dominated by soft law and codified legal instruments. Although commentators have argued that the demand for custom is declining, we contend that states will assert customary law arguments when they prefer CIL's design features or its substantive terms over those of existing international agreements or nonbinding norms. We offer numerous examples to illustrate the continuing incentives for states to forge international law through custom, while explaining why their ability to do so is limited by custom's domains. In the end, custom may be most likely to arise where the three domains overlap—that is, where powerful states (or groups of like-minded countries) advance new rules that respond to emerging global problems or seek to overcome distributional differences by promoting rules with compelling normative content.