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Making Sense of Customary International Law

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MAKING SENSE OF CUSTOMARY INTERNATIONAL LAW

Monica Hakimi*

This Article addresses a longstanding puzzle about customary international law (CIL): How can it be, at once, so central to the practice of international law—routinely invoked and applied in a broad range of settings—and the source of such persistent confusion and derision? The centrality of CIL suggests that, for the many people who use it, it is not only comprehensible but worthwhile. They presumably use it for a reason. But then, what accounts for all the muddle and disdain?

The Article argues that the problem lies less in the everyday operation of CIL than in the conceptual baggage that is brought to bear on it. Most contemporary accounts of CIL reflect what can be called a “rulebook conception.” They presuppose that, in order for a given proposition to be CIL, it must apply more or less in the same way in all cases of a given type, rather than fluctuate without established criteria from one situation to the next. This rulebook conception is wrong. It does not accurately describe the range of normative material that global actors, in the ordinary course, use and treat as CIL. And because it is wrong, it systematically sows confusion and leads analysts to devalue CIL as a kind of international law. We should stop imagining that CIL operates like a rulebook and should recognize that it is an inherently contingent and variable kind of law.

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INTRODUCTION

Customary international law (CIL) is central to the practice of international law. On several important issues, including the conduct of hostilities in civil wars¹ and the immunity of foreign states from national jurisdiction,² CIL defines most of the content of international law; it is the main mode of international regulation. In other areas—for example, the *jus ad bellum*, which governs when states may use force across national borders³—CIL applies concurrently with and helps fill interstices in treaty texts.⁴ Elsewhere, it serves to extend to states that are not party to a treaty the main content of that treaty, as it does for the United States and the U.N. Convention on the

1. See, e.g., MARCO SASSÒLI ET AL., 1 HOW DOES LAW PROTECT IN WAR?: CASES, DOCUMENTS AND TEACHING MATERIALS ON CONTEMPORARY PRACTICE IN INTERNATIONAL HUMANITARIAN LAW 65 (3d ed. 2011); SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 105–07 (2012).

2. See, e.g., ALEXANDER ORAKHELASHVILI, AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW 232–33 (8th ed. 2019).

3. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶¶ 187–95 (June 27); OLIVIER CORTEN, THE LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW 6 (Christopher Sutcliffe trans., 2010) (“Scarcely any commentators today are prepared to question the importance of custom in the debates surrounding the scope of the prohibition on the use of force.”).

4. Because CIL often intersects with and helps inform the content of treaty law, my argument in this Article extends to many areas of international law that are also regulated by treaties. The *jus ad bellum* is a good example. I discuss it at some length in Sections IV and V.B.2.

Law of the Sea.⁵ And beyond its specific policy prescriptions, CIL establishes a host of background principles that undergird the entire legal order: on the types of rights and duties that accompany statehood,⁶ the conditions for holding states responsible,⁷ and much more.

Yet CIL has also long been shrouded in confusion and skepticism. It is an amorphous kind of law that neither enters into force on a date certain nor derives from binding texts. It forms more organically, through an interactive and highly informal legal process.⁸ International lawyers still struggle to explain when and why particular norms emerge from this process as CIL.⁹ And because CIL can be so hard to pin down, many contend that it is deficient as law—lacking in the legitimacy¹⁰ or the efficacy¹¹ that we usually associate with law. These criticisms of CIL are not new, but they have lingered.¹² They suggest that CIL has little value in the world and might even be harmful.

CIL thus presents something of a puzzle: How can it be, at once, so prominent in the practice of international law—routinely invoked and applied in a broad range of settings—and the source of such persistent confusion and derision? Its prominence suggests that, for the many people who

5. See United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397; Statement on United States Oceans Policy, 1 PUB. PAPERS 378 (Mar. 10, 1983); *The Convention on the Law of the Sea*, U.S. NAVY JUDGE ADVOCATE GENERAL'S CORPS, https://www.jag.navy.mil/organization/code_10_law_of_the_sea.htm [<https://perma.cc/FP6W-HY7G>].

6. See, e.g., MALCOLM N. SHAW, *INTERNATIONAL LAW* 211–15 (6th ed. 2008).

7. See Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, at 43, U.N. Doc. A/56/10 (2001) [hereinafter ILC, *Articles on State Responsibility*].

8. See *infra* Part I.

9. See *infra* Section II.B; see also, e.g., David P. Fidler, *Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law*, 39 GERMAN Y.B. INT'L L. 198, 198 (1996) (“[I]s CIL . . . a riddle inside a mystery wrapped in an enigma?”).

10. See, e.g., JEAN D'ASPREMONT, *FORMALISM AND THE SOURCES OF INTERNATIONAL LAW: A THEORY OF THE ASCERTAINMENT OF LEGAL RULES* 164 (2011) (describing CIL as “dangerously indeterminate” such that its “authority is gravely enfeebled”); J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 451 (2000) (asserting that CIL is so “indeterminate and manipulable” that it “cannot function as a legitimate source of substantive legal norms”).

11. See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 23–43 (2005) (“Our claim is . . . that [CIL] is not an exogenous influence on state behavior.”); Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 124 (2005) (“[T]he lack of precision in CIL rules does indeed undermine the force of the rules and generate skepticism about their importance.”).

12. See, e.g., B.S. Chimni, *Customary International Law: A Third World Perspective*, 112 AM. J. INT'L L. 1, 7 (2018) (arguing that “CIL rules embody ‘hegemonic’ ideas and beliefs”); Daniel H. Joyner, *Why I Stopped Believing in Customary International Law*, 9 ASIAN J. INT'L L. 35 (2019); Joel P. Trachtman, *The Growing Obsolescence of Customary International Law, in CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD* 172, 172 (Curtis A. Bradley ed., 2016) [hereinafter *CUSTOM'S FUTURE*] (“[I]t is unimaginable that customary international law (CIL) can provide effective mechanisms by which to address [modern global governance] challenges.”).

use it, it is not only comprehensible but worthwhile. They presumably use it for a reason. But then, what accounts for all the muddle and disdain?

I argue in this Article that the problem lies less in the everyday practice of CIL than in the conceptual baggage that is brought to bear on it. Most contemporary accounts of CIL reflect what can be called a “rulebook conception.” They presuppose that CIL manifests as a body of rules. In using the word “rule” here, I am not drawing the common distinction between rules and standards. I am lumping together the broad range of legal norms that might qualify as rules or standards. A rule can be precise and rigid, allowing little discretion in the course of its application. Or it can be more flexible and fact dependent. What makes it a rule for my purposes is that its main content is both discernible and generalizable. In the rulebook conception, CIL consists entirely of rules; a given proposition can be CIL only if it applies more or less in the same way in all cases of a given type, rather than fluctuates without established criteria from one situation to the next.

The rulebook conception is especially evident in CIL orthodoxy. In 2018, the U.N. International Law Commission adopted¹³ and the U.N. General Assembly endorsed a set of *Conclusions on Identification of Customary International Law* (the ILC *Conclusions*).¹⁴ Like other orthodox accounts of CIL, the ILC *Conclusions* present CIL as a body of primary and secondary rules.¹⁵ Primary rules directly regulate behavior. They define who must do what, in what circumstances, and subject to what consequences. The prohibition of genocide is an example. Secondary rules establish criteria for identifying the primary rules. According to the ILC *Conclusions*, the metasecondary rule for CIL is a two-element test, under which a normative position is CIL only if states widely support it in their: (1) practice, and (2) *opinio juris*—meaning their acceptance that the position is not just good policy but law.¹⁶ The *Conclusions* then articulate other secondary rules to expand on that test. Their driving premise is that CIL consists of a bunch of identifiable and generally applicable rules.¹⁷ That premise is what defines the rulebook conception.

The rulebook conception is not limited to orthodox accounts of CIL. It informs, in deep and subtle ways, how most international lawyers analyze

13. Int’l Law Comm’n, Rep. on the Work of Its Seventieth Session, U.N. Doc. A/73/10 (2018) [hereinafter ILC, *Conclusions on CIL*].

14. G.A. Res. 73/203, ¶ 4 (Dec. 20, 2018) (italics omitted) (bringing the ILC *Conclusions* “to the attention of States and all who may be called upon to identify rules of customary international law, and encourag[ing] their widest possible dissemination”).

15. On primary and secondary rules, see H.L.A. HART, *THE CONCEPT OF LAW* 79–99 (3d ed. 2012).

16. ILC, *Conclusions on CIL*, *supra* note 13, at 124, 135 (Conclusions 2, 8). The ILC *Conclusions* recognize that the practice of international organizations can also contribute to CIL, but they underscore that “[t]he requirement of a general practice, as a constituent element of customary international law, refers primarily to the practice of States.” *Id.* at 130 (Conclusion 4).

17. For an elaboration on this point, see *infra* Section II.A.

CIL, the many projects that they have initiated to codify CIL, and their frequent debates on and criticisms of CIL.¹⁸ I intend to show that it is not only wrong but pernicious. The idea that CIL must operate like a rulebook contributes to the confusion and skepticism on CIL.

My argument begins with a straightforward descriptive claim: in the day-to-day operation of international law, CIL works nothing like a rulebook. The normative material that global actors in the ordinary course recognize and treat as CIL does not derive from stable secondary rules and does not manifest only as primary rules. It emerges more enigmatically, and much of its content is more contingent than the rulebook allows. This does not mean that CIL never functions like rules. Some of its conduct norms display rule-like levels of clarity and stability. (The prohibition of genocide is again illustrative.) But many do not, and even when they do, it is not because they satisfy certain secondary rules. Put simply, the rulebook conception reflects what many people imagine CIL to be, but it does not describe what global actors use and receive as CIL in the everyday practice of law. It does not reflect what CIL “is” as a real-world sociological phenomenon.

This descriptive claim is not entirely new. International lawyers to some extent appreciate that CIL is not really like a rulebook—that it is more unstable and fragmentary than any rulebook would be.¹⁹ Still, the rulebook conception structures their thinking. When they come to describing, analyzing, or appraising CIL, they usually do so through the lens and with the blinders of the rulebook conception.²⁰

That approach to CIL is unsound. Because CIL does not actually conform to a rulebook, assessing it as if it does is wrongheaded. Methods of legal analysis that are suitable for a rulebook are inapt for CIL. Lawyers who use these methods to examine or to advise clients on CIL will routinely be misdirected or confused.²¹ Likewise, normative appraisals that reflect the rulebook conception—that presuppose that CIL is or should be like a rulebook—consistently devalue CIL. They both exaggerate the problems with CIL and fail to account for the important functions that it serves by *not* conforming to a rulebook. As I will explain, the qualities of CIL that make it unlike a rulebook are part of how it works to limit bias in the law, achieve normative settlements through law, and advance values that are associated with the rule of law.²²

In short, there are good reasons to change how we think about CIL—to retire the rulebook conception and recognize that CIL is a contingent and variable kind of law. Doing so would help us understand the practice of CIL, advise those who might participate in this practice, evaluate when and why it is valuable, and identify suitable proposals for reform. Moreover, although

18. See *infra* Sections II.B, II.C.

19. See *infra* Section II.C.

20. See *infra* Sections II.B, II.C.

21. See *infra* Part IV.

22. See *infra* Part V.

these issues are longstanding in CIL, they have some urgency. Precisely because CIL does not conform to a rulebook, it is well suited for periods of uncertainty, contest, and change. With the rise of nationalist movements in many parts of the world,²³ the associated efforts to withdraw from or otherwise circumscribe key treaty obligations,²⁴ an overall retreat from international law's humanitarian impulses,²⁵ and the broader geopolitical shifts that make existing legal arrangements susceptible to disruption,²⁶ we can expect global actors to turn more readily to CIL to address their regulatory challenges. They will not maximize CIL's potential unless they understand how it works and can assess when and why it is worth their time.

The Article proceeds as follows. Part I sets the foundation for my argument by describing the legal process for CIL. Nothing in this Part of the Article should be controversial. The process for creating and using CIL is known to be highly unstructured. Yet those who adhere to the rulebook conception persistently relegate this process to the background of their analysis. They treat the process as if it is somehow distinct from the rules that comprise CIL.²⁷ I am foregrounding the process because I argue that it largely defines CIL. The reason that CIL's normative content is often disjointed and mercurial is that that is what the CIL process produces. Having a clear picture of this process thus is essential to understanding CIL.

Part II elaborates on the rulebook conception and shows that, despite persistent debates about CIL, this conception is pervasive. It animates most contemporary thinking on CIL. The remainder of the Article then challenges the rulebook conception along three dimensions: (1) descriptive, (2) analytic, and (3) normative. Part III argues that the rulebook conception is inaccurate. It does not describe the normative material that is routinely accepted and

23. See, e.g., HAROLD HONGJU KOH, *THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW* (2019); Heike Krieger, *Populist Governments and International Law*, 30 EUR. J. INT'L L. 971 (2019); Alain Pellet, *Values and Power Relations—The 'Disillusionment' of International Law?*, (Berlin Potsdam Research Grp., KFG Working Paper No. 34, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3400689 [<https://perma.cc/C8F9-N2LS>].

24. See, e.g., Monica Hakimi, *Why Should We Care About International Law?*, 118 MICH. L. REV. 1283 (2020) (discussing recent U.S. actions); Laurence R. Helfer, *Treaty Exit and Intra-branch Conflict at the Interface of International and Domestic Law*, in *THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW* 355 (Curtis A. Bradley ed., 2019) (discussing other recent examples).

25. See, e.g., Philip Alston, *The Populist Challenge to Human Rights*, 9 J. HUM. RTS. PRAC. 1 (2017); Yu-Jie Chen, *China's Challenge to the International Human Rights Regime*, 51 N.Y.U. J. INT'L L. & POL. 1179 (2019); Douglas Guilfoyle, *Part I—This Is Not Fine: The International Criminal Court in Trouble*, EJIL: TALK! (Mar. 21, 2019), <https://www.ejiltalk.org/part-i-this-is-not-fine-the-international-criminal-court-in-trouble/> [<https://perma.cc/2ZG5-8582>].

26. See, e.g., Graham Allison, *The Myth of the Liberal Order: From Historical Accident to Conventional Wisdom*, FOREIGN AFF., Jul.–Aug. 2018, at 124; Tom Ginsburg, *Hersch Lauterpacht Memorial Lecture 2019, Lecture Three: Authoritarian International Law?* (Mar. 14, 2019) (on file with the *Michigan Law Review*).

27. E.g., ILC, *Conclusions on CIL*, *supra* note 13, at 124 (“Dealing as they do with the identification of rules of customary international law, the draft conclusions do not address, directly, the processes by which customary international law develops over time.”).

used as CIL in the practice of law. Part IV contends that, because the rulebook conception is inaccurate, it is not a suitable framework for analyzing CIL. It prioritizes legal methods that are inapt for CIL. Part V argues that it also contaminates most normative appraisals of CIL. The rulebook conception obscures the good work that CIL does by not conforming to a rulebook, so it leads appraisers systematically to debase CIL as a kind of international law. By the end of the Article, I ask: If the rulebook conception is inaccurate, if it distorts rather than sharpens the legal analysis, and if it discounts much of the good that CIL does, why are we holding onto it? Why shouldn't we change how we think about CIL?

I. A PRIMER ON PROCESS

The frustrations with CIL stem directly from the process for making, invoking, and applying it. This process is unstructured and heterarchical. In the ordinary course, states and other global actors say and do things to advance their own priorities and “‘bid’ and ‘barter’ and ‘trade’ in new rules of conduct.”²⁸ The positions that they take in these interactions are sometimes just statements of fact or preference. But more often, the positions embed assertions about governance authority. They put at issue the question of how or by whom authority may be exercised. This element of authority makes them claims about the law.

To illustrate, imagine that a state decides to build a hydroelectric power plant along a shared river without first consulting with or accounting for the environmental risks to its neighbors. The state that makes the decision signals more than that it thinks the plant is good policy. It also signals that it believes that it has jurisdiction to build the plant as it pleases. The decision embeds a claim about the law—about the proper locus of governance authority. Likewise, neighboring states that contest the decision might just express their displeasure. But if they argue that the acting state overstepped its authority and intruded on theirs, they too would advance a legal claim.

Such claims are routine in international life. They are made all the time, in manifold settings, without any overarching organizing principle for prioritizing among them. Some legal claims are advanced in collective fora, such as international organizations. Others appear in unilateral pronouncements. Still others are communicated nonverbally, through concrete actions or reactions in discrete settings. The disparate claims and counterclaims that are presented through this process are all part of the CIL mix. They are the raw data that help to define CIL.

A central question for those who participate in or want to analyze these data is methodological: How are we supposed to distinguish mere claims about the law, which are common and often contradictory, from normative positions that actually have authority as law? I return to this question be-

28. DAVID J. BEDERMAN, *THE SPIRIT OF INTERNATIONAL LAW* 57 (2002).

low.²⁹ For now, I underscore that the nature of the CIL process itself complicates the answer.³⁰ Consider three reasons why.

First, the process does not have formal controls that inhibit the participants from pushing hard for their preferred positions. Tendentious or controversial CIL claims are common and often presented as if they simply describe the positive law.³¹ What demarcates them as dubious are the contrary claims of other participants. However, even when a claim is contested, it becomes part of the CIL mix and has the potential to affect the law's content. The fact that a claim is opportunistic does not necessarily diminish its legal relevance.³²

Second, authority in this process is diffusely held. Although individual actors can easily advance claims about the law, none can alone establish the law. No one entity is entitled to assess the various claims on an issue, weed out the outliers, and finally settle CIL's normative content. This does not mean that all CIL claims have equal weight. They do not. Some participants in the process are more effective at shaping expectations about CIL than are others.³³ For example, despite the common refrain that states are the main drivers of CIL,³⁴ other actors—international adjudicators,³⁵ intergovernmental bodies,³⁶ and certain nongovernmental experts³⁷—can be extremely influ-

29. See *infra* Sections II.A, II.B, III.B.

30. See Michael Wood (Special Rapporteur), Int'l Law Comm'n, *First Report on Formation and Evidence of Customary International Law*, at 2, U.N. Doc. A/CN.4/663 (May 17, 2013) [hereinafter Wood, First Report on CIL] (recognizing the "inherent difficulties" and "complexity of assessing the existence of a rule of customary international law").

31. See, e.g., ALAN BOYLE & CHRISTINE CHINKIN, *THE MAKING OF INTERNATIONAL LAW* 21 (2007) ("Uncertainties about the existence and content of rules of customary [international] law allow opportunistic claims . . .").

32. For evidence, see the example on the continental shelf *infra* in notes 124–127 and accompanying text.

33. See North Sea Continental Shelf (Ger./Den., Ger./Neth.), Judgment, 1969 I.C.J. 3, 43 (Feb. 20) (explaining that states that are especially invested in an issue can play an outsized role); Michael Byers, *Introduction: Power, Obligation, and Customary International Law*, 11 DUKE J. COMP. & INT'L L. 81, 84 (2001) (same for powerful states).

34. See, e.g., Yoram Dinstein, *The Interaction Between Customary International Law and Treaties*, 322 RECUEIL DES COURS 243, 267 (2006) ("[States] have a quasi-monopoly over the formation of custom . . ."); Christiana Ochoa, *The Individual and Customary International Law Formation*, 48 VA. J. INT'L L. 119, 135 (2007) ("What is remarkable in this literature [on CIL] is that virtually all of it has accepted the core premise that only states can form CIL").

35. See, e.g., SHANE DARCY, *JUDGES, LAW AND WAR: THE JUDICIAL DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW* 80 (2014) (on international criminal tribunals); Antonio Cassese, *The International Court of Justice: It Is High Time to Restyle the Respected Old Lady*, in *REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW* 239, 240 (Antonio Cassese ed., 2012) (on the ICJ); Christian J Tams, *The ICJ as a 'Law-Formative Agency': Summary and Synthesis*, in *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT OF JUSTICE* 377, 379 (Christian J Tams & James Sloan eds., 2013) (on the ICJ).

36. See ILC, *Conclusions on CIL*, *supra* note 13, at 130 (Conclusion 4.2).

37. See, e.g., Fernando Lusa Bordin, *Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law*, 63 INT'L &

ential. The normative positions that these actors take on CIL often carry considerable authority. But unless an actor is specifically charged with resolving a concrete dispute under CIL, its authority to define CIL will be incomplete and contestable.³⁸

Third, because the CIL process is unstructured, it lacks an end point. It is always ongoing.³⁹ Any incident that puts a particular normative position at issue thus contributes new data that can alter the position's CIL status or content.⁴⁰ A position that is endorsed might get more entrenched as CIL. A position that is ignored might lose its legal relevance. A position that is applied in novel ways might acquire new meaning. And so on. The critical point is that, because the CIL process is continuous, a position's status or content within CIL can be transitory and elusive.

A concrete example illustrates how the process plays out. In 1998, an elderly Italian man named Luigi Ferrini sued Germany in Italian court for his forced deportation and labor during World War II. The case, *Ferrini v. Repubblica Federale di Germania*, put in conflict two distinct strands of CIL.⁴¹ The first is on foreign state immunity. CIL generally prohibits states from exercising national jurisdiction over other states for their public sovereign, as opposed to their private or commercial, conduct.⁴² The second strand of CIL concerns the commission of atrocities. CIL not only prohibits atrocities but also declares them to be contrary to the fundamental precepts of the legal order⁴³ and subject to distinct remedial schemes.⁴⁴ The question in *Ferrini* was whether Germany's "immunity from jurisdiction is capable of operating even in respect of conduct which . . . is so extremely serious that, in the context of customary international law, it belongs to that category of interna-

COMP. L.Q. 535, 542–46 (2014) (on the International Law Commission); *infra* notes 81, 129–140 and accompanying text (on the International Committee of the Red Cross).

38. For more on this point, see *infra* Section III.B.

39. See Maurice H. Mendelson, *The Formation of Customary International Law*, 272 RECUEIL DES COURS 155, 188 (1998) (“[T]he customary law process is a continuing one”); K. Wolfke, *Some Persistent Controversies Regarding Customary International Law*, 24 NETH. Y.B. INT’L L. 1, 15 (1993) (“[A]scertaining international customs and the formulation of the corresponding legal rules may be carried out repeatedly on various occasions. Such identification is never final . . .”).

40. See Mendelson, *supra* note 39, at 175–76; W. Michael Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, 10 YALE J. INT’L L. 1, 4–5 (1984).

41. Cass., sez un., 11 marzo 2004, n. 5044, Foro it. 2207, I, 936 (It.), translated in 128 I.L.R. 659, 665 (Elihu Lauterpacht et al. eds., 2007).

42. See ORAKHELASHVILI, *supra* note 2, at 232–33.

43. See, e.g., Dire Tladi (Special Rapporteur), Int’l Law Comm’n, *Fourth Report on Peremptory Norms of General International Law (Jus Cogens)*, at 21–62, U.N. Doc. A/CN.4/727, (Jan. 31, 2019) (listing atrocity prohibitions as among the norms that are widely cited as *jus cogens*).

44. See, e.g., Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331; ILC, *Articles on State Responsibility*, *supra* note 7, at art. 26, 40–41.

tional crimes which are so prejudicial to universal values that they transcend the interests of individual States.”⁴⁵

In 2004, Italy’s Court of Cassation decided that Germany was not entitled to immunity for its atrocities in Italy during World War II.⁴⁶ The Italian government questioned *Ferrini’s* logic, but the court held firm in later cases.⁴⁷ It did so even as it recognized that its position on CIL was tendentious. The court explained that, although “there existed no *definite and explicit* international custom according to which the immunity of the foreign State . . . could be deemed to have been derogated from in respect of . . . ‘crimes against humanity,’” *Ferrini* and its progeny “contributed to the *emergence* of [that] rule.”⁴⁸ According to the court, its move to push CIL in that direction—to create an exception to immunity for cases involving atrocities—was not in any way improper. It was “*inherent* in the system of the international legal order,” just part of how the CIL process works.⁴⁹

Eventually, Germany contested the Italian court’s exercise of jurisdiction before the International Court of Justice (ICJ). The ICJ decided in *Jurisdictional Immunities* that Germany was entitled to immunity for the acts in question.⁵⁰ That decision is binding on Italy under the U.N. Charter.⁵¹ Moreover, because of the ICJ’s pride of place in the international legal system, its position on foreign state immunity is widely understood to be authoritative. Other actors cite the *Jurisdictional Immunities* decision as evidence of CIL.⁵² Nevertheless, Italy’s Constitutional Court declined to follow it for reasons of domestic law. The Constitutional Court’s contrary position on foreign state immunity put Italy in violation of the Charter and, most would say, CIL. But as the court noted, its position might still “contribute to a desirable—and desired by many—evolution of international law.”⁵³ Although the ICJ’s position was for the time being authoritative, it was also contestable. It was subject to disruption through the same process that brought it about. Because authority in this process is diffusely held, no actor—not even the ICJ—has the final say on its content.

45. *Ferrini*, 128 I.L.R. at 665.

46. *Id.* at 674.

47. See Memorial of the Federal Republic of Germany, *Jurisdictional Immunities of State* (Ger. v. It.; Greece intervening), ¶¶ 26–27 (June 12, 2009), <https://www.icj-cij.org/files/case-related/143/16644.pdf> [<https://perma.cc/ELG6-9GDU>] (describing this sequence of events).

48. *Id.* at ¶ 27 (translating and quoting the Court of Cassation’s post-*Ferrini* orders).

49. *Id.*

50. *Jurisdictional Immunities of the State* (Ger. v. It.; Greece intervening), Judgment, 2012 I.C.J. 99, 155 (Feb. 2).

51. U.N. Charter art. 94, ¶ 1.

52. *E.g.*, *Jones v. United Kingdom*, 2014-I Eur. Ct. H.R. 1.

53. Corte Cost., 22 ottobre 2014, n. 238, Foro. it. 2015, I, 1152 (It.), *translated in Judgment No. 238 - Year 2014*, CORTE COSTITUZIONALE ¶ 3.3, https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf [<https://perma.cc/ZRZ2-9HVR>].

II. THE RULEBOOK CONCEPTION

We can now return to the methodological question that occupies so much attention: How do we determine whether particular normative positions that are advanced through the CIL process have the authority of law? Orthodox accounts of CIL answer this question with a two-element test. A normative position is said to be CIL only if a sufficiently large and representative group of states supports it in their: (1) settled practice, and (2) *opinio juris*.⁵⁴ This test both reflects and entrenches the rulebook conception of CIL. It depicts CIL as a set of discernible, generally applicable rules. And although international lawyers routinely debate how best to formulate and identify the rules, they overwhelmingly share that premise; they presuppose that CIL must be like a rulebook.

A. Theoretical Foundations

The rulebook conception is a particular vision of what CIL must be. Its central premise is that CIL must manifest as a body of rules—more specifically, that a proposition can be CIL only if it applies more or less in the same way in all cases of a given type, rather than vacillates without discernible criteria from one situation to the next.⁵⁵ In this conception, CIL's content is both objectively identifiable and generally applicable.

Orthodox accounts depict CIL as a body of primary and secondary rules. The ILC *Conclusions* are the most systematic and authoritative effort to date to articulate the secondary rules.⁵⁶ As the ILC explains, the *Conclusions* “seek to offer practical guidance”—also “clear guidance”—“on how the existence of [primary] rules of customary international law, and their content, are to be determined.”⁵⁷ The ILC does not contend that the *Conclusions* have the degree of precision of, say, an architectural plan. It recognizes that they require some context specificity in the course of their application.⁵⁸ Still, it pre-

54. E.g., ILC, *Conclusions on CIL*, *supra* note 13, at 124, 135 (Conclusions 2, 8).

55. To be clear, international lawyers might disagree about which propositions satisfy this definition and qualify as rules. My point is that they take *that* to be the critical question; they conceive of CIL as a body of rules.

56. See Georg Nolte, *How to Identify Customary International Law? – On the Final Outcome of the Work of the International Law Commission (2018)*, at 5 (Berlin Potsdam Research Grp., KFG Working Paper No. 37, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3402384 [<https://perma.cc/HU2C-RWFR>]. The International Law Association has also produced a high-profile account of the secondary rules of CIL. See Int'l Law Ass'n, Comm. on Formation of Customary Law, *Statement of Principles Applicable to the Formation of General Customary International Law* (2000). This account was controversial on some issues, but it still reflected the rulebook conception. It still presupposed that CIL consists of a mix of primary and secondary rules.

57. ILC, *Conclusions on CIL*, *supra* note 13, at 122, 123.

58. *Id.* at 127 (“Whether a general practice that is accepted as law (accompanied by *opinio juris*) exists must be carefully investigated in each case, in the light of the relevant circumstances.”).

sents them as if they are secondary rules. It intends for them to establish objective criteria that apply across the board, whenever the CIL status or content of a normative position is at issue.

Like other orthodox accounts, the ILC *Conclusions* begin with the two-element test.⁵⁹ The accompanying commentary explains that this test must be satisfied “in any given case” involving CIL.⁶⁰ “The test must *always* be: is there a general practice that is accepted as law?”⁶¹ The ILC *Conclusions* then articulate other secondary rules to refine the test. They explain that the “requirement of a general practice . . . refers primarily to the practice of States.”⁶² This practice “must be sufficiently widespread and representative, as well as consistent.”⁶³ It “must be undertaken with a sense of legal right or obligation” such that it is distinguishable “from mere usage or habit.”⁶⁴ And so forth. The point is that the ILC *Conclusions* purport to define the secondary rules of CIL. They are meant to apply “[i]n each case” in which CIL is at issue in order “to ensure that a [primary] rule of customary international law is properly identified.”⁶⁵

In addition, they presuppose that particular normative positions can satisfy the secondary rules and qualify as CIL only if they too are rules. The qualities that make a position CIL under the ILC *Conclusions*—generalizability, widespread adherence, representativeness, and consistency—also make it like a rule. They mean that the position’s core content is both coherent and consistently applied. To be clear, the ILC does not contend that CIL’s primary rules are always universal in scope. It explains that, although they usually are “binding on all States,” their scope of application can be more limited.⁶⁶ But even in these unusual circumstances, a normative position can be CIL only if it prescribes more or less the same thing in all circumstances in which it applies. It must display rule-like levels of coherence and generalizability. If it does not, the ILC suggests, it cannot be CIL. “Where the existence of a general practice accepted as law cannot be established, the conclusion will be that the alleged rule of customary international law does not exist.”⁶⁷

The ILC *Conclusions* purport to “describe the current state of international law”⁶⁸ But they—and the rulebook conception that underlies them—are not just descriptive accounts of CIL. They also provide the dominant framework for analyzing CIL. The ILC *Conclusions* are intended to

59. *Id.* at 124 (Conclusion 2).

60. *Id.* at 125.

61. *Id.* (emphasis added).

62. *Id.* at 130 (Conclusion 4).

63. *Id.* at 135 (Conclusion 8(1)).

64. *Id.* at 138 (Conclusion 9).

65. *Id.* at 122.

66. *Id.* at 123, 154; *see also id.* at 152, 154 (Conclusions 15, 16).

67. *Id.* at 125.

68. *See* Wood, First Report on CIL, *supra* note 30, at 7.

guide lawyers who confront CIL in the practice of law. And their message is that, before using, assessing, or making decisions on CIL, we must determine whether the normative position at issue satisfies CIL's secondary rules and manifests as a primary rule. "All [a decisionmaker] needs to decide," Maurice Mendelson has said, "is whether, at the moment the appreciation is being made, the practice has matured into a rule of law."⁶⁹ If it has, it should inform the substantive legal analysis. Otherwise, it should not.

Take the precautionary principle in international environmental law. Depending on the context in which this principle arises, it either permits or requires states to account for environmental risks when making regulatory decisions. The principle already appears in multiple treaties.⁷⁰ If it also is CIL, it has the potential to radiate beyond what the treaty texts indicate—to cover more situations than the treaties do or to harden treaty language that is not by itself binding. The claim that the precautionary principle has the status of a CIL rule has long been in circulation but remains contested.⁷¹ For the rulebook conception, *that* is the key question. Before using the precautionary principle as CIL, one must determine, as a threshold matter, whether it satisfies the secondary rules and manifests as a primary rule.

B. Variations on a Theme

An enormous amount of energy has been devoted to answering that threshold question—identifying the rules that belong in the CIL book. These efforts vary in their details and results. But most of them rest on the rulebook conception. They assume that CIL is a set of rules and that our main task as international lawyers is to figure out what the rules are.

The ILC *Conclusions* are just one especially high-profile example. The secondary rules that they articulate have been exhaustively debated. The debates center on the two-element test. Are both elements really necessary to establish a CIL rule, or can one or the other element suffice?⁷² When is a

69. Mendelson, *supra* note 39, at 176 (emphasis omitted).

70. *E.g.*, Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Mar. 17, 1992, 31 I.L.M. 1312, 1316; Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 143, 272–73; Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541, 1551.

71. International courts and tribunals have repeatedly avoided resolving the CIL status of the precautionary principle. *E.g.*, Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Case No. 17, Advisory Opinion of Feb. 1, 2011, 11 ITLOS Rep. 10, ¶ 135 (asserting that there was at least “a trend towards making [the precautionary principle] part of customary international law”); Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, ¶ 7.89, WTO Docs. WT/DS291/R, WT/DS292/R, WT/DS293/R (adopted Sept. 29, 2006) (“Since the legal status of the precautionary principle remains unsettled . . . we consider that prudence suggests that we not attempt to resolve this complex issue . . .”).

72. Compare, *e.g.*, Anthony D’Amato, *Customary International Law: A Reformulation*, 4 INT’L LEGAL THEORY 1 (1998) (arguing that CIL can arise from a practice alone, without much evidence of *opinio juris*), and Mendelson, *supra* note 39, at 250, 289 (same), with Guzman, *su-*

treaty evidence of CIL?⁷³ How significant are verbal pronouncements that contradict the material practice?⁷⁴ When, if ever, may a state opt out of a CIL rule?⁷⁵ When do the actions of just a few states, combined with the persistent silence of many others, establish a CIL rule?⁷⁶ And so on and so forth. These questions make sense on their own terms only if one assumes the rulebook conception. To be more precise, the questions presuppose that CIL consists of a set of secondary and primary rules and that the secondary rules require some combination of a practice and *opinio juris* to establish a primary rule.

Not everyone is committed to that particular formula for CIL. But scholars who resist the two-element test usually still adhere to the rulebook conception on some level. For example, Eyal Benvenisti has argued that the ICJ may create CIL, even when the underlying practice and *opinio juris* are insufficiently robust.⁷⁷ Benvenisti's claim is that CIL has a secondary rule that entitles the ICJ to "step in and impose" or "invent 'customary law.'"⁷⁸ When the ICJ uses this secondary rule, he says, it produces a primary rule—a coherent conduct norm that "all players" are likely to follow.⁷⁹ This account is consistent with the rulebook conception because it defines CIL as a set of secondary and primary rules. Its innovation is to say that CIL's secondary rules are not limited to the two-element test.

Given the many debates about the secondary rules, it's not surprising that the primary rules are often also contested. Indeed, even if everyone accepted the secondary rules as the ILC *Conclusions* articulate them, the primary rules would be hard to pin down. The practice and *opinio juris* on any particular issue are bound to be eclectic and disjointed. Applying the two-element test requires sifting through all the raw data on an issue, interpreting

pra note 11, at 153 (arguing that CIL can arise from only *opinio juris*, without a supporting practice).

73. For the ILC's view, see ILC, *Conclusions on CIL*, *supra* note 13, at 143 (Conclusion 11).

74. For an overview of this debate, see Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 757–58 (2001).

75. For an overview, see JAMES A. GREEN, THE PERSISTENT OBJECTOR RULE IN INTERNATIONAL LAW 3–6 (2016).

76. For the ILC's view, see ILC, *Conclusions on CIL*, *supra* note 13, at 133, 140 (Conclusions 6(1), 10).

77. Eyal Benvenisti, *Customary International Law as a Judicial Tool for Promoting Efficiency*, in THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION: THEORETICAL PERSPECTIVES 85, 86 (Eyal Benvenisti & Moshe Hirsch eds., 2004) ("The ICJ has, in fact, the authority to invent the custom.").

78. *Id.* at 93; see also *id.* at 87 ("[T]his legislative function of international adjudicators is itself grounded in customary international law.").

79. *Id.* at 98 ("A judicial declaration of one equilibrium as the one that is binding as custom is likely to lead all players to modify their activities to conform to the judicially sanctioned equilibrium.").

the ambiguities, and making judgments about inevitable inconsistencies.⁸⁰ Reasonable people routinely disagree about how to do that.

But they overwhelmingly agree that it must be done. Think of the 2005 study by the International Committee of the Red Cross (ICRC) that purports to identify 161 rules of customary international humanitarian law.⁸¹ Or the many efforts by the ILC to codify discrete substantive rules of CIL.⁸² Or the persistent debates about whether there is now a CIL rule that inflects the U.N. Charter and permits individual states to use cross-border force to avert humanitarian crises.⁸³ These projects all embrace the descriptive and analytic precepts of the rulebook conception. They assume that CIL manifests as a set of rules. And they take as their central mission the task of identifying the rules.

C. *The Discontents*

The commitment to crystallizing the rules that belong in the CIL book has a normative bent, as well. A persistent anxiety about CIL is that, despite what orthodox accounts say, it is too elastic at any given moment to be like a rulebook.⁸⁴ Critics of CIL have long argued that, *because* CIL is so malleable,

80. See, e.g., I.A. SHEARER, *STARKE'S INTERNATIONAL LAW* 26 (11th ed. 1994) ("The difficulties involved in extracting a customary rule or principle of international law from the mass of heterogeneous documentation of state practice . . . are not to be minimised . . ."); Daniel Bodansky, *Does Custom Have a Source?*, 108 *AJIL UNBOUND* 179, 179 (2015) ("Inducing the rules of customary international law from state practice would be a Herculean task—a task, by the way, more appropriate for an empirically oriented social scientist than for a lawyer.").

81. *IHL Database: Customary IHL*, INT'L COMMITTEE RED CROSS [hereinafter ICRC, *CIL Study*], https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul [<https://perma.cc/PV2P-8Q3F>].

82. See Int'l Law Comm'n, *Analytical Guide to the Work of the International Law Commission*, UNITED NATIONS, <http://legal.un.org/ilc/guide/gfra.shtml> [<https://perma.cc/6Y4A-Q57F>] (listing the topics covered).

83. See Jane Stromseth, *Rethinking Humanitarian Intervention: The Case for Incremental Change*, in *HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS* 232, 241–45 (J.L. Holzgrefe & Robert O. Keohane eds., 2003) (describing the dominant positions in this debate). Compare, e.g., Christine Gray, *The Use of Force for Humanitarian Purposes*, in *RESEARCH HANDBOOK ON INTERNATIONAL CONFLICT AND SECURITY LAW: JUS AD BELLUM, JUS IN BELLO, AND JUS POST BELLUM* 229, 253 (Nigel D. White & Christian Henderson eds., 2013) ("It is difficult, if not impossible, to make a legal case for the existence of a right of unilateral humanitarian intervention today."), with Harold Hongju Koh, Address, *The War Powers and Humanitarian Intervention*, 53 *HOUS. L. REV.* 971, 1004 (2016) (arguing that such interventions are sometimes lawful).

84. Some international lawyers argue that CIL's flexibility is an asset because it allows CIL to adapt to new circumstances or sensibilities. E.g., Jeremy Pearce, *Customary International Law: Not Merely Fiction or Myth*, 2003 *AUSTL. INT'L L.J.* 125, 125, 128; Int'l Law Comm'n, Summary Record of the 3148th Meeting, at 140, U.N. Doc. A/CN.4/SR.3148 (2012) (comments of Mr. Tladi). This position does not fully address the perceived problems with it. One might take the view that CIL's flexibility is a strength so long as CIL's content can be determined at any given moment but that it becomes a weakness when CIL is too amorphous to pin down in

it is deficient as law—lacking in the legitimacy or the efficacy that we usually demand of law. The normative logic of this critique is clear: we should try to make CIL more rule-like, and insofar as we cannot, we should refrain from putting much stock in it.

Attacks on the legitimacy of CIL center on its secondary rules. Critics contend that the supposed secondary rules of CIL are not at all like rules. They are so “indeterminate and manipulable” that they “cannot function as a legitimate source of substantive legal norms.”⁸⁵ The reason why is that normative positions that derive from them are biased in favor of some actors—typically the most powerful actors—at the expense of others; these positions are “not, in fact, based on the implied consent or general acceptance of the international community.”⁸⁶ Put differently, people who claim to apply the secondary rules are really just using CIL as a pretext for foisting their own “‘hegemonic’ ideas and beliefs” on unwitting subjects.⁸⁷

As an example, B.S. Chimni cites the obligation to afford fair and equitable treatment to foreign investors and investments.⁸⁸ This obligation is codified in and central to most modern bilateral investment treaties (BITs).⁸⁹ The question for CIL is whether a comparable obligation exists outside of the BITs. Does the fair and equitable treatment obligation operate only under the BITs that prescribe it, or does it also appear in CIL? Chimni contends that tribunals that address this question find that CIL is what they would like it to be, disregarding substantial evidence to the contrary. In his words, “tribunals ‘have adapted the history of fair and equitable treatment to suit their purpose’” and have “‘overstate[d] the protections afforded to investors un-

concrete cases. For the rare suggestion that it is a strength even in the latter scenario, see Mr. Murase’s statement, *id.* at 137–38.

85. Kelly, *supra* note 10, at 451.

86. *Id.* at 452; *see, e.g.,* Joyner, *supra* note 12, at 42 (calling this dynamic “very troubling” and “counter to a fundamental principle . . . of the international legal system, i.e. that the sources of international law are essentially based, even if imperfectly, upon the consent of states to be bound to international legal obligation”); Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT’L L. 413, 434 (1983) (describing the “danger of imposing more and more customary rules on more and more states, even against their clearly expressed will”).

87. Chimni, *supra* note 12, at 7; *see also* Joyner, *supra* note 12, at 39 (“[A]ll of us—international courts, the ILC, and academics—in fact use our corrupted methodologies for determining the presence of CIL in order to serve our own instrumentalist ends.”); Fernando R. Tesón, *Fake Custom*, in REEXAMINING CUSTOMARY INTERNATIONAL LAW 86, 103 (Brian D. Leppard ed., 2017) (“[T]he problem is that [lawyers] disguise a value choice as an objective norm, one that (they pretend) is not chosen by them as the best but is already enshrined in the law.”).

88. Chimni, *supra* note 12, at 30–33.

89. *See id.* at 30; *see also* CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION ¶ 7.04 (2007) (explaining that the fair and equitable treatment obligation is often “the outcome-decisive right, eclipsing even the more established protection against expropriation” in its importance).

der customary international law.’”⁹⁰ The consequences can be significant. An obligation to provide fair and equitable treatment “can now be smuggled in as a CIL principle,” even when the relevant states have declined to adopt it as a matter of treaty law.⁹¹

Attacks on the efficacy of CIL also fixate on its variability, but they tend to focus on CIL’s primary rules. These rules are said to be too plastic to meaningfully regulate behavior. The worry is that states can easily manipulate the raw data—the evidence of a practice and *opinio juris*—to interpret away or evade a putative primary rule at the point of application. That dynamic is exacerbated because no third-party arbiter has the authority to resolve, once and for all, what the primary rule on a given issue is or, in many cases, how any such rule applies to specific facts. The events surrounding the *Jurisdictional Immunities* decision might be an example.⁹² If any state may at any time ignore an existing CIL rule under the guise of trying to change the rule, then the rule seems feckless.

Although scholars debate just how ineffective CIL is, they almost always assume that its efficacy depends on its capacity to establish stable primary rules. And many insist that its efficacy is impaired.⁹³ For instance, Karol Wolfke has said that “the frequently expressed doubts about [CIL’s] present usefulness . . . seem to be fully justified,” “[c]onsidering [its] complexity, imprecision, and relative slowness.”⁹⁴ Carlos Vásquez has asserted that CIL’s elasticity presents “opportunities for evasion or contestation” that undercut

90. Chimni, *supra* note 12, at 31 (quoting Theodore Kill, Note, *Don’t Cross the Streams: Past and Present Overstatement of Customary International Law in Connection with Conventional Fair and Equitable Treatment Obligations*, 106 MICH. L. REV. 853, 858, 867 (2008)).

91. *Id.* at 32.

92. See *supra* notes 50–53 and accompanying text.

93. See, e.g., *supra* note 11 and accompanying text; Curtis A. Bradley & Mitu Gulati, *Mandatory Versus Default Rules: How Can Customary International Law Be Improved?*, 120 YALE L.J.F. 421, 421 (2011) (“[I]t has become increasingly apparent that CIL is structurally unable to address many of the world’s most pressing problems . . .”); Laurence R. Helfer & Ingrid B. Wuerth, *Customary International Law: An Instrument Choice Perspective*, 37 MICH. J. INT’L L. 563, 580 (2016) (arguing that custom is relevant in certain limited situations); George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT’L L. 541, 541–42, 543 (2005) (arguing that “there are circumstances where [CIL] may independently affect the behavior of states,” “even if it only does so at the margins”); Edward T. Swaine, *Rational Custom*, 52 DUKE L.J. 559, 622 (2002) (asserting that “customary international law is least likely to exist where it would be most helpful” because the “greater the potential benefits” of establishing a rule, “the greater the incentive of individual states to defect, and the greater the need for draconian enforcement mechanisms—mechanisms absent in the case of custom”). *But cf.* Pierre-Hugues Verdier & Erik Voeten, *Precedent, Compliance, and Change in Customary International Law: An Explanatory Theory*, 108 AM. J. INT’L L. 389, 401 (2014) (“[W]hile the legal and institutional characteristics of CIL often impair reciprocity and retaliation, they increase the precedential impact of defections. As a result, states may comply because they expect that their defection would undermine a cooperative norm whose continued existence they value.”).

94. Wolfke, *supra* note 39, at 15.

its efficacy.⁹⁵ Andrew Guzman agrees: “[T]he lack of precision in CIL rules does indeed undermine the force of the rules and generate skepticism about their importance.”⁹⁶

The usual response to these criticisms is, like the ILC’s, to double down on the rulebook—to insist that CIL’s secondary rules limit its elasticity and help establish stable primary rules.⁹⁷ As I explain below, this response is unconvincing. CIL does not actually conform to a rulebook. Thus, as long as the rulebook conception is the metric for evaluating it, CIL will come up short. But what if the rulebook conception is misinformed? What if the problem lies not with CIL but with the conceptual apparatus that we have been using to assess it?

III. A PRACTICE-ORIENTED ALTERNATIVE

It’s hard to overstate just how dissociated the rulebook conception is from CIL’s day-to-day operation. As discussed, the process for CIL is extremely messy and produces a lot of disconnected raw data. In the rulebook conception, this process can create CIL only if the output satisfies certain secondary rules and manifests as primary rules. The ILC *Conclusions* say that, for this to happen, the mix of practice and *opinio juris* must be sufficiently clear and consistent. Otherwise, the output cannot be CIL.

That depiction of CIL is inaccurate. It does not describe the normative material that global actors in the ordinary course recognize and use as CIL. This material neither derives from secondary rules nor manifests only as primary rules. The reason why is that the disorderly process for CIL largely determines what it is.⁹⁸ Because this process is so messy, the normative material that it produces does not come only, or even primarily, in the form of rules. It often is contingent and variable. Put differently, although the CIL process sometimes produces norms that have the clarity and stability of rules, most of its normative output is more fragmentary—treated and accepted as CIL by some actors or in certain settings but not by or in others. This material cannot be CIL under the rulebook conception. But it routinely shapes how people understand and interact with CIL. It is in a very real sense CIL.

95. Carlos M. Vásquez, *Withdrawing from International Custom: Terrible Food, Small Portions*, 120 YALE L.J.F. 269, 286–87 (2011).

96. Guzman, *supra* note 11, at 124; *see also* Andrew T. Guzman & Timothy L. Meyer, *Customary International Law in the 21st Century*, in *PROGRESS IN INTERNATIONAL LAW* 197, 207 (Russell A. Miller & Rebecca M. Bratspies eds., 2008) (“A lack of clarity as to the content of rules of CIL is likely to be a major factor in weakening [them].”).

97. *See* ILC, *Conclusions on CIL*, *supra* note 13, at 122.

98. I have previously argued that the act of identifying CIL cannot meaningfully be dissociated from the process for creating it. *See* Monica Hakimi, *Custom’s Method and Process: Lessons from Humanitarian Law*, in *CUSTOM’S FUTURE*, *supra* note 12, at 148. Here, I elaborate on and discuss the implications of that claim.

To be clear, I am here presenting an alternative account of CIL that describes what it is as a real-world sociological phenomenon. Let me address at the outset one likely objection. Some will say that CIL, as I am describing it, is too unmoored or inconstant to be law. A prominent family of jurisprudential theories posits that law is by definition rule-like—that in order for a social practice to constitute law, it must in key ways conform to a rulebook.⁹⁹ The objection would be that CIL must satisfy the rulebook conception in order to be law.

However, the jurisprudential theories that define law in rule-like terms are not the only available ones; others are compatible with my account.¹⁰⁰ Moreover, the idea that all law must conform to the same universal criteria, no matter its social context, is itself suspect. People in this world understand law in all sorts of ways. My goal is not to resolve what law is in some universal sense but rather to describe a particular kind of law. If the material that global actors routinely accept and treat as law does not satisfy a certain jurisprudential theory, the logical conclusion is not that the material is not law but that the theory is incomplete; it is detached from and an inadequate barometer of what law “is” in the real world. After all, law is not just an abstract theoretical proposition. It is a social phenomenon. To understand how CIL functions as law, we need to move beyond those theories—as I do here.

A. *The Practice of Customary International Law*

CIL’s defining characteristics are not clarity or consistency but high levels of fluidity, uncertainty, and contestation. These characteristics are a function of the CIL process. Because this process is so unstructured, it lacks mechanisms to regulate which normative positions are advanced through it or how particular positions play out. Two important points follow. First, the salience of a position within CIL—the extent to which the position is recognized and used as CIL—does not depend on whether it satisfies certain secondary rules. What matters instead is how the group of actors who participate in a given domain of global governance interact with the position.

99. See, e.g., Wood, First Report on CIL, *supra* note 30, at 17 (“[A]s in any legal system, there must in public international law be rules for identifying the sources of the law.”); Frederick Schauer, *The Jurisprudence of Custom*, 48 TEX. INT’L L.J. 523, 524 (2013) (“At least since H.L.A. Hart, . . . most legal theorists in the positivist tradition[] have accepted that the internalization of a rule of recognition, or, more precisely, the official internalization of the ultimate or master rule of recognition[] is both a necessary and sufficient condition for the existence of law.” (footnote omitted)).

100. The jurisprudential theory that is probably most on point is the New Haven School, which I discuss *infra* in note 168. But one need not adopt that theory to accept that law need not be like a rulebook. See, e.g., ABRAM CHAYES, THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW 101–02 (1974) (conceiving of law “not [as] a set of fixed, self-defining categories of permissible and prohibited conduct” but rather as a tool to “orient deliberation, order priorities, [and] guide within broad limits”); O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460–61 (1897) (“The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”).

Second, because global actors take different stances on the normative positions that are batted around in the CIL process, these positions do not consistently take the form of conduct rules. They are often inconstant.

1. No Secondary Rules

CIL does not have secondary rules.¹⁰¹ Although orthodox accounts insist that it does, any serious effort to articulate the rules ends up exposing that they are nothing like rules. The ILC *Conclusions* are illustrative. They purport to establish intelligible, generally applicable criteria—“clear guidance”—“to ensure that a rule of customary international law is properly identified.”¹⁰² But in fact, they do not.

Even the ILC’s commentary that accompanies the *Conclusions* recognizes that the criteria for identifying CIL are unstable. For example, Conclusion 8 posits that, in order to satisfy the two-element test, a practice “must be sufficiently widespread and representative, as well as consistent.”¹⁰³ That sounds like a rule. Yet the commentary then advises that what counts as sufficient “does not lend itself to exact formulations, as circumstances may vary greatly from one case to another.”¹⁰⁴ In some cases (the ILC does not tell us which ones), the underlying support “may have to be widely exhibited,” while in others (again, we don’t know which), support “may well be less.”¹⁰⁵ According to the ILC itself, the requisite level of support for a position is not fixed or discernible in advance but fluid and highly contextually variable.

Likewise, the commentary asserts that the raw data that count as support vary from one situation to the next. “[T]he type of evidence consulted . . . depends on the circumstances, and certain forms of practice and certain forms of evidence of acceptance as law (*opinio juris*) may be of particular significance, according to the context.”¹⁰⁶ The ILC does not identify when certain kinds of evidence are relevant or weighty. It just reminds us that “regard must be had to the particular circumstances in which any evidence is to be found; only then may proper weight be accorded to it.”¹⁰⁷

Take the question of whether the many BITs with fair and equitable treatment obligations evince a comparable obligation in CIL. Here is what

101. Other scholars have also emphasized this point. For example, Daniel Bodansky contends that, because “non-treaty rules emerge through a diffuse process of social interaction . . . it would be a mistake to analyze [them] in terms of secondary rules.” Bodansky, *supra* note 80, at 182. However, even Bodansky seems to adhere to the rulebook conception on some level. He speaks of CIL as if it is just a collection of primary rules—both because he repeatedly refers to CIL as “rules” and because he suggests that, however CIL emerges, it manifests as intelligible, generally applicable conduct norms. *Id.*

102. ILC, *Conclusions on CIL*, *supra* note 13, at 122, 123.

103. *Id.* at 135.

104. *Id.* at 136.

105. *Id.*

106. *Id.* at 127.

107. *Id.* at 128.

the ILC's commentary advises about using "the existence of similar provisions in a number of bilateral or other treaties" as evidence of CIL:

While it may indeed be the case that such repetition attests to the existence of a corresponding rule of customary international law (or has given rise to it), it "could equally show the contrary" in the sense that States enter into treaties because of the absence of any rule or in order to derogate from an existing but different rule of customary international law.¹⁰⁸

There is not a secondary rule here. The many BITs with fair and equitable treatment obligations might be good evidence of a corresponding obligation in CIL, but they "could equally show" the opposite—that no such obligation exists. The ILC *Conclusions* do not give us any guidance for determining which of these possibilities is correct.

Thus, despite what they purport to do, the ILC *Conclusions* do not actually articulate rules for identifying the normative positions that satisfy the rulebook's magic threshold and qualify as CIL.¹⁰⁹ This does not mean that the *Conclusions* are wholly disconnected from the practice. They are not. They rightly identify a range of discursive moves that global actors use to argue about and justify particular decisions in CIL. The moves just do not function like secondary rules. They do not represent "clear" or generally applicable criteria that "ensure that a [primary] rule of customary international law is properly identified."¹¹⁰

Moreover, global actors do not consistently use the discursive moves, as they would secondary rules. They pick and choose among the various moves or sometimes just ignore them. And to be clear, this variability in how global actors argue about or justify particular positions in CIL is central to, not at the periphery of, the practice. Global actors do not systematically apply the same criteria for validating particular positions as CIL.

Most actors approach CIL not as detached observers assessing different normative positions against certain preestablished criteria but as advocates advancing their own preferences. Consider the ICRC study that purports to find 161 rules of customary international humanitarian law.¹¹¹ The ICRC did

108. *Id.* at 146 (quoting Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Judgment, 2007 I.C.J. 582, ¶ 90 (May 24)).

109. Others have also criticized the ILC *Conclusions* on these grounds. For example, while the ILC was working on the *Conclusions*, a group of Asian and African legal experts contended that, "[i]n order to achieve the objective of the ILC project . . . to produce a practical, user-friendly set of conclusions, further precision and more concrete criteria are necessary." See Sienho Yee, *Report on the ILC Project on "Identification of Customary International Law,"* 14 CHINESE J. INT'L L. 375, 381 (2015) (reproducing the report of the Informal Expert Group on Customary International Law of the Asian-African Legal Consultative Organization). The group's diagnosis—that the ILC *Conclusions* do not establish meaningful criteria for identifying CIL—is correct. But its suggestion to make the ILC *Conclusions* more precise is misguided. That suggestion presupposes that CIL conforms to a rulebook and has secondary rules that can be articulated more precisely.

110. ILC, *Conclusions on CIL*, *supra* note 13, at 121–22.

111. ICRC, *CIL Study*, *supra* note 81.

not apply, at least not in any standard way, the two-element test that requires a widespread practice and *opinio juris*.¹¹² Instead, it suggested that some positions can be CIL despite an extensive practice to the contrary and the absence of any *opinio juris*. In the ICRC's words: "It appears that international courts and tribunals on occasion conclude that a rule of customary international law exists when that rule is a desirable one . . . for the protection of the human person, provided that there is no important contrary *opinio juris*."¹¹³

Some might want to minimize this language. They might contend that the study's positions on CIL still for the most part satisfied the two-element test. If this is true, it would have to be a version of the two-element test that is contingent and contestable, not one that applies across the board, as secondary rules would. In fact, whatever test the ICRC used *was* contested. And it was contested in terms that are completely routine for CIL. Critics of the ICRC study claimed that its normative positions lacked sufficient support in state practice and *opinio juris*, that it wrongly diminished or exaggerated the significance of certain data, that it failed to account for the contrary treaty practice, and so on.¹¹⁴ These moves are business as usual in CIL. They evince what the ILC's commentary to the *Conclusions* also implicitly concede: The grounds that global actors use to assert that particular positions qualify as CIL are not stable or fixed. They are malleable and contingent. They do not operate like rules.

One might expect international courts and tribunals to be more disciplined by the rulebook conception. These institutions are charged with identifying and applying, not making, CIL. The ILC explains that they are particularly well suited to conducting the "structured and careful process of legal analysis and evaluation" that the rulebook requires.¹¹⁵ However, several studies show that adjudicative institutions do not consistently apply any sec-

112. See Hakimi, *supra* note 98, at 169–70.

113. 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, at xlvi (2005), <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf> [<https://perma.cc/ZLU3-ZGZX>].

114. E.g., George H Aldrich, *Customary International Humanitarian Law—An Interpretation on Behalf of the International Committee of the Red Cross*, 76 BRIT. Y.B. INT'L L. 503, 507 (2005); John B. Bellinger, III & William J. Haynes II, *A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, 89 INT'L REV. RED CROSS 443 (2007); Daniel Bethlehem, *The Methodological Framework of the Study*, in PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 3, 10 (Elizabeth Wilmschurst & Susan Breau eds., 2007); Yoram Dinstein, *The ICRC Customary International Humanitarian Law Study*, 36 ISR. Y.B. HUM. RTS. 1 (2006). For examples of the ICRC's responses to these criticisms, see Jean-Marie Henckaerts, *Customary International Humanitarian Law: A Response to US Comments*, 89 INT'L REV. RED. CROSS 473 (2007), and Jean-Marie Henckaerts, *Customary International Humanitarian Law—A Rejoinder to Judge Aldrich*, 76 BRIT. Y.B. INT'L L. 525 (2005).

115. ILC, *Conclusions on CIL*, *supra* note 13, at 122.

ondary rules for CIL.¹¹⁶ They generally do not harness the raw data to show that their CIL positions have enough support to satisfy the two-element test.¹¹⁷ And they periodically identify as CIL positions that have only thin support or remain quite controversial.¹¹⁸

Take an example that postdates the ILC *Conclusions*. In 2019, the Appeals Chamber of the International Criminal Court decided that, under both the Rome Statute and CIL, heads of state are not immune from arrest by other states when executing a warrant that an international court has issued.¹¹⁹ The Appeals Chamber did not show that this position on immunity has widespread support in the practice and *opinio juris*. And in fact, it does not. The opposition to it is both substantial and undeniable.¹²⁰ Thus, rather than amass the raw data to justify the position, the Appeals Chamber simply announced that it need not carry that burden: “[T]he *onus* is on those who claim that there is such immunity in relation to international courts to estab-

116. The evidence suggests that prominent international courts and tribunals not only ignore the two-element test but also decline to constrain themselves with any other secondary rules. See, e.g., BOYLE & CHINKIN, *supra* note 31, at 279; Ilias Bantekas, *Reflections on Some Sources and Methods of International Criminal and Humanitarian Law*, 6 INT’L CRIM. L. REV. 121, 121 (2006); Stefan Talmon, *Determining Customary International Law: The ICJ’s Methodology Between Induction, Deduction and Assertion*, 26 EUR. J. INT’L L. 417 (2015).

117. See, e.g., Stephen J. Choi & Mitu Gulati, *Customary International Law: How Do Courts Do It?*, in CUSTOM’S FUTURE, *supra* note 12, at 117, 146–47; Rudolf H Geiger, *Customary International Law in the Jurisprudence of the International Court of Justice: A Critical Appraisal*, in FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA 673, 692 (Ulrich Fastenrath et al. eds., 2011); see also Ryan M. Scoville, *Finding Customary International Law*, 101 IOWA L. REV. 1893, 1935 (2016) (conducting a quantitative study that concludes that U.S. “federal courts have not followed the traditional doctrine” for identifying CIL).

118. See, e.g., DARCY, *supra* note 35, at 80; Benvenisti, *supra* note 77, at 86; Tams, *supra* note 35, at 379.

119. Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09 OA2, Judgment in the Jordan Referral re Al-Bashir Appeal, paras. 2, 114, 117 (May 6, 2019).

120. See, e.g., *id.* at para. 53 (explaining Jordan’s position that, “[u]nder customary international law, Head of State immunity from foreign criminal jurisdiction is not subject to any exceptions”); Prosecutor v. Al Bashir, ICC-02/05-01/09-367, The League of Arab States’ Observations, para. 26 (July 16, 2018) (arguing for head of state immunity in this case); Prosecutor v. Al Bashir, ICC-02/05-01/09-370, The African Union’s Submission, at 6 (July 13, 2018) (same); see also, e.g., Dapo Akande, *ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals*, EJIL: TALK! (May 6, 2019), <https://www.ejiltalk.org/icc-appeals-chamber-holds-that-heads-of-state-have-no-immunity-under-customary-international-law-before-international-tribunals/> [https://perma.cc/G2SD-B5NB] (describing the no-immunity position as “extremely controversial”); Dov Jacobs, *You Have Just Entered Narnia: ICC Appeals Chamber Adopts the Worst Possible Solution on Immunities in the Bashir Case*, SPREADING JAM (May 6, 2019), <https://dovjacobs.com/2019/05/06/you-have-just-entered-narnia-icc-appeals-chamber-adopts-the-worst-possible-solution-on-immunities-in-the-bashir-case/> [https://perma.cc/YKY8-RBV4] (calling the no-immunity position “ridiculous”). *But cf.* Prosecutor v. Al-Bashir, ICC-02/05-01/09-359, Written Observations of Professor Claus Kress as Amicus Curiae, para. 8 (June 18, 2018) (arguing that the Appeals Chamber should adopt the no-immunity position, even though it “is admittedly not (yet) firmly entrenched and fortified”).

lish sufficient State practice and *opinio juris*.”¹²¹ In making this decision, the Appeals Chamber did not apply the two-element test or any other secondary rule. It did its own thing.

Of course, courts and tribunals have techniques for constraining their own discretion on CIL or otherwise limiting the normative positions that they recognize as CIL. These techniques do not function as secondary rules because they do not apply in all situations in which CIL is at issue; they are confined to the particular cases or institutions that use them. For instance, the U.S. Supreme Court has determined that a normative position is cognizable as CIL under the Alien Tort Statute only if it is “accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”¹²² Although this standard applies in Alien Tort cases in U.S. court, it is not a secondary rule for CIL. Positions that do not satisfy it are routinely accepted and treated as CIL in other venues and for other purposes. Likewise, an international court could choose to require substantial evidence of a practice and *opinio juris* before adopting a position as CIL. For the requirement to operate as a secondary rule, global actors would have to apply it in the many other contexts in which they engage with CIL. That eventuality has not yet come to pass. Despite all the efforts to define the secondary rules of CIL, it still does not have any.

2. Variable Conduct Norms

The lack of secondary rules in CIL does not mean that “anything goes.” It means that what goes is not determined by secondary rules. The status of a given normative position within CIL depends instead on how global actors interact with it over time.¹²³ To what extent do these actors invoke, regard, and use the position as CIL, rather than ignore or challenge it? Thus, as a practical matter, those who want a position to have traction as CIL must find support for it. They must earn authority for the position from other participants in the CIL process.

Insofar as global actors broadly accept and treat a position as CIL, it becomes entrenched. At some point, it might even garner enough support to operate like a conduct rule. A well-known example involves the continental shelf.¹²⁴ In 1945, the United States announced that it had exclusive jurisdic-

121. Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09 OA2, Judgment in the Jordan Referral re Al-Bashir Appeal, para. 116 (May 6, 2019).

122. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

123. On the point that an international legal practice is necessarily interactional, see JUTTA BRUNNÉE & STEPHEN J. TOOPE, *LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT* (2010).

124. On this example, see MICHAEL P. SCHARF, *CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE: RECOGNIZING GROTIAN MOMENTS* 107–22 (2013); ZDENEK J. SLOUKA, *INTERNATIONAL CUSTOM AND THE CONTINENTAL SHELF* 32 (1968).

tion over the resources in its continental shelf.¹²⁵ Other coastal states followed the United States' lead by advancing similar claims. These states then codified their common positions in a 1958 treaty.¹²⁶ And in 1969, the ICJ pronounced that the positions reflected "received or at least emergent rules of customary international law."¹²⁷

The rights of coastal states to explore and exploit the continental shelf solidified as rules because they attained such broad support. They will remain entrenched so long as that support continues. Although competing claims on the continental shelf might still be advanced through the CIL process, these claims can easily be dismissed. The reason why has nothing to do with any secondary rules. It is because support for the existing rules is sufficiently robust to prevent the opposition from resonating or gaining legal traction.

Because global actors do not act as a coordinated bloc, the support that they display for different normative positions is not uniform or stable. It varies. Many normative positions that are presented in the CIL process are neither collectively endorsed, like the ones on the continental shelf, nor summarily rejected. They remain in circulation for extended periods with only tepid or contingent support and real competition. These positions have enough support to function as CIL in some settings but not enough support to manifest as rules. Their legal salience is splintered and contingent, rather than consistent or fixed. But in the settings in which they are legally salient, they have the look, feel, and effect of CIL. In these settings, they for all intents and purposes *are* CIL.

The rulebook denies that such positions can be CIL, but it implicitly recognizes their legal significance. If a position must have broad support in the practice and *opinio juris* to satisfy the two-element test and qualify as CIL, then it must gather quite a bit of steam before then. Before it operates as a rule, it must be treated and accepted as law by some actors and in certain respects but not by or in others. International lawyers sometimes try to capture this reality by sayings things like, "x is emerging as CIL," or "there is a trend toward x becoming CIL." These statements themselves reveal the inadequacy of describing CIL as a set of rules. No matter whether x is gaining traction and on the way to becoming a rule, it is at the moment not one. It is

125. Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, Proclamation No. 2667, 10 Fed. Reg. 12,303 (Oct. 1, 1945). This claim was not entirely new; other states had previously asserted jurisdiction over resources in the seabed and subsoil beyond their territorial seas. Nevertheless, the U.S. claim in 1945 "gave birth to the modern concept of the continental shelf." SUZETTE V. SUAREZ, *THE OUTER LIMITS OF THE CONTINENTAL SHELF: LEGAL ASPECTS OF THEIR ESTABLISHMENT* 25 (2008).

126. See Convention on the Continental Shelf art. 1, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 312.

127. North Sea Continental Shelf (Fed. Republic of Ger./Den.; Fed Republic of Ger./Neth.), 1969 I.C.J. 3, 39 (Feb. 20); see also H. Lauterpacht, *Sovereignty over Submarine Areas*, 27 BRIT. Y.B. INT'L L. 376, 377 (1950) (asserting that the position was "instant custom").

fragmentary and might never turn into a rule. And yet, it still might have some force as CIL.

Adherents to the rulebook might say that we should reserve the label “CIL” exclusively for normative positions that have become entrenched like rules. Positions that are more mercurial or contingent might be called something else—if not “emergent CIL,” maybe “soft law.”¹²⁸ The different labels presumably would be intended to mean something. They would signify that normative positions that do not function like rules are not really CIL and cannot accurately be characterized as such. But why not? If the goal is to describe the normative material that is produced through the CIL process and that global actors in the ordinary course regard and use as they do CIL, then non-rule-like positions must be included. These positions routinely have force as CIL. To call them something else just because they do not operate as rules is weirdly tautological: “Non-rule-like positions cannot be CIL because they are not rules.” It also is misleading. It obscures important parts of the practice of CIL.

Take a question that lies at the heart of international humanitarian law (IHL): Who may be targeted for attack in wartime? The answer in interstate conflicts is relatively straightforward and rests on the fundamental distinction between combatants and civilians. Members of state armed forces generally qualify as combatants, wear uniforms or other identifying insignia, and are targetable unless they are *hors de combat*.¹²⁹ By contrast, civilians are not targetable unless they directly participate in hostilities.¹³⁰ In many conflicts involving armed nonstate groups, the distinction between combatants and civilians—and the targeting rules that depend on it—is blurred.¹³¹ Members of these groups often blend in with the general population, rather than identify themselves as such.¹³² Moreover, membership itself can be

128. I discuss the limits of the term “soft law” in more detail *infra* in note 164.

129. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts arts. 43–44, 1125 U.N.T.S. 4, 23–24 [hereinafter Additional Protocol I]; Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 3320–22, 75 U.N.T.S. 135, 138–40; *Rule 3. Definition of Combatants*, INT’L COMMITTEE RED CROSS, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule3 [<https://perma.cc/FA46-Z3EE>].

130. Additional Protocol I, *supra* note 129, at art. 51(3), 1125 U.N.T.S. at 26–27.

131. See 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, 190 (2005) (“[I]n non-international armed conflicts practice is ambiguous as to whether . . . members of armed opposition groups are considered members of armed forces or civilians.”).

132. See, e.g., Orna Ben-Naftali & Keren R. Michaeli, ‘We Must Not Make a Scarecrow of the Law’: A Legal Analysis of the Israeli Policy of Targeted Killings, 36 CORNELL INT’L L.J. 233, 269 (2003) (“This militarization of the civilian population is, indeed, a characteristic feature of non-international conflicts . . . render[ing] it ever harder to distinguish between civilians and combatants.”); Laurie Blank & Amos Guiora, *Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare*, 1 HARV. NAT’L SECURITY J. 45, 53 (2010) (ob-

more fluid. Loosely organized armed groups consist of people who participate in different capacities or to varying degrees over time.¹³³

In 2009, the ICRC released a document—the *Interpretive Guidance on the Notion of Direct Participation in Hostilities*—that aimed to clarify the targeting norms that apply, mostly as a matter of CIL, in conflicts against non-state groups.¹³⁴ The positions that the ICRC adopted in the *Interpretive Guidance* were controversial¹³⁵ and incompatible with the known views of a number of militarily active states.¹³⁶ Thus, the ICRC did not contend that its positions satisfied the secondary rules of CIL or had the status of primary rules. It said only that they “reflect the ICRC’s institutional position[s] as to how existing IHL should be interpreted.”¹³⁷

Yet because of the ICRC’s standing in IHL, its institutional positions are legally salient. The positions that it took in the *Interpretive Guidance* are not always treated as CIL, but they sometimes are, and even when they are not, they are “the main reference point for any discussion of the subject.”¹³⁸ Of course, the ICRC itself invokes these positions as the best iterations of CIL when it discusses or tries to educate people on IHL.¹³⁹ Some national prose-

servicing that “[n]ew warfare” is “characterized by fighting in highly populated areas with a blurring of the lines between military forces and civilian persons and objects”).

133. See NILS MELZER, INT’L COMM. OF THE RED CROSS, *INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 33* (2009) [hereinafter ICRC, *INTERPRETIVE GUIDANCE*] (“[T]here may be various degrees of affiliation with such groups that do not necessarily amount to ‘membership’ within the meaning of IHL.”).

134. *Id.* at 9–10.

135. See Bill Boothby, “*And for Such Time as*”: *The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U. J. INT’L L. & POL. 741 (2010); W. Hays Parks, *Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT’L L. & POL. 769 (2010); Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT’L SECURITY J. 5 (2010); Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 641 (2010).

136. Compare, e.g., ICRC, *INTERPRETIVE GUIDANCE*, *supra* note 133, at 16 (Recommendation II) (“[O]rganized armed groups . . . consist only of individuals whose continuous function it is to take a direct part in hostilities . . .”), with U.S. WHITE HOUSE, *REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 19, 29* (2016) [hereinafter U.S. WHITE HOUSE, *REPORT ON LEGAL AND POLICY FRAMEWORKS*] (asserting that “[s]tates may target specific, identified individual members of an enemy force” and defining membership in terms that are broader than whether someone consistently takes a direct part in hostilities); compare, e.g., ICRC, *INTERPRETIVE GUIDANCE*, *supra* note 133, at 70 (“The ‘revolving door’ of civilian protection is an integral part, not a malfunction, of IHL.”), with Boothby, *supra* note 135, at 758–66 (discussing U.S., Canadian, and Israeli positions to the contrary).

137. ICRC, *INTERPRETIVE GUIDANCE*, *supra* note 133, at 9.

138. Yahli Shereshevsky, *Back in the Game: International Humanitarian Lawmaking by States*, 37 BERKELEY J. INT’L L. 1, 15 (2019).

139. On the ICRC’s work, see Steven R. Ratner, *Law Promotion Beyond Law Talk: The Red Cross, Persuasion, and the Laws of War*, 22 EUR. J. INT’L L. 459 (2011).

cutors, militaries, and courts have also treated the positions as CIL.¹⁴⁰ For example, prosecutors in Germany have invoked the *Interpretive Guidance* to justify terminating criminal investigations into attacks on people who, though not at the time participating in hostilities, regularly fought for armed nonstate groups.¹⁴¹ Likewise, the Supreme Court of Israel cited the *Interpretive Guidance* in 2018 to explain why attacking demonstrators near the security barrier with Gaza could be consistent with IHL.¹⁴² In these cases, the positions that the ICRC articulated in the *Interpretive Guidance* have CIL effect. To insist that they cannot be CIL, just because they do not operate as rules, is to obscure the various ways in which they are actually used and received as CIL in the practice of law.

The precautionary principle is another example. The principle does not function as a CIL rule because global actors take very different positions on what it entails and whether and how it applies in discrete settings.¹⁴³ But any suggestion that it is not part of CIL—that there is only, as the International Tribunal for the Law of the Sea said in 2011, “a trend towards making [it] part of customary international law”—is misleading.¹⁴⁴ For decades, states have used the principle beyond what treaty law indicates to make, justify, or challenge particular governance decisions.¹⁴⁵ These states have treated the principle as CIL, if not across the board, as they would a rule, more circumstantially.

International adjudicative institutions have occasionally done the same. These institutions have repeatedly declined to clarify the precautionary prin-

140. See Ka Lok Yip, *The ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities: Sociological and Democratic Legitimacy in Domestic Legal Orders*, 8 *TRANSNAT'L LEGAL THEORY* 224, 226–32 (2017) (reviewing some practice).

141. *Id.* at 226–27 (discussing cases).

142. HCJ 3003/18 Yesh Din–Volunteers for Human Rights v. Chief of General Staff, IDF (May 24, 2018) (Isr.), ¶ 45, <https://supreme.court.gov.il>.

143. See Daniel Bodansky, *Deconstructing the Precautionary Principle*, in *BRINGING NEW LAW TO OCEAN WATERS* 381, 391 (David D. Caron & Harry N. Scheiber eds., 2004) (“[T]he various formulations of the precautionary principle . . . differ along virtually every important dimension: the legal status and function of the precautionary principle; the circumstances that trigger its application; [and] the nature of a precautionary response . . .”); David L. VanderZwaag, *The ICJ, ITLOS and the Precautionary Approach: Paltry Progressions, Jurisprudential Jousting*, 35 *U. HAW. L. REV.* 617, 617 (2013) (asserting that the principle is “well-known for the confusion surrounding its interpretation and practical implications”).

144. *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Case No. 17, Advisory Opinion of Feb. 1, 2011, 11 *ITLOS Rep.* 10, ¶ 135.

145. *E.g.*, Memorial of Argentina, *Pulp Mills on the River Uruguay* (Arg. v. Uru.), 2007 *I.C.J.* ¶¶ 5.13–5.19 (Jan. 15); Memorial of the Republic of Hungary, *Gabcikovo-Nagymaros Project* (Hung. v. Slov.), 1994 *I.C.J.* ¶¶ 6.63–6.69 (May 2); Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products*, ¶ 121, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) (*adopted* Feb. 13, 1998) [hereinafter WTO Appellate Body, *Beef Hormones*] (“The basic submission of the European Communities is that the precautionary principle is, or has become, ‘a general customary rule of international law’ . . .”).

ciple's CIL status,¹⁴⁶ but they have in discrete settings applied the principle as CIL—in ways that radiate beyond the specific texts in which it appears.¹⁴⁷ For example, in the 1998 *Beef Hormones* case, the Appellate Body of the World Trade Organization (WTO) determined that it was “unnecessary, and probably imprudent” to opine on the principle's status in CIL.¹⁴⁸ The Appellate Body further noted that the principle was not codified in the WTO agreement at issue.¹⁴⁹ However, the Appellate Body then said that the principle “finds reflection” in, and in certain circumstances may inform, what states do under that agreement.¹⁵⁰ The Appellate Body effectively used the precautionary principle as CIL. It licensed states to restrict trade consistently with the precautionary principle, even though the text of the WTO agreement did not provide for that result.

The ICJ's 2010 *Pulp Mills* judgment is similar. Like the Appellate Body in *Beef Hormones*, the ICJ in *Pulp Mills* declined to resolve the CIL status of the precautionary principle.¹⁵¹ Nevertheless, the ICJ noted that “a precautionary approach may be relevant in the interpretation and application of the” bilateral treaty at issue.¹⁵² It then determined that the treaty obligation

to protect and preserve [the aquatic environment] . . . has to be interpreted in accordance with [what] . . . may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.¹⁵³

Here, the ICJ used the precautionary principle as “general international law” to define the treaty obligation at issue. It gave the principle CIL force.

Where does this leave us? In the everyday practice of international law, CIL looks nothing like the rulebook conception. It does not derive from in-

146. See *supra* note 71 and accompanying text.

147. See *Whaling in the Antarctic* (Austl. v. Japan; N.Z. intervening), Judgment, 2014 I.C.J. 226, 453, ¶ 9 (Mar. 31) (separate opinion by Charlesworth, J.) (“These observations suggest that treaties dealing with the environment should be interpreted wherever possible in light of the precautionary approach”); *Pulp Mills on the River Uruguay* (Arg. v. Uru.), Judgment, 2010 I.C.J. 13, ¶ 100 (Apr. 20) (dissenting opinion by Vinuesa, J.) (describing the precautionary principle as “general international law”); *Southern Bluefin Tuna* (N.Z. v. Japan; Austl. v. Japan), Case Nos. 3 & 4, Order of Aug. 27, 1999, 3 ITLOS Rep. 280, ¶¶ 79–80 (interpreting a treaty obligation to cooperate on maritime conservation to mean “that measures should be taken . . . to avert further deterioration of the southern bluefin tuna stock,” notwithstanding the “scientific uncertainty regarding measures to be taken to conserve the stock of southern bluefin tuna”).

148. WTO Appellate Body, *Beef Hormones*, *supra* note 145, ¶ 123.

149. *Id.* ¶ 124.

150. *Id.*

151. See *Pulp Mills on the River Uruguay* (Arg. v. Uru.), Judgment, 2010 I.C.J. 13, ¶¶ 160–64 (Apr. 20).

152. *Id.* ¶ 164.

153. *Id.* ¶¶ 61, 204.

telligible and generally applicable secondary rules. It emerges more organically, through an unstructured process in which the participants apply variable criteria to justify their normative positions in CIL. These disjointed interactions define the content of CIL. While they sometimes are sufficiently stable to generate conduct norms that operate like rules, they often are not. Much of CIL's content is inconstant and contingent, not fixed or generalizable, as rules would be.

B. *The Law in Customary International Law*

CIL is not the only kind of law that lacks secondary rules and manifests in variable conduct norms. The common law is similarly “untethered.”¹⁵⁴ Digging into the analogy is instructive because it helps explain how CIL can be recognizable as law, without conforming to the rulebook. After all, the common law plainly is law and does not so conform.

The common law is, as Frederick Schauer says, an inherently “contingent and non-canonical” kind of law.¹⁵⁵ Its content does not derive from secondary rules because judges may create or change it as they see fit. The common law is “subject to modification . . . when it appears to the common law judge that application of what was previously thought to be the rule would be silly, or inconsistent with good policy, or inconsistent with the justifications for having that rule.”¹⁵⁶ And common law judges do not just tinker around the edges. They sometimes discard what had been a conduct rule and replace it with a normative position that is altogether different—not necessarily with another rule. Many common law decisions reflect all-things-considered assessments that turn heavily on the facts of the case and the judge who happens to be deciding it.¹⁵⁷ The content of the common law thus can be highly variable; it does not always come in the form of rules.

154. Lea Brilmayer, *Untethered Norms After Erie Railroad Co. v. Tompkins: Positivism, International Law, and the Return of the “Brooding Omnipresence,”* 54 WM. & MARY L. REV. 725, 727 (2013). This analogy is not new, but most scholars who focus on it address the role of courts in developing or applying each kind of law. *E.g.*, Curtis A. Bradley, *Customary International Law Adjudication as Common Law Adjudication*, in CUSTOM'S FUTURE, *supra* note 12, at 34, 34 (“The application of CIL by an international adjudicator . . . is best understood in terms similar to the judicial development of the common law . . .”); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561 (1984) (arguing that although “customary international law has often been characterized as ‘federal common law,’” the analogy is misleading, in large part because CIL “is not made and developed by the federal courts independently and in the exercise of their own law-making judgment”). Scholars commonly also use the analogy in passing. *E.g.*, Anthony D’Amato, *International Law*, in THE OXFORD COMPANION TO AMERICAN LAW 423, 424 (Kermit L. Hall et al. eds., 2002); Guzman, *supra* note 11, at 120, 124.

155. FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 178 (1991).

156. *Id.* at 175.

157. *Id.* at 176 (discussing the canonical cases of *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916), and *Henningens v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960)).

Some might intuit that common law doctrines on precedent and *stare decisis* function like secondary rules that help establish stable conduct rules. But Brian Simpson has persuasively rebutted that logic. As an initial matter, he explains, these doctrines are relatively recent innovations, not inherent in or historically part of the common law. The common law existed for centuries as a kind of law before the idea emerged that “there could be binding precedents” or even that precedents had “status as authorities.”¹⁵⁸ More to the point: common law precedents do not operate like secondary rules. They do not establish discernible, generally applicable criteria for validating particular normative positions as law. A precedent’s authority in future cases is not stable or fixed but variable, uncertain, and contestable. “It is as if,” Simpson has said, “the system placed particular value upon dissension, obscurity, and the tentative character of judicial utterances.”¹⁵⁹

In the absence of secondary rules, the stickiness of a normative position—the extent to which it is stable, like a rule, or more transitory—depends on how it is used by the group of actors who participate in creating and applying it. As Simpson explained, “common law rules enjoy whatever status they possess . . . because of their continued reception.”¹⁶⁰ “[T]he relative value of formulated propositions of the common law depends upon the degree to which such propositions are accepted as accurate statements of received ideas or practice, and . . . the degree to which practice is consistent with them.”¹⁶¹ That sounds an awful lot like CIL.

The main difference between the two kinds of law is that the common law is centered around courts. Courts generally are available to apply the common law in concrete cases and play an outsized role in determining its content. Although courts also participate in the creation and application of CIL, they are less prominent here. A broader range of actors exert control over CIL’s content. As such, the authority of particular normative positions within CIL is even more diffuse and elusive than it is in the common law. CIL’s authoritative content is harder to pin down.

The analogy offers three lessons for CIL. First, a normative position can be highly contingent and transitory but still law. A common law decision creates law, even when it does not express its content as a conduct rule. The decision establishes the law of the case, no matter whether other judges decide to follow it in subsequent cases. It is the law in the jurisdiction in which it is decided, even if another court in a different jurisdiction declines to give it *res judicata* effect and comes out the other way. The same goes for CIL. The precautionary principle is CIL in *Pulp Mills*, even though its generaliza-

158. A.W.B. SIMPSON, *LEGAL THEORY AND LEGAL HISTORY: ESSAYS ON THE COMMON LAW* 359 (1987).

159. *Id.* at 372.

160. *Id.* at 367–68.

161. *Id.* at 377; see also SCHAUER, *supra* note 155, at 180–81 (explaining that “common-law rules become encrusted over time” through understandings, established in cases and the professional discourse, “that tend to give those rules presumptive albeit not conclusive force”).

bility to other contexts is unclear.¹⁶² It is the CIL of the case, no matter whether other actors follow it in future cases.

Second, because of this “contingent and non-canonical” character,¹⁶³ the authority of different normative positions within CIL is not binary or constant.¹⁶⁴ It is variable. Some normative positions (e.g., the prohibition of genocide) are more authoritative and sticky than are others (e.g., the ICRC’s positions in the *Interpretive Guidance*). Moreover, the authority of any particular position can be challenged in real time. Although preexisting expectations usually inflect how a position is used and received, its authority can still be contested as a case plays out and then diminished or reconstituted depending on what happens.

This is true even of positions that fall toward the rule end of a spectrum. For example, recall that the ICJ decided in *Jurisdictional Immunities* that CIL entitles foreign states to immunity from national jurisdiction in cases involving wartime atrocities.¹⁶⁵ Although the ICJ’s position on foreign state immunity is highly authoritative, it was contestable enough for the Italian judiciary to depart from it. Now, the CIL on foreign state immunity in Italy consists not of one position (immunity) or the other (no immunity) but of both simultaneously. Each position has some authority in Italy, but this authority is contingent, rather than absolute. Italy’s foreign ministry might reasonably treat the ICJ position as authoritative on the world stage, even as Italian claimants suing Germany in Italian court do not.

Third, the contingent character of these two kinds of law affects the job of lawyering. Because authority is not binary or stable, the key questions for legal practitioners are not whether a particular normative position is law but to what degree, in what settings, and for whom does it have some legal effect.¹⁶⁶ These questions cannot be answered with legal methods that are de-

162. See *supra* notes 152–153 and accompanying text.

163. SCHAUER, *supra* note 155, at 178.

164. The concept of soft law has been used to make a similar point: the authority that attaches to different legal norms operates along a soft–hard spectrum. Authority thus can be varying degrees of soft or hard; it need not fall on the hard side of the spectrum to be law. See W. Michael Reisman, *The Concept and Functions of Soft Law in International Politics*, in 1 ESSAYS IN HONOUR OF JUDGE TASLIM OLAWALE ELIAS 135, 136 (Emmanuel G. Bello & Bola A. Ajibola eds., 1992); Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421, 421 (2000). For an excellent overview of the literature on soft law, see Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 712–17 (2010).

165. *Supra* note 50 and accompanying text.

166. See W. Michael Reisman, *The Democratization of Contemporary International Law-Making Processes and the Differentiation of Their Application*, in DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 15, 28–29 (Rüdiger Wolfrum & Volker Röben eds., 2005) (“Because the question of whether international law will be effective in a particular dispute will increasingly depend upon the arena or forum in which the dispute is heard, scholarly and practitioner statements of what the law is . . . will increasingly have to be qualified by reference to *where* a potential dispute in the future may be initially characterized in terms of law and *where* those characterizations will thereafter be put to political use.”).

signed for a rulebook. In other words, the law's content cannot be determined by applying any secondary rules (there are none to apply) or assuming that that content will be in one context what it was in another (it might not be). The legal analysis requires more craft and expertise than the straightforward application of preestablished rules. Identifying whether a particular normative position is likely to have CIL force requires one to examine the relevant precedents, identify the propositions for which they stand, and assess their salience in the varied settings in which they might be invoked. "[L]ife might be much simpler," Simpson said, "if the common law consisted of a code of rules, identifiable by reference to source rules, but the reality of the matter is that it is all much more chaotic than that."¹⁶⁷ The same is true of CIL.

Where the law has, if only for the time being, stabilized, expectations about its content can be gleaned from established patterns of behavior. Analysts can do reasonably well (though not perfectly) at anticipating how particular positions will play out—to what extent or in what settings the positions will resonate as law. Such predictions become less reliable when the law is highly inconstant and contentious. This is where the contrast between the common law and CIL is most relevant. Because CIL's content cannot be settled by any one actor, it more often remains splintered. Competing positions on the law can stay in circulation for extended periods, each with some authority but none with sufficient authority to stamp out the others. As discussed, this can also happen in the common law. The difference is that, in CIL, it happens not just across cases but also in a single case. Again, it does not follow that the competing positions are not law. It just means that they are a kind of law that does not operate like a rulebook.¹⁶⁸

167. SIMPSON, *supra* note 158, at 368; cf. D'ASPROMONT, *supra* note 10, at 164 ("[S]ubjecting customary international law to a purely formal identification process would run *contra* to its *raison d'être* and would deprive it of its distinctive character.").

168. For those who want a more extensive account of how this material can be law, even though it is splintered and contested, the New Haven School of jurisprudence is instructive. This School defines law as that which is controlling (materially relevant) and authoritative (normatively relevant). More precisely, a policy position is law insofar as people expect the position to be implemented and perceive it to be authoritative. See W. Michael Reisman, *International Lawmaking: A Process of Communication, Address at the American Society of International Law Annual Meeting*, in AMERICAN SOC'Y OF INT'L LAW, PROCEEDINGS OF THE ANNUAL MEETING 101 (1981) [hereinafter Reisman, *International Lawmaking*]; see also JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 211, 296, 300, 301 (1994) (positing that law both claims "legitimate authority" and possesses the ability to "impos[e] its will on many over whom it claims authority"). These two attributes of law are similar to the rulebook's elements of a practice and *opinio juris*. But whereas the rulebook requires consistency in the elements to create law, the New Haven School does not. It recognizes that policies vary in the extent to which they are controlling and authoritative, and that this variance makes law itself more splintered than any rulebook would be. Michael Reisman has explained that a policy position can be law, even if its normative content is extremely contingent or hard to pin down; even if it is case-specific, rather than generally applicable; and even if it is accepted and treated as law only among a subset of potential participants. See W. Michael Reisman, *The Quest for World Order and Human Dignity in the Twenty-First Century*:

IV. METHODS OF LEGAL ANALYSIS

I have thus far advanced a descriptive claim that counters the rulebook conception and the many accounts of CIL that reflect it. CIL is not like a rulebook. It does not consist of a set of secondary and primary rules. It emerges more enigmatically and its content is more elastic than the rulebook conception imagines. Why does this matter? One might intuit that, even if the rulebook conception is too simplistic, it still captures something real about CIL. Some CIL norms *do* operate like primary rules and can be said to satisfy a version of the rulebook's secondary rules. So, what's at stake in whether we continue to think about and describe CIL as a rulebook, or we discard that conception and acknowledge that CIL is a messy, variable type of law?

The short answer is that, in purporting to describe CIL, the rulebook conception also structures how most international lawyers assess it—the kinds of questions they ask about it and the analytic methods that they bring to bear on it. This is not just happenstance. Recall that the ILC *Conclusions* are intended “to offer practical guidance” to those who come across CIL in the practice of law.¹⁶⁹ The guidance that they offer is delusory. Given that CIL does not actually operate like a rulebook, analyzing it as if it does is misguided.

This is so for two reasons. First, lawyers who believe that CIL has a set of secondary rules reasonably spend time trying to figure out what the rules are and how they apply in concrete cases.¹⁷⁰ The fact that CIL does not derive from secondary rules means that this exercise is futile. The rulebook conception distracts or misguides analysts by instructing them to look for and faithfully apply secondary rules that do not exist.

As discussed, CIL's content is determined not by any secondary rules but by how different normative positions are used and received in concrete settings. Lawyers who want to identify that content might examine the same raw data that are relevant for the rulebook—the various claims and counterclaims on an issue, as expressed in the operational practice, judicial deci-

Constitutive Process and Individual Commitment, 351 RECUEIL DES COURS 15, 131–32 (2010) [hereinafter Reisman, *Quest for World Order and Human Dignity*]; Reisman, *supra* note 166, at 136; Reisman, *International Lawmaking*, *supra* at 112. To be clear, the New Haven School defines law more capaciously than the rulebook does, but its definition is not completely open-ended. It emphasizes that the distinguishing features of law are an authority signal that is lacking in mere policy preferences and a control signal that is not evident for mere aspirations. See Reisman, *International Lawmaking*, *supra* at 108–10. This definition of law is sometimes difficult to apply; we cannot always be sure whether or to what extent a particular claim reflects the law. But as discussed *supra* in Sections II.A and II.B, the same is true of the rulebook's definition.

169. ILC, *Conclusions on CIL*, *supra* note 13, at 122; see also Michael Wood, Editorial Comment, *The Present Position Within the ILC on the Topic of “Identification of Customary International Law”*: In Partial Response to Sienho Yee, Report on the ILC Project on “Identification of Customary International Law,” 15 CHINESE J. INT'L L. 3, 6 (2016) (“Members of the Commission agree that the outcome . . . should be of an essentially practical nature.”).

170. See, e.g., *supra* notes 72–78 and accompanying text.

sions, verbal pronouncements, and so on. But the question to ask when examining these data is not whether they satisfy some variant of the two-element test. The question is, what do the data reveal about a position's legal salience? To what extent and in what circumstances is the position likely to be regarded as CIL? This question might at times lead to similar results as the rulebook, but it often does not, and even when it does, the analysis is different.

Second, because the rulebook conception directs lawyers to the two-element test, it distorts how they assess different normative positions within CIL. It directs them to ask only whether a position has ripened into a conduct rule, and it instructs them not to factor into their calculus positions that have not. However, positions that do not manifest as conduct rules routinely have legal traction. International lawyers and policymakers need to pay attention to these positions. They need to assess not (or not only) whether a position is a rule but to what extent, in what ways, and for whom it is legally salient. How will the position be advanced and received, and how should they themselves interact with it?

Take the example on the continental shelf. In the early 1950s, when the positions of coastal states were gaining traction but had not yet solidified as rules, any lawyer worth her salt would analyze them as part of CIL. These positions already had the look, feel, and effect of CIL, not across the board, as rules would, but by some actors in some settings. Advising a client that the positions were not CIL—that they were just politics or “fake custom”¹⁷¹—would be deeply misleading, bordering on malpractice. The client would understandably be confused by the considerable support for these positions. He would confront legal problems if he started exploiting a continental shelf without first obtaining permission from the states that had already made it their own. And he would be derelict if he himself were a state official who did nothing as his coastal neighbors asserted jurisdiction over parts of the continental shelf that his government could also reasonably claim. In each of these scenarios, the client would have good reason to complain: “You told me that these positions are not legally cognizable; why do people talk and act as if they are?” The fact that they had not satisfied the rulebook's threshold would have been almost entirely irrelevant to understanding or engaging with the then-existing law on the continental shelf.

The point is not limited to situations in which a normative position is on the verge of becoming a rule. Consider the current contest about when, if ever, states may use cross-border force to defend against attacks by nonstate actors.¹⁷² Several states contend that such force is lawful if an attack ema-

171. Tesón, *supra* note 87.

172. I have discussed this contest in more detail elsewhere. Monica Hakimi, *Defensive Force Against Non-State Actors: The State of Play*, 91 INT'L L. STUD. 1 (2015) [hereinafter Hakimi, *Defensive Force*]; Monica Hakimi, *The Jus ad Bellum's Regulatory Form*, 112 AM. J. INT'L L. 151, 180–190 (2018) [hereinafter Hakimi, *The Jus ad Bellum's Regulatory Form*]; Monica Hakimi & Jacob Katz Cogan, *The Two Codes on the Use of Force*, 27 EUR. J. INT'L L. 257, 27883 (2016).

nates from a state that is unable or unwilling to contain the threat.¹⁷³ Moreover, when states invoke this position, the blowback under the *jus ad bellum*—which is defined by both the U.N. Charter and CIL—is often imperceptible.¹⁷⁴

However, authority for the unable-or-unwilling position is still fragmentary and contingent. The position has more authority in some circles and for some operations than it does in or for others. The states that themselves use the position treat it as law in their domestic settings and their interactions with one another.¹⁷⁵ But outside of those arenas, the position's authority is demonstrably weaker. Most states have indicated that, although they tolerate or support discrete operations that might be compatible with the position, they are unprepared to endorse it as a generally applicable rule of CIL.¹⁷⁶ Brazil and France each recently advanced a competing position: that defensive force against nonstate actors is never or almost never lawful.¹⁷⁷

The question under the rulebook is which of the available positions on self-defense is the rule of CIL and, by extension, the U.N. Charter. That question has received enormous attention over the past two decades, with each new incident becoming more grist for the mill. Most efforts to answer it recognize that the raw data are full of ambiguities and inconsistencies. States do not consistently take the same position on the use of defensive force against nonstate actors. But faithful to the rulebook, lawyers insist on distilling all the data into a single conduct rule—defining in intelligible and generally applicable terms when defensive force against nonstate actors is lawful.¹⁷⁸

173. *E.g.*, Permanent Rep. of Australia to the U.N., Letter dated Sept. 9, 2015 from the Permanent Rep. of Australia to the U.N. addressed to the President of the Security Council, U.N. Doc. S/2015/693 (Sept. 9, 2015); Chargé d'affaires a.i., Letter dated 31 Mar. 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2015/221 (Mar. 31, 2015); Permanent Rep. of the United States of America to the U.N., Letter Dated Sept. 23, 2014 from the Permanent Rep. of the United States of America to the U.N. Addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014).

174. *See* Hakimi & Cogan, *supra* note 172, at 280–81.

175. *See, e.g.*, U.S. WHITE HOUSE, REPORT ON LEGAL AND POLICY FRAMEWORKS, *supra* note 136, at 10.

176. *See, e.g.*, Jutta Brunnée & Stephen J Toope, *Self-Defence Against Non-state Actors: Are Powerful States Willing but Unable to Change International Law?*, 67 INT'L & COMP. L.Q. 263, 269–77 (2018) (reviewing recent practice).

177. Mission of Brazil to the U.N., Statement by H.E. Ambassador Mauro Vieira, Permanent Representative, to U.N. Security Council, Upholding International Law Within the Context of the Maintenance of International Peace and Security (May 17, 2018), https://drive.google.com/file/d/15CWYwX_G9K610xBWb7JmKelCOYHZDKSX/view [<https://perma.cc/8Z4Z-V7B5>]; République Française, Droit International Appliqué aux Operations dans le Cyberspace, at 10–11, <https://www.justsecurity.org/wp-content/uploads/2019/09/droit-internat-appliqu%C3%A9-aux-op%C3%A9rations-cyberspace-france.pdf> [<https://perma.cc/GX2U-6X5B>].

178. *Compare, e.g.*, NICO SCHRIJVER & LARISSA VAN DEN HERIK, LEIDEN POLICY RECOMMENDATIONS ON COUNTER-TERRORISM AND INTERNATIONAL LAW ¶¶ 29, 32 (2010)

That approach flattens all the discrepancies that affect how this area of the *jus ad bellum* actually operates. For those who want to engage with or understand the law on defensive force, the question of how a detached observer might distill all of the practice into a single, standalone rule is almost completely beside the point. These people need to know what positions are seriously in contention and to what extent, when, and by whom each position is likely to be accepted and treated as law. For instance, policymakers in states that endorse the unable-or-unwilling position need to be advised that it is not in fact a rule. Otherwise, they will be surprised to learn that their operations are in certain contexts not authoritative but rather regarded as lawless. They will be confused by the varied responses to their operations—the fact that some operations compatible with the unable-or-unwilling position garner broad support,¹⁷⁹ while others are only quietly tolerated,¹⁸⁰ and still others are condemned.¹⁸¹ They might also forego opportunities to try to earn authority for particular operations in real time and thus increase their base of support. In short, they will to varying degrees be caught off guard, misguided, or confused.

The rulebook conception is not just unhelpful here. It is pernicious. It makes it harder, rather than easier, for people to partake in an important aspect of global life. It suggests that the kinds of questions that enable policymakers to make sense of and engage with CIL are somehow improper or extraneous to law. After all, to ask and answer these questions is to do almost the opposite of what the rulebook instructs—not to crystallize the law into discernible, generally applicable rules but to highlight and examine the various positions that prevent any one of them from being a rule.

Some might wonder whether my account really provides more analytic clarity. At least the rulebook tries to impose some order on CIL, they might say. But there is a difference between analytic confusion and legal or factual uncertainty. The rulebook conception causes confusion because it pretends

(purporting to “clarify[] the state of international law on the use of force against terrorists” and endorsing the unable-or-unwilling position), and Elizabeth Wilmschurst, *The Chatham House Principles of International Law on the Use of Force in Self-Defence*, 55 INT’L & COMP. L.Q. 963, 963–64, 969 (2006) (recognizing that “the law in this area is politically and legally contentious” but then purporting to “reflect current international law” and positing that the unable-or-unwilling position is law), with Brunnée & Toope, *supra* note 176, at 264, 266 (arguing that, while “the parameters of [self-defense] remain contested,” “the evidence does not support the existence of [the unable-or-unwilling] standard in current customary law”).

179. An example is the coordinated campaign against the so-called Islamic State in Iraq and Syria. See *infra* Section V.B.2.

180. Examples include Ethiopia’s 2006–2007 incursion into Somalia and some U.S. drone operations. For a discussion of these examples, see Hakimi & Cogan, *supra* note 172, at 284–85.

181. For example, in 2008, both the Organization of American States and the Rio Group of Latin American States condemned as unlawful Colombia’s incursion into Ecuador to target a non-state rebel group. Org. of Am. States, Rep. of the OAS Comm’n that Visited Ecuador and Colom., at 10, OEA/Ser.F/II.25 RC.25/doc 7/08 (Mar. 17, 2008) (reprinting Rio Group Declaration).

that CIL is something that it is not. It impedes people from seeing CIL for what it is and then making decisions on that basis. And it directs them toward methods of analysis that are at best irrelevant and at worst disorienting. My account informs people of how CIL actually works. Decisionmakers might be unsure of what to do with CIL or of how others will interact with it, but they can at least map out its terrain, identify and assess their options, and plan for different eventualities.

V. NORMATIVE APPRAISALS

It's bad enough that the rulebook conception directs lawyers to use analytic methods that are unsound. But this conception of CIL is corrosive for another reason, as well. Recall that it is not just the dominant descriptive account of CIL, and not just a framework for analyzing CIL, but also the normative metric against which CIL is most often evaluated. The rulebook conception portrays CIL's non-rule-like qualities as a problem that must be corrected or disavowed.¹⁸²

That normative logic systematically devalues CIL. Appraisals that assume that CIL must be like a rulebook do not even consider how CIL might contribute to the global order by *not* conforming to a rulebook. I argue below that the result is to obscure and discount important work that CIL does to: (1) limit biases in the law, (2) achieve normative settlements through law, and (3) promote values that are associated with the rule of law. To be clear, I am not saying that CIL always does every one of these things or that what it does is always, on balance, desirable. I am also not saying that, if we were designing CIL for an ideal world, we would choose for it to operate as it does. We might prefer for CIL to conform to the rulebook conception. But given that it does not, that conception contributes to the immense skepticism of it. The rulebook conception obscures much of the good that CIL (as it currently operates) does. The implications for future efforts to appraise or reform CIL are significant.

A. *Limiting Bias*

In insisting that CIL has certain secondary rules, the rulebook conception breeds a prominent set of attacks on its legitimacy. According to the rulebook, the secondary rules help keep CIL consensual and therefore legitimate.¹⁸³ They are supposed to weed out tendentious claims about CIL—claims that are biased in favor of some actors, at the expense of others—so that CIL's content has enough support to be legitimate as law.

This logic is evident in the ILC *Conclusions*. The accompanying commentary underscores that the metasecondary rule for CIL—the two-element test—works to separate the wheat from the chaff. “It serves to ensure that the

182. See *supra* Section II.C.

183. ILC, *Conclusions on CIL*, *supra* note 13, at 122.

exercise of identifying rules of customary international law results in determining only such rules as actually exist.”¹⁸⁴ Without the two-element test and other secondary rules, the commentary explains, we cannot be sure that a given practice has a sufficient degree of “acceptance among States that it may be considered to be the expression of a legal right or obligation.”¹⁸⁵ The secondary rules thus are supposed to save CIL from a serious legitimacy problem. If people do not rigorously apply these rules, if they treat tendentious claims as CIL, then CIL will lack the requisite degree of acceptance to create legitimate law.¹⁸⁶

The same logic animates the persistent attacks on CIL’s legitimacy.¹⁸⁷ Critics of CIL assume that the rulebook’s secondary rules are what keep it consensual and therefore legitimate. They argue, however, that these secondary rules do not work. And in the absence of meaningful secondary rules, the critics claim that CIL cannot be consensual or legitimate; it must just be a foil for some actors—usually, the most powerful actors—to impose their own biases on everyone else.

My account of CIL reveals that this logic is flawed. CIL derives what legitimacy it has not from any secondary rules but from the process through which it is developed and used. Because this process is unstructured, and authority within it is diffusely held, normative positions must be accepted and treated as CIL in order to have the force of CIL. Those who want a position to be CIL must work to earn support for it from other participants in the process. This serves to check (though not eliminate) the effect of biased or tendentious claims in CIL.¹⁸⁸ A normative position becomes entrenched enough to operate like a conduct rule only if it actually acquires widespread support. The support that entrenches the rule also evinces some consensus for it.

Positions that are more controversial are, almost by definition, less entrenched. These positions might still be invoked as law, but they can more readily be challenged or evaded. A claim that a contested position is CIL can

184. *Id.* at 125.

185. *Id.*

186. This logic is also evident in how one ILC member has described the impetus for the *Conclusions*. See Nolte, *supra* note 56, at 8–9. He explained that the failure to apply shared secondary rules creates the risks of bias and abuse; global actors might “use the available information selectively for the purpose of arriving at certain results.” *Id.* at 8. So, he said, “it is important . . . to articulate and maintain a common standard, and to ascertain that the identification of customary rules is not done lightly. Otherwise, the authority and the value of customary international law as an important source of international law could diminish . . .” *Id.* at 8–9. Again, the suggestion is that CIL’s secondary rules must be established and rigorously applied in order for its content to be legitimate. *Id.*

187. See *supra* Section II.C.

188. See Stephen Toope, *Powerful but Unpersuasive? The Role of the United States in the Evolution of Customary International Law*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 287, 313 (Michael Byers & Georg Nolte eds., 2003) (“The fluidity of the processes of construction of customary law can be a shield against hegemonic control.”).

easily be countered with a claim that it is not. The openness of the process is what enables the participants to shield themselves from the CIL positions with which they disagree.¹⁸⁹ Put differently, the fluidity and contingency in CIL—the fact that it does not actually conform to the rulebook—limit the risk that it will consistently reinforce the preferences of some actors, at the expense of others. This does not mean that every position that is regarded and treated as CIL is, in the specific settings in which it is used, legitimate. It means that, even though certain uses of CIL might be illegitimate, the CIL process creates ample opportunity to resist those uses and prevent their entrenchment, so that they are not systematically reproduced. The rulebook is quite simply the wrong metric for evaluating CIL's legitimacy.

So what's the right metric? How should we assess the extent to which CIL is contaminated by bias? My account suggests that the question cannot meaningfully be answered in the abstract. Because CIL manifests in diverse ways, those who want to evaluate or contest its legitimacy must examine how it plays out in discrete settings. How, by whom, and with what effect is a particular position used as CIL? And does something about that use make it illegitimate or oppressive? For example, are there reasons to believe that the position is being arbitrarily imposed, despite real opposition and without adequate opportunities to be challenged?

My account also offers three more discrete lessons for reform. First, insisting that CIL is or should be like a rulebook does not make it so. For all the efforts to identify secondary rules for CIL, it still does not have any. The ILC *Conclusions* and similar projects reflect a desire to establish such rules—to make CIL more rule-like by imposing on it a set of secondary rules that ensure that its conduct norms always manifest as primary rules. These efforts should be better justified or abandoned. Those who want to turn CIL into a rulebook should explain not only why its plasticity is such an immense problem (more on this below)¹⁹⁰ but also how their vision can realistically be achieved, given what we already know: secondary rules are in many ways antithetical to the process for CIL and have repeatedly proven to be out of

189. See *supra* Part I. Skeptics sometimes contend that tendentious CIL claims have ripple effects that extend beyond the discrete settings in which they are made—that they corrode all of CIL, including the parts that operate like rules, and degrade the entire enterprise of international law. *E.g.*, Joyner, *supra* note 12, at 45; Tesón, *supra* note 87, at 109. This contention lacks empirical support. But there is plenty of evidence to refute it. In the past few decades, many CIL positions were entrenched and international law itself flourished. And as skeptics themselves underscore, tendentious CIL claims were routine. Such claims were business as usual in a vibrant legal order.

190. On the broader point that variability in the law's content is not necessarily a problem, see Christopher L. Kutz, *Just Disagreement: Indeterminacy and Rationality in the Rule of Law*, 103 YALE L.J. 997 (1994). Kutz argues that the "feature of luck at the heart of the legal system" is completely routine. *Id.* at 1027. Mature legal systems invariably have multiple, at times conflicting sources of authority, such that different decisionmakers can reasonably reach contrary results. *Id.* Kutz explains that this elasticity "does not necessarily corrupt the conclusions actually generated" because a specific decision "can still be defended by pointing to the reasons supporting it." *Id.* at 1027–28.

reach. In the meantime, pretending that CIL is something that it is not has real downsides; it contributes to the confusion and skepticism around CIL.

Second, because CIL draws its legitimacy from its own process, those who worry about its legitimacy should focus on improving this process. Take the concern that the process disproportionately benefits its most active participants—actors who expend the resources promoting their own priorities.¹⁹¹ The solution is not to advise everyone else that the secondary rules will save them. It is to help these actors participate on more equal terms. For example, perhaps the United Nations or civil society groups could help historically marginalized actors advance their preferences through CIL. Or perhaps lawyers could routinely remind these actors that a position is not CIL just because someone claims that it is. Or perhaps we could make more accessible the divergent positions that global actors take on discrete issues, so that no one position solidifies due to the effective lobbying of a select few. In any event, the goal should be to help disenfranchised groups participate in the process, not to distract them with a bunch of fabricated secondary rules.

Third, although CIL is at times infected by bias, the solution is not always to formulate its content as conduct rules. Consider again the contest on defensive force against nonstate actors. Because multiple CIL positions are in play, no one of them operates as a rule. CIL's fluidity enables militarily dominant states to push hard for their unable-or-unwilling position. But the same fluidity enables other states to resist or challenge that position. Trying to formulate this practice into a conduct rule might mean not removing the unable-or-unwilling position from law but rather entrenching it as the rule and therefore making it harder to resist.¹⁹² As between that option and the non-rule-like status quo, the status quo better protects the interests of other states; it preserves space for them to continue pressing for their views and undermining the position that favors militarily powerful states.

The point is that, if we aim to limit the biases in CIL, settling its content in stable conduct rules is not always preferable to the alternatives. After all, rules entrench certain positions in law. If their content is repulsive or oppressively imposed, then solidifying them in law is unappealing. The rule-book's insistence that the conduct norms of CIL always manifest as primary rules pushes in the direction of entrenchment, even when that is not the most desirable or equitable result.

B. *Achieving Normative Settlement*

Assuming that any number of normative positions are reasonable and legitimate, picking one and settling it in law has value that is independent of

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

192. Indeed, a number of expert reports have concluded that the unable-or-unwilling position is the single best position on CIL. *E.g.*, SCHRIJVER & VAN DEN HERIK, *supra* note 178, ¶¶ 29, 32; Wilmshurst, *supra* note 178, at 963–64, 969.

its content.¹⁹³ Normative settlement can enhance CIL's regulatory effect by allowing people to know the consequences of their decisions and to coordinate their behavior accordingly. Although a better settlement is preferable to a worse one, some settlement might be better than none at all.¹⁹⁴

The question for CIL is whether its elasticity makes it ill-suited to achieve a settlement. Recall that this question underlies the debate about the efficacy of CIL. Critics contend that, because CIL is so capacious, it has a hard time settling what must be done—or therefore regulating behavior. The participants can too easily argue their way out of their obligations.¹⁹⁵ This critique suggests that CIL works best as a regulatory tool when its conduct norms are sufficiently precise and entrenched to operate like rules and stymie further contest. The critique thus discounts the relevance of the normative material in CIL that is not rule-like. However, this material routinely also contributes to normative settlements and has regulatory purchase.

1. Settlement in Conduct Rules

An important strand of research already emphasizes that arguing in law helps the participants find and settle on common normative positions—and thus establish new conduct rules.¹⁹⁶ A legal contest invites the participants to focus on the issue in dispute, to crystallize their own views, to feel out their competition, and eventually to converge on conduct rules that they all are willing to accept. The contest is not just a distraction from, a waystation for, or an impediment to settlement. It often is essential to achieving a settlement.

CIL is an especially suitable vehicle for having these contests because it is so pliable—not rigid, like rules.¹⁹⁷ Global actors can easily use CIL to advance a diverse range of legal claims and thus catalyze the kinds of interactions that generate new conduct rules. The resultant rules might stay in CIL or might be prescribed in a new treaty. Remember what happened on the continental shelf.¹⁹⁸ As the claims of coastal states gained traction, they were codified as treaty rules and then accepted as rules of CIL. CIL's malleability facilitated the formation of these rules by giving states a relatively easy way

193. Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1377 (1997) (“An important—perhaps *the* important—function of law is its ability to settle authoritatively what is to be done . . .”).

194. *Id.* at 1371.

195. See, e.g., notes 92–96 and accompanying text.

196. See, e.g., IAN JOHNSTONE, *THE POWER OF DELIBERATION: INTERNATIONAL LAW, POLITICS AND ORGANIZATIONS* 32 (2011) (“Legal argumentation . . . does help to solidify agreement . . .”).

197. I have argued elsewhere that CIL affirmatively invites and facilitates such conflicts. See Monica Hakimi, *The Work of International Law*, 58 HARV. INT'L L.J. 1, 37–39 (2017). But I need not press that point here. For present purposes, it is enough to say that global actors can easily use CIL as a vehicle for having these conflicts.

198. See *supra* text accompanying notes 121–124.

to instigate juris-generative interactions. All the United States had to do was issue a proclamation advancing its legal claim. Here, the non-rule-like character of CIL was an ingredient for, not an impediment to, establishing stable conduct rules that regulate behavior.

Of course, CIL's plasticity can then work to undercut the very rules that it helped to produce. Again, this would not necessarily be a problem. Rules that had been desirable might become outmoded. Their downsides might be newly apparent and significant. Or precisely because they function as rules, they might be too crude to regulate certain governance issues. But in any event, CIL rules do not always unravel. Some CIL rules are deeply entrenched and extremely hard to change, even though they are also at times violated. The prohibition of torture is an example.¹⁹⁹ Moreover, where CIL helps generate new conduct rules that are codified in treaty law, as it did on the continental shelf, the settlement can be further insulated from CIL's own vicissitudes.

The key point is that CIL's malleability does not consistently detract from its capacity to establish stable conduct rules. Its malleability is sometimes how it produces such rules. Any effort to evaluate its efficacy along this dimension thus should account not only for the part of CIL that already manifests as rules but also for all of the other stuff that contributes to rule formation, whether in CIL or in treaties that grow out of CIL. The rulebook conception skews the analysis; it leads people to diminish the non-rule-like material in CIL that helps to produce settled rules.

2. Provisional Settlement

The normative settlements that CIL produces do not come only in the form of rules. They are often only partial or provisional—settlements in the sense that they reflect what the relevant group of actors accepts in a particular setting, at a given moment. Cass Sunstein's concept of "incompletely theorized agreements" nicely captures the idea:

[W]ell-functioning legal systems often tend to adopt a special strategy for producing agreement amidst pluralism. *Participants in legal controversies try to produce incompletely theorized agreements on particular outcomes.* They agree on the result and on relatively narrow or low-level explanations for it. They need not agree on fundamental principle. They do not offer larger or more abstract explanations than are necessary to decide the case.²⁰⁰

Incompletely theorized agreements settle the law for specific contexts, without resolving the larger or deeper issues in dispute. CIL is effective in producing this kind of settlement precisely because it is not rule-like.

199. See, e.g., Guzman, *supra* note 11, at 148, 153.

200. Cass R. Sunstein, Commentary, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735–36 (1995).

Return to the contest on defensive force against nonstate actors. Because this contest is ongoing, it has not produced stable, consistently applied conduct rules. Nevertheless, we can discern the contours of a settlement. It looks something like this: states that use defensive force against nonstate actors usually do not face material or normative repercussions for their operations, especially if they keep their force to a low level. Yet they do not have the full authority of the law behind them, and they risk condemnation for their operations if they seem too trigger happy or if they have to defend themselves before certain institutions, such as the ICJ. This settlement has been in place for at least a few years, but it is unsteady. It can easily shift with a major incident or authoritative decision on defensive force, or a notable change in state behavior. The settlement is not fixed or complete; it is partial and provisional.²⁰¹

Still, it allows the key players to know, more or less, where they stand and establishes the normative backdrop against which they can make concrete decisions. A high-profile incident is illustrative.²⁰² In 2014, the so-called Islamic State in Iraq and Syria (ISIS) occupied large areas of territory, threatening not only those two states but also many others. Dozens of states responded by participating in or assisting a U.S.-led military campaign to defeat ISIS. The campaign was conducted with the Iraqi government's consent, but the legal basis for using force in Syria was contested. Although states widely supported the Syria part of the campaign, they disagreed about whether or why it was lawful.

Then, in November 2015, states that wanted to bolster the anti-ISIS campaign went to the U.N. Security Council and obtained Resolution 2249.²⁰³ The resolution did not identify a legal basis for using force in Syria.²⁰⁴ It left on the table, for states to fight over in future cases, the competing normative positions on self-defense. Yet it also called on states "to take all necessary measures, in compliance with international law . . . to eradicate the safe haven [ISIS has] established over significant parts of Iraq and Syria."²⁰⁵ The practical effect of Resolution 2249 was to confer authority on the anti-ISIS operation; after the Council adopted the resolution, the claim that the operation was unlawful became much harder to sustain.²⁰⁶ The resolution thus shifted the terms of the above settlement on defensive force for this case, while leaving that settlement largely intact for future cases.

The incident is instructive for four reasons. First, the settlements here—both the default settlement that operated in the background and the more specific settlement that is reflected in Resolution 2249—were partial and

201. For evidence of this settlement, see *supra* notes 172–177 and accompanying text.

202. For the facts of this incident, see the sources cited *supra* in note 172.

203. S.C. Res. 2249 (Nov. 20, 2015).

204. *Id.*

205. *Id.* ¶ 5.

206. I defend this assertion in more detail in Hakimi, *The Jus ad Bellum's Regulatory Form*, *supra* note 172, at 187–89.

provisional because states disagree on what the rule on defensive force should be. Given that they disagree, CIL's malleability made a settlement more, rather than less, likely. States almost certainly would have had a harder time agreeing on Resolution 2249 if they first had to define the generally applicable rule in this area. They indicated that the anti-ISIS campaign was, for all intents and purposes, lawful by leaving open the broader question that it presented.

Second, although this area of the *jus ad bellum* does not manifest as a conduct rule, it appears to have had a regulatory effect. A number of states that supported the anti-ISIS campaign hesitated to use force in Syria until the Security Council adopted Resolution 2249.²⁰⁷ The ambiguity in the law before then appears to have impeded these states from doing what they wanted to do. It also might have influenced the conduct of states that acted without Resolution 2249. For example, the contest surrounding the unable-or-unwilling position gave the United States incentives to try to earn authority for the campaign by coordinating with Iraq, pressing other states to support or participate in the campaign, and eventually working in the Council to obtain Resolution 2249.²⁰⁸ The *jus ad bellum* need not manifest as conduct rules—or operate like a rulebook—in order to have regulatory purchase.

Third, if one prizes legal settlements for reducing uncertainty and allowing people to evaluate the costs and benefits of different courses of action, the *jus ad bellum* seems to have served that function. There is little indication that, as states were deciding what to do about ISIS, they were confused about the *jus ad bellum*'s terrain. To be clear, they might have had doubts about how best to navigate this terrain—how to balance the competing considerations that were at issue. But the main players appeared to appreciate the legal implications and risks of the options that were available to them.²⁰⁹

Fourth, the incident supports my earlier point about CIL's legitimacy. To accept the usual narrative about CIL's illegitimacy—which, again, is that CIL is just a tool for subjugation²¹⁰—we need a more refined account of how CIL embeds bias in a case like this one, where its content was porous and contingent. The evidence is mixed. Although a number of militarily dominant states now insist that the unable-or-unwilling position is law, that position was insufficiently entrenched in law to give them all of the authority that they wanted to bolster their exercise of military power against ISIS.²¹¹ They had to earn at least some of that authority by building broad support for their operation both within and outside of the Council. Here, CIL's plia-

207. See *id.* at 190.

208. See Hakimi, *Defensive Force*, *supra* note 172, at 25–26; Hakimi & Cogan, *supra* note 172, at 281–82.

209. See, e.g., Hakimi, *The Jus ad Bellum's Regulatory Form*, *supra* note 172, at 188; Hakimi, *Defensive Force*, *supra* note 172, at 28.

210. See *supra* notes 85–87 and accompanying text.

211. See Hakimi, *The Jus ad Bellum's Regulatory Form*, *supra* note 172, at 187–89, 187 n.187.

bility was a vehicle not just for imposing the U.S. will on everyone else but for rallying many others behind and garnering broad support for the campaign.

The *jus ad bellum*'s content in this area thus remains fluid and contestable but not without settlement. To date, the settlements have been loose enough for the broader normative contest on defensive force to continue. But they have been fixed enough to allow for some predictability in the law's likely application in concrete settings. And they have been important enough to have a material impact. They have been partial and provisional but still real. If one assumes that normative settlements in CIL must come in the form of conduct rules, one misses the ways in which it produces settlements by *not* operating as rules. The effect, again, is to diminish CIL's operational relevance.

C. Promoting Rule of Law Values

Partial and provisional settlements might strike some readers as undesirable for reasons that relate to the rule of law. The rule of law is an ideal type that generally refers not to what law is in a jurisprudential sense but to what makes law, as a political project, desirable. Why and under what conditions should we aspire to live in a society governed by law? Although opinions on that question differ, many accounts of the rule of law define it with criteria that resemble a rulebook. The rule of law is said to require constraining how public officials exercise power by establishing and then consistently and impartially applying relatively fixed conduct rules.²¹² These accounts of the rule of law provide more ammunition for the rulebook's normative logic—for discounting the part of CIL that does not manifest as conduct rules.²¹³

However, the non-rule-like part of CIL fares much better under accounts of the rule of law that prioritize what might be called its "argumentative dimension." Here, the rule of law is less about constraining state discretion or establishing stable conduct rules than it is about "commit[ing] to a certain method of arguing about the exercise of public power."²¹⁴ The idea is that the rule of law is advanced when people in power take seriously the task of explaining publicly why they think they have the authority to

212. For evidence that these accounts inform how many people think about the international rule of law, see, for example, U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004), and Simon Chesterman, *An International Rule of Law?*, 56 AM. J. COMP. L. 331, 342 (2008). For arguments that the accounts are inapt or insufficiently substantiated for the international context, see IAN HURD, *HOW TO DO THINGS WITH INTERNATIONAL LAW* 19–46 (2017), and Jeremy Waldron, *Are Sovereigns Entitled to the Benefit of the International Rule of Law?*, 22 EUR. J. INT'L L. 315 (2011).

213. See *supra* Section II.C.

214. Jeremy Waldron, *The Rule of Law as a Theater of Debate*, in DWORKIN AND HIS CRITICS 319, 330 (Justine Burley ed., 2004).

make particular decisions, and external actors can then scrutinize and challenge those justifications and demand a reasoned response.²¹⁵

The argumentative dimension of the rule of law is valuable because it helps preserve the foundational distinction between sheer power and legitimate authority.²¹⁶ Arguing about authority highlights that authority matters—that material control is not a sufficient basis for making particular governance decisions. Governance decisions must instead be tied to some authority, which itself must be earned, identified, and continuously defended. Put differently, the people in power must justify how and toward what ends they use their power. They must show not only that they *can* control a situation but that they *may*, that they have the right to rule as they want to do.

This dimension of the rule of law was not lost, for example, in the ISIS incident. States consistently acted like having international legal authority for the operation against ISIS mattered. Some states tried to justify the operation with the unable-or-unwilling position. Others offered narrower positions that were more tailored to the facts. Still others asserted that the operation was consistent with the *jus ad bellum*, without explaining precisely why. And several declined to participate in the Syria part of the campaign until the Security Council “cured” what they perceived to be a deficiency in authority.²¹⁷ We can debate why states cared about establishing their authority in this incident or why they sought to preserve their longer term positions on the law. But we should not discount the fact that they did.

215. My claim here is in tension with two prominent strands of thought about international legal argumentation. First, many suggest that irresolvable normative contests fall outside the law, in the realm of ordinary politics. *E.g.*, SHAW, *supra* note 6, at 12 (“Power politics stresses competition, conflict and supremacy . . . [while] law aims for harmony and the regulation of disputes.”). One motivation for relegating these contests to the domain of politics is to prevent the people in power from harnessing law’s normative valence to reinforce their own preferences. If the people in power can claim that the law is whatever they want it to be, then (the reasoning goes) they can use law’s authority to bolster their own power. This reasoning overstates the downsides of the argumentative dimension. Tendentious legal claims do not by themselves constitute authority. Those who make such claims in an effort to get the law on their side must build support for their positions; they must earn authority for what they want to do from other participants in the process. If they do not, their claims can easily be dismissed. By contrast, putting contested issues outside the law suggests that, on those issues, people may exercise their power as they like, without any expectation that they defend a decision in law or subject it to legal challenge. It’s not clear how that outcome would contribute to the rule of law.

Second, the usual explanation for why legal arguments are valuable is that they allow disparate actors to accept and converge on shared norms. Some suggest that that is the only good reason to have a legal argument. *E.g.*, JOHNSTONE, *supra* note 196, at 7 (“If no one can say with authority what the law is . . . what would be the point of making legal arguments at all?”). My claim is that normative settlement is not the only or even the primary reason to care about legal arguments. The argumentative dimension of the rule of law is valuable even when it does not lead to settlement.

216. I develop this argument in more depth in Hakimi, *supra* note 24, at 1305.

217. For a review of states’ normative positions in this case, see Brunnée & Toope, *supra* note 176, at 269–73.

Although CIL's argumentative dimension can have regulatory force, it does not necessarily do so through stable conduct rules. It affects behavior by creating the conditions under which governance decisions are routinely justified, scrutinized, and insofar as they are perceived to be lacking, undermined. Moreover, even when the argumentative dimension does not serve this kind of regulatory function, it promotes other values that are associated with the rule of law. The expectation that governance decisions must be justified in law presses the participants to think about what they are doing under the law and why, to explain their reasons to people who care, and to confront and grapple with arguments to the contrary. If nothing else, Mark Tushnet says, this argumentative practice "express[es] respect for people as reasoning (and reasonable) beings," which "does seem an unqualified human good."²¹⁸ Along similar lines, Jeremy Waldron explains that what we often value in law is that it "occasions, frames, and facilitates a certain process of reflection and argument, rather than just the mechanical conformity of behaviour to an empirically or even numerically defined requirement."²¹⁹ The point is that the rule of law is about much more than just defining and following a bunch of rules.²²⁰

We might in the abstract want to advance all of the attributes that are associated with the rule of law. We might want to foster justification and debate, while also establishing conduct rules that limit official discretion. But as a practical matter, these facets of the rule of law routinely push in different directions and require tradeoffs. Prioritizing the argumentative dimension often means tolerating greater levels of discretion, unpredictability, and inconsistency in the law's application.²²¹ Law best fosters justification and debate by staying elastic and contestable—such that people can use it to advance different positions—not by establishing clear rules that are mechanically applied.

The tradeoff is not always worth making. The question of whether it is depends on the specific interests and values that are at stake and on the political economy in which the law operates. In some circumstances, constraining official discretion through settled conduct rules is both possible and important. But as discussed, it can also be infeasible or repressive. The key insight for now is that no matter whether we ultimately prioritize the argumentative dimension, it is a rule-of-law good. It might not be everything

218. Mark Tushnet, *Critical Legal Studies and the Rule of Law* 12 (Harvard Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 18-14, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3135903 [<https://perma.cc/RF6U-FBXG>].

219. Waldron, *supra* note 214, at 336–37.

220. See, e.g., SAMANTHA BESSON, *THE MORALITY OF CONFLICT: REASONABLE DISAGREEMENT AND THE LAW* 117 (2005) ("Knowing precisely where we stand is not always the point of a provision: instead, the point may be to ensure that certain reasonable debates take place in our society rather than to settle them entirely."); Kutz, *supra* note 190, at 1029 ("The ideal of the rule of law is far better served by lively debate than by wooden consensus because debate renders the law's many values perspicuous in the actual exercise of authority.").

221. See Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 6–9 (2008).

that the rule of law requires, or what we most prize about the rule of law, but it is not nothing. It has independent value.

CIL is particularly good at promoting this dimension of the rule of law because it is so elastic. Global actors can tap into CIL to defend or challenge a broad range of governance decisions.²²² CIL does real good when the people who hold positions of power invoke it to try to establish authority for their decisions or when affected audiences use it to scrutinize or contest particular decisions. The argumentative dimension might be especially valuable when it does not come at the expense of stable conduct rules—when the alternative is not for the conduct at issue to be regulated through conduct rules but for that conduct to occur outside of the law, without any expectation that it be tied to a source of authority and justified in those terms. But again, the argumentative dimension has value even when the tradeoff must be made.

Return to the hypothetical involving the hydroelectric power plant. Assume now that the state that builds the plant does not try to justify the decision to its neighbors but that they invoke the precautionary principle as CIL to complain. They do so, even though the principle's status and content in CIL are unsettled. Advancing the precautionary principle as CIL is a way for these states to contest a decision that affects them, to push the acting state to defend its decision in law, and to argue with it about how best to balance environmental protection against other regulatory goals. That dynamic is valuable from a rule-of-law perspective, no matter whether the participants all come away from the experience with the same understanding of whether or why the decision was lawful. If the alternative is not that the acting state is controlled but that it does whatever it pleases, while others lose a vehicle through which to contest its authority and justify pressing their opposing views, the rule-of-law downsides are negligible.

The implications for reform are straightforward. The best way to enhance the argumentative dimension of CIL is not to clamp down on the part of it that does not manifest as rules. It is to reinvigorate that part—to push global actors to justify or challenge particular exercises of power by invoking CIL, even when their normative positions are splintered and contingent, rather than stable or entrenched. In other words, we should make it harder, not easier, for states to disengage from the argumentative dimension simply by asserting, as the rulebook encourages them to do, that CIL does not exist in the absence of rules.

Let me drill down on two last points for those who still cling to the rulebook conception. First, some might intuit that CIL's argumentative practice itself requires the rulebook. We know that it doesn't. Global actors regularly engage in this practice—they invoke, argue about, and justify their decisions in CIL—even though CIL does not operate like a rulebook. But, skeptics might say, perhaps we need to *pretend* that CIL is like a rulebook in order for them to continue engaging with this practice. Why would that be so? The

222. See *supra* Part I.

recognition that CIL does not conform to the rulebook conception would probably reduce the rote invocations of the two-element test (and good riddance!), but global actors have plenty of other moves for arguing about and justifying particular positions in CIL. The ILC *Conclusions* list a bunch of them.²²³ Although these moves do not function like rules, they still structure much of the discourse on CIL. They remain available, even if we acknowledge that they are not rules. Indeed, discarding the rulebook conception should make them more, not less, appealing; it would clarify that positions that do not satisfy the supposedly high threshold of the two-element test can still have force as CIL—and thus can be worth pursuing in CIL.

The second point is jurisprudential. Some might accept my earlier argument that CIL need not operate like a rulebook to be law.²²⁴ But they might contend that CIL cannot be law, where it only structures an argumentative practice, without authoritatively resolving what ought to be done, whether in generally applicable conduct rules or through more provisional settlements. I disagree. Law does all sorts of things beyond establishing action-guiding prescriptions. The common distinction between law's regulatory and constitutive functions might be useful here. Recall from the ISIS example that CIL can have regulatory purchase, even when its content is contested. The *jus ad bellum* shaped the military behavior of some states, both before and after the Security Council adopted Resolution 2249, despite the contest about its content.²²⁵ However, even assuming that CIL has no regulatory effect in a given context, it still might have a constitutive one. It might structure a certain kind of argumentative practice. This practice is quintessentially legal in nature so long as it centers on the authority to make particular governance decisions and places this authority outside the hands of any one player. Again, constituting this kind of argumentative practice is not everything that we want law to do, but it is not nothing. And it happens to be something that CIL does particularly well.

CONCLUSION

The rulebook conception that dominates current thinking on CIL is not only incorrect but insidious. This conception is too dissociated from the everyday practice of CIL to describe, with any degree of accuracy, what CIL is to the many people who come across or interact with it. Nothing about the rulebook conception is jurisprudentially required. It interferes with or is irrelevant to sound legal analysis. And because it defines CIL so stringently, to include only that which manifests as rules, it systematically obscures and devalues much of the good that CIL does, and favors pushing CIL in directions that are at best ill-considered and at worst counterproductive. We should retire the rulebook conception and acknowledge that CIL is a more variable,

223. See *supra* Section III.A.1.

224. See *supra* Section III.B; *supra* notes 99–100 and accompanying text.

225. See *supra* notes 207–208 and accompanying text.

enigmatic kind of law. Or at least, we should push those who insist on preserving the rulebook conception to explain the reasons why. What exactly do they think they gain by pretending that CIL is something that it is not?

