

ACQUIESCENCE, OBJECTION AND THE DEATH OF CUSTOMARY INTERNATIONAL LAW

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INTRODUCTION

Curtis Bradley and Mitu Gulati have offered¹ a carefully argued and nuanced approach to a central dilemma in international legal theory: once constituted, can customary international law (“CIL”) norms ever be supplanted? As tempting as it might be to weigh-in on the intellectual and doctrinal history of what Bradley and Gulati refer to as the “Mandatory View”—that States may not unilaterally withdraw from CIL rules once such rules are formed²—my contribution here focuses on two, related claims made by Bradley and Gulati and their normative implications. Bradley and Gulati’s first claim has to do with a crucial feature of the birth of CIL: the ability of States as persistent objectors to block the formation of custom. The second claim refutes the possibility that, once birthed, CIL cannot—under the Mandatory View—ever really die. Both these claims require further elaboration and qualification.

I. PERSISTENT OBJECTION

Bradley and Gulati’s first claim is that there is an apparent disconnect in international legal theory which allows States to unilaterally opt-out of the formation of a rule as CIL, but, once “crystalized,” that norm cannot be subsequently violated. This is known as the “persistent objector” rule. Bradley and Gulati ask whether the rule was really intended to be an exception to the Mandatory View and thus whether the rule has obscured the possibility that international actors have, in fact, embraced a “Default

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1. See Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 *YALE L.J.* 202 (2010).

2. See *id.* at 204-05 (describing the “Mandatory View”), 215-26 (discussing historical support for the Mandatory View).

View,” allowing States to opt-out of a CIL norm with sufficient notice and expectation safeguards.³ In large measure this debate turns on the proper reading of a number of canonical decisions issued by the International Court of Justice (“ICJ”) in the mid-twentieth century.⁴ This was just the time (Bradley and Gulati argue⁵) that the Mandatory View was stealthily supplanting the Default View.

The first of these, *The Asylum Case*,⁶ implicated a most peculiar custom. The case arose when a Peruvian military leader, Victor Raul Haya de la Torre, took refuge in the Colombian embassy in Lima after leading an unsuccessful coup attempt. Elsewhere in the world, this would have resulted in a very long stay for Haya de la Torre. For while all nations respect the inviolability of foreign embassy premises, there is certainly no rule requiring a host State to allow a political refugee safe passage out of the embassy, out of the country, and to the asylum State. Nowhere, that is, except Latin America, where there evolved a regional custom of diplomatic asylum.

Imagine, then, the surprise of the Colombian authorities, who, after waiting a few months, made what they assumed was a *pro forma* request to Peru to grant Haya de la Torre safe passage to Colombia. The Peruvians turned them down, asserting that they were not bound by the regional custom of diplomatic asylum. The Court ultimately took Peru’s side in the dispute, ruling that the regional custom was not binding.⁷ Once it became clear that Colombia bore the burden of showing that Peru’s conduct violated international law (as opposed to Peru being required to explain its actions), the result was inevitable.

The most significant aspects of this case were the ICJ’s treatment of a State’s reaction as proof of its opposition to the formation of a custom and its discounting of regional custom as a source of international law. The Court ruled that where a regional (as distinct from a global) custom was concerned, silence on the part of the State in the face of an emerging practice meant that that State objected or protested to the rule. A silent or ambiguous response meant rejection. This ran counter to the general

3. *See id.* at 232, 239-41.

4. *See id.* at 233-34 (discussing the *Asylum* and *Fisheries* cases).

5. *See id.* at 233.

6. *Asylum* (Colom. v. Peru), 1950 I.C.J. 266 (Nov. 20).

7. *See* Herbert W. Briggs, *The Colombian-Peruvian Case and Proof of Customary International Law*, 45 AM. J. INT’L L. 708, 728-731 (1951); ANTHONY D’AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 246-54 (1971); SIR HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 374-77, 380 (1958); H.W.A. THIRLWAY, *INTERNATIONAL CUSTOMARY LAW AND CODIFICATION* 100-03, 136-37 (1972).

presumption in international law that States were obliged to protest loud and often if they wished to avoid being bound by a rule of emerging global custom.

Why, then, did the World Court change the calculus of consent for regional custom in the *Asylum* Case? One can only conclude that the Court wished to suppress regional custom, and the Court found that there was no more effective way to do so than to declare a presumption that fundamentally disrupts the formation of such regional practices. While the ICJ has no qualms about applying rules derived from regional (or at least non-global) treaties, it was concerned that the development of distinctive bodies of regional rules—perhaps not just for Latin America, but also for Europe, Africa and Asia—might unduly interfere with the universal aspirations of international law. The World Court was worried such easy-to-make rules would significantly diminish its power. This is evident in light of an analytically similar case, *Right of Passage over Indian Territory*, decided by the Court in 1960,⁸ the ICJ reached a very different conclusion.

The problem raised in that dispute was Portugal's asserted right to transit both civil administrators, troops and munitions from the Portuguese colony of Goa (on the coast of India) to little Portuguese-controlled enclaves in India's interior. This dispute arose in the late 1950s—a critical time for the process of decolonization around the world—and India did not hide its desire to drive the last vestiges of colonialism from the Indian subcontinent. The Indian authorities denied Portugal's right of passage, assuming (correctly) that if the enclaves could not be re-supplied, they would be ripe for the picking.

The ICJ could have decided the dispute as a matter of global custom: whether there was some inherent right of passage by one nation over the territory of another, especially in situations where one nation's territory completely surrounded another's. The Court declined to undertake this analysis, however, and one can hardly blame them. Such an analysis would have been a daunting and difficult task; it would have required collecting many centuries of State practice over many continents, in order to derive a set of global customary rules for these situations.

Instead, the World Court chose to limit the scope of the analysis to an exceedingly narrow shutter. The ICJ decided to tackle the question of whether Portugal and India (and its predecessors, the British and Maratha rulers) had developed a special, or local, custom allowing Portuguese right of passage. The Court sifted through evidence of the course of dealing between the two sides over the course of many centuries. The ICJ

8. *Right of Passage Over Indian Territory* (Port. v. India), 1960 I.C.J. 6 (Apr. 12).

ultimately concluded that Portugal's right of passage for civil administrators was binding custom on India, although India retained the right to suspend such passage in exceptional circumstances. But as for a right to move troops and weapons over Indian territory, previous permissions to do so had been "mere" comity or courtesy, and in so lacking *opinio juris* it failed as a custom.⁹

In *Right of Passage* and its 1952 *Nationals in Morocco* opinion,¹⁰ the Court essentially decided that it was futile to declare a global custom in a case where it was easier to describe and characterize an ongoing practice between the two disputing parties. And, in using a special custom—which can be analogized to commercial usages and "course of dealing"—the Court resorted to the typical presumption that silence in the face of an emerging practice means acquiescence or acceptance. In these bilateral situations, it appears especially incumbent on States to protest if they are unhappy with the legal positions taken by their neighbors.

For example, in the 1951 *Anglo-Norwegian Fisheries Case*,¹¹ the United Kingdom and Norway contested access to fisheries off the Norwegian coast. Norway had attempted to claim ocean areas through some creative cartography: by drawing "straight baselines" from points along its rugged coastline and asserting that the enclosed areas were exclusive Norwegian fisheries. Norway's zealous "bidding" of a straight-baseline rule, combined with Britain's lack of effective (and well-documented) protests in the early-1900s, meant that Britain had waived its subsequent objection.¹² The Court indicated that Norway's straight-baseline rule was thus not "opposable" by the U.K.

If one regards this pattern of ICJ rulings about the formation of customary international law as troublesome (as Bradley and Gulati do¹³), one would be correct to be concerned—but not for the reasons that Bradley and Gulati express. The persistent objector cases do appear to support, at least implicitly, the existence of the Mandatory View. It would seem that, with the exception of regional custom, fortune favors those States that aggressively stake-out new rules and hope that other nations simply do not notice or fail to act in a timely or compelling manner. Why else have a

9. See D'AMATO, *supra* note 7, at 256–58; THIRLWAY, *supra* note 7, at 138–39.

10. *Right of Nationals of the United States in Morocco* (U.S. v. Fr.), 1952 I.C.J. 176, 199–200 (Aug. 27) (specifically referring to "local custom"). See also D'AMATO, *supra* note 7, at 254–55; LAUTERPACHT, *supra* note 7, at 388–92; THIRLWAY, *supra* note 7, at 92–94.

11. *Anglo-Norwegian Fisheries* (U.K. v. Nor.), 1951 I.C.J. 116 (Dec. 18).

12. See D'AMATO, *supra* note 7, at 258–62; LAUTERPACHT, *supra* note 7, at 368–70; I.C. MACGIBBON, *Customary International Law and Acquiescence*, 33 BRIT. Y.B. INT'L L. 115, 134 (1957).

13. See Bradley & Gulati, *supra* note 1, at 232, 237–41.

persistent objector rule, other than as a signaling device that the time for unilateral opposition to a CIL norm has passed? Despite criticism, the persistent objector rule is likely to remain a robust feature in the development of CIL.

II. IS INTERNATIONAL CUSTOM IMMORTAL?

That leaves the question of how States can effectively “opt-out,” or block the application of a customary rule. While the formation of customary obligations can be foiled by a lack of duration or consensus in State practice, or the occasional denial of *opinio juris*, once a usage has gained momentum it is hard to stop. The general presumption is that, unless a State has persistently objected during the process of crystalizing a customary norm, it will be held to that rule, even if it later regrets or denounces the norm in question.¹⁴ Indeed, Bradley and Gulati go so far as to assert that “[t]he only way for nations to change a rule of CIL (as opposed to overriding it by treaty) is to violate the rule and hope that other nations accept the new practice.”¹⁵

I call this the “Walking Dead View” of CIL, and it is perhaps the decisive feature of the customary regime in international law. It means that States are obliged to protest loud and often if they wish to avoid being bound by a norm of emerging global custom. Subsequent objections to an already-formed custom are likely to be ineffective, and the only way for a State to liberate itself from a CIL obligation is to demonstrate that that norm has been superseded or entered desuetude.¹⁶ But it is worth observing that, with the exception of the acquiescence of coordinate branches of government in constitutional separation-of-powers disputes, in no other

14. Compare Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT'L L. 1, 21 (1985) (“the persistent objector rule has no legitimate basis in the international legal system”), with Maurice H. Mendelson, *The Formation of Customary International Law*, 272 RECUEILS DES COURS DE L'ACADEMIE DROIT INT'L [Collected Courses of the Hague Academy of International Law] [hereinafter RCADI] 155, 227–44 (1998-II) (arguing that the persistent objector rule has substantial authority from international precedents) and Ted L. Stein, *The Approach of the Different Drummer: The Principle of Persistent Objection in International Law*, 26 HARV. INT'L L.J. 457 (1985). See also BRIAN D. LEPARD, *CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS* 229–42 (2010). For the origins of the persistent objector rule in academic literature, see Olufemi Elias, *Some Remarks on the Persistent Objector Rule in Customary International Law*, 1991 DENNING L.J. 37 (tracing it to the writings of Ian Brownlie).

15. Bradley & Gulati, *supra* note 1, at 212.

16. North Sea Continental Shelf (F.R.G. v. Den./F.R.G. v. Neth.), 1969 I.C.J. 3, ¶ 63 (CIL “cannot . . . be the subject of any right of unilateral exclusion exercisable at will by any [State] in its own favour”). See also Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 170–71 (2005); MARK E. VILLIGER, *CUSTOMARY INTERNATIONAL LAW AND TREATIES* 36–37 (rev. 2d ed. 1997).

domain of customary law is persistent objection, by a particular actor in a legal community, entertained as a ground for refusing to enforce a custom.¹⁷ Public international law thus has two peculiar features for customary norms: they may be objected to by a vociferous minority, but, once acceded to, they may not (apparently) be breached, except in the absence of a new rule.

The structure of customary law is thus skewed in favor of rule formation, at least once a threshold has been crossed. Persistent objection can thus be difficult to sustain.¹⁸ As the International Law Association has reported, the persistent objector rule

respects States' sovereignty and protects them from having new law imposed on them against their will by a majority; but at the same time, if the support for the new rule is sufficiently widespread, the convoy of the law's progressive development can move forward without having to wait for the slowest vessel.¹⁹

Tribunals will occasionally allow States to silently abstain from a usage (or to substitute another rule). If other interested nations themselves fail to object, this lack of "opposability" might have the same effect as a successful persistent objection.²⁰ But this is a strategy fraught with risk, and the dynamic of tacit acceptance and persistent objection best describes the formation of CIL.

All this leads to broader—and even more intractable—problems of how a norm of CIL, once formed, later is modified or terminated in application or effect. Put simply, how can there be *desuetudo* for custom (*consuetudo*)?²¹ One myth—perpetuated by Bradley and Gulati—is that, once born, a norm of customary international law can never die.²² But this

17. See also J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 511-12 (2000).

18. See KAROL WOLFKE, *CUSTOM IN PRESENT INTERNATIONAL LAW* 66-67 (2d rev. ed. 1993).

19. Int'l Law Ass'n, *Committee on Formation of Customary International Law, Statement of Principles Applicable to the Formation of General Customary International Law: Report of the Sixty-Ninth Conference, London*, Section II.C.15, Comment (c) (July 25-29, 2000).

20. See *Anglo-Norwegian Fisheries (U.K. v. Nor.)*, 1951 I.C.J. 116, 131 (Dec. 18) (the delimitation rule "would appear to be inapplicable as against Norway, in as much as she has always opposed any attempt to apply it to the Norwegian coast"). See also Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1, 23-27 (1974-75); G.M. DANILENKO, *LAW-MAKING IN THE INTERNATIONAL COMMUNITY* 109-13 (1993).

21. See E. Jiménez de Aréchega, *International Law in the Past Third of a Century*, 159 RCADI 1, 21 (1978-1); D'AMATO, *supra* note 7, at 239-40.

22. See Bradley & Gulati, *supra* note 1, at 212; see also G.J.H. VAN HOOFF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* 99 (1983).

is “a wholly erroneous belief,”²³ and it is refuted in State practice. Custom does evolve over time. The opposite line of argument is that every act contrary to an existing custom “contains the seeds of a new legality,” and that “each deviation contains the seeds of a new rule.”²⁴ Indeed, the ICJ in the 1986 *Nicaragua* Judgment seemed to sanction this approach. It observed that instances of State conduct inconsistent with a particular customary norm could be treated not only as “breaches” of the rule, but also “indications of the recognition of a new rule.”²⁵ In this Freudian construct, every aberrant usage really is a “bid” for a new custom. But sometimes a violation of a CIL norm is just that—an unlawful act that does not really purport to establish a new rule.²⁶ Similarly, it surely cannot be enough for States to unilaterally declare that a custom is no longer real or binding.²⁷

To unwind an existing custom, it must no longer be constituted by its essential ingredients—there must be a contrary State practice, and the old norm must no longer be supported by *opinio juris*.²⁸ This more nuanced stance also has support in the *Nicaragua* Judgment, when the Court noted that “[r]eliance by a state on a novel right or an unprecedented exception to the principle might, if shared in principle by other states, tend towards a modification of customary international law.”²⁹ This may, however, beg the question whether “a lack of state practice consistent with [a norm,] rather than directly contrary practice”³⁰ triggers desuetude for a custom. There is a split among publicists as to whether, in order to complete the process of desuetude, the old custom must be entirely supplanted by a new one. Some authorities insist this must be so, if for no other reason than to avoid lacunae in CIL.³¹ But others argue that “the evidence of the absence of general consensus in respect of a customary rule causes its disappearance even before the replacing customary rule has matured.”³²

23. Jorg Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems*, 15 EUR. J. INT’L L. 523, 531 (2004).

24. VAN HOOF, *supra* note 22, at 99 n.379.

25. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 186 (June 27).

26. See WOLFKE, *supra* note 18, at 65–66.

27. See Akehurst, *supra* note 20, at 8.

28. See VILLIGER, *supra* note 16, at 55.

29. Military and Paramilitary Activities, 1986 I.C.J. at ¶ 207.

30. LEPARD, *supra* note 14, at 279 (original emphasis).

31. See Krzysztof Skubiszewski, *Elements of Custom and the Hague Court*, 31 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 810, 846 (1971) (F.R.G.).

32. Aréchaga, *supra* note 21, at 21; see also Anglo-Norwegian Fisheries (U.K. v. Nor.), 1951 I.C.J. 116, 148 (Dec. 18) (separate opinion of Judge Alvarez) (“[A] new case strongly stated may be sufficient to render obsolete an ancient custom.”).

Despite these disagreements, one can accept the notion that existing customs should not be lightly discarded. Indeed, there should be a higher threshold of uniformity, consistency and volume of State practice in order to terminate “an old, well-settled customary rule,”³³ as opposed to creating a new one in a hitherto unregulated realm of international relations.

One can be agnostic in regard to these questions, but still believe, as Judge Jiménez de Aréchaga noted in his separate opinion in the 1982 *Tunisia-Libya Continental Shelf Case*, that it cannot be enough to subvert an existing custom by vague or inchoate statements³⁴—“in order to have this abrogating effect the new rule must necessarily partake of the nature of a rule of customary law Only a legal rule may abrogate a preexisting one.”³⁵ This statement was clearly intended as a complement to Kelsen’s assertion that “[i]f a substantial number of states repeatedly and effectively violate a rule of custom, and particularly do so with the conviction that they are creating new law, it is difficult to maintain that the old law remains unimpaired.”³⁶

For an existing custom to enter desuetude, patterns of State practice really must change *or* there must be very clear evidence that the usage is no longer “accepted as law.” Put another way, there are two ways to kill a norm of customary international law: divert the course of State practice, or deprive the rule of its legitimacy via *opinio juris*.³⁷ Unlike Bradley and Gulati, I strongly believe that CIL can and should evolve, and that, by no means, are CIL rules immortal.

III. RECONCEPTUALIZING CUSTOM

To their immense credit, Professors Bradley and Gulati confine their analysis of the problem of withdrawal from CIL to a prescriptive antidote rather than a broad attack on the very nature of international custom itself.³⁸ This is just as well, because of all the contemporary challenges to customary international law, the line of inquiry which suggests that CIL can never be a “real” source of international legal obligation can be most

33. WOLFKE, *supra* note 18, at 65.

34. See Akehurst, *supra* note 20, at 8 (explaining that CIL can be altered simply “by repeatedly declaring that the old rule no longer exists”).

35. *Continental Shelf (Tunis. v. Libya)*, 1982 I.C.J. 18, 115 (Feb. 24) (separate opinion of Judge Aréchaga).

36. See HANS Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 454 (Robert W. Tucker ed., 2d ed. 1966).

37. *But see* VAN HOOFF, *supra* note 22, at 101 (arguing that only changes in *opinio juris* can effectuate modifications of CIL).

38. See Bradley & Gulati, *supra* note 1, at 208 (“[O]ur goal is not to challenge CIL’s legitimacy, but rather to better understand how it should work.”).

readily dispensed with. Although most recently popularized in the work of Jack Goldsmith and Eric Posner,³⁹ this critique of CIL obviously has, as its intellectual roots,⁴⁰ Hans Kelsen's and H.L.A. Hart's two-edged attack on international law. Kelsen and Hart famously argued that, to the extent that custom plays any role in international legal obligation, it is a sign of a "premature" legal order,⁴¹ and, even worse, a thinly-disguised natural law vision based on inchoate notions of "international morality."⁴² CIL really is, however, an intensely positivist construct. It is far from being a "subordinate"⁴³ source of international legal obligation and actually quite central to current doctrinal debates.

Goldsmith and Posner take a very different methodological tack, but their provisional conclusion is still the same as Kelsen's and Hart's:⁴⁴ that States have no real obligation to follow CIL rules. Using rational choice and game theory approaches,⁴⁵ Goldsmith and Posner posit four models of behavioral compliance with customary international law norms: coincidence of interest, coercion, cooperation, and coordination. Coincidence occurs when States follow a norm irrespective of the behavior of other nations.⁴⁶ Coercion occurs when strong States force weak nations to comply.⁴⁷ Cooperation and coordination occur when States, out of pure self-interest and the expectation of reciprocity, observe a rule.⁴⁸ In none of these situations, Goldsmith and Posner assert, do States follow such norms according to a sense of legal obligation.⁴⁹ To some degree, Bradley and Gulati share this view.⁵⁰

The flaw in this contention is not so much the game-theoretic perspective (which may well describe the dynamic of some State

39. See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 21-28 (2005).

40. For an intellectual history, see D'AMATO, *supra* note 7, at 23-29; LEPARD, *supra* note 14, at 14-15, 99-100.

41. See H. L. A. HART, *THE CONCEPT OF LAW* 44-47 (Penelope A. Bulloch & Joseph Raz eds., 2d ed. 1994); KELSEN, *supra* note 36, at 440-43.

42. See HART, *supra* note 41, at 219-32; see also KELSEN, *supra* note 36, at 444-45.

43. HART, *supra* note 41, at 45.

44. See GOLDSMITH & POSNER, *supra* note 39, at 225-26.

45. See *id.* at 26-27. See generally Edward T. Swaine, *Rational Custom*, 52 DUKE L.J. 559, 560-67 (2002).

46. See GOLDSMITH & POSNER, *supra* note 39, at 27-28.

47. See *id.* at 28-29.

48. See *id.* at 29-35 (distinguishing "cooperation" as a bilateral, "single-play" Prisoner's Dilemma from "coordination" as multilateral, "repeated-play" scenarios).

49. See *id.* at 39.

50. See Bradley & Gulati, *supra* note 1, at 210-11.

behaviors),⁵¹ but its fundamental assumption as to *why* States obey international law.⁵² Using a hyperactively realist perspective of international relations,⁵³ Goldsmith and Posner conclude that “[m]ainstream international law scholars would not view a behavioral regularity that arises from” their four models “as an example of customary international law.”⁵⁴ For Goldsmith and Posner, to follow a CIL norm because of its inherent value (coincidence), or out of self-interest (cooperation and coordination), or even because of fear of negative consequences (coercion), is inimical with it being a *legal* rule.

That conclusion ignores the rich experience of functional cooperation in the international community. Whether one views functionalism in the sense of expected reciprocities for behavior, or through a wider lens, one must realize that while a State’s compliance with a norm may begin with expectation, apathy, or (even) fear, it ultimately ends with the certainty of legal duty. Functional cooperation between States and international actors is conditioned largely by forces that may have little to do with law. These forces might include: developments in the international economy; movements of people, goods and services; and the globalization of culture and intellectual life.⁵⁵ The phenomenon of functional legal cooperation between States has been overwhelmingly responsive or reactionary. International law has acknowledged the demands of international life, rather than anticipating or directing them. That is not entirely a bad circumstance; some of the signal failings of international law have arisen when lawyers and diplomats have moved ahead of the needs of the international community. International law is doctrinally most vulnerable—and most illegitimate—when it loses touch with its constituencies and function. Therefore, Goldsmith’s and Posner’s belief that a schism should exist between the “true” motivations of States in obeying CIL and their sense of legal obligation is no criticism at all. Put another way, one can be instrumental about the role of CIL in international relations,⁵⁶ without

51. For a review of the game theoretic implications of Goldsmith’s and Posner’s work, see generally George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT’L L. 541 (2005); Swaine, *supra* note 45, at 573–88.

52. See generally Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997); Swaine, *supra* note 45, at 588-92.

53. See Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1875-76 (2002).

54. GOLDSMITH & POSNER, *supra* note 39, at 38.

55. For more on these phenomena, see DAVID J. BEDERMAN, *GLOBALIZATION AND INTERNATIONAL LAW* (2008).

56. Goldsmith and Posner refer to theirs as an “instrumental theory.” See GOLDSMITH & POSNER, *supra* note 39, at 185.

falling into the realist trap that disclaims any proof of norm-compliance as evidence of an international legal obligation.

However, just because customary international law easily escapes the clutches of the realist critique does not make it immune from other charges. Standard accounts of customary law—including CIL—laud its efficiency and nimbleness in incorporating into a legal system the actual behaviors and expectations of that system’s constituents. Custom remains a powerful, if subliminal, source of law, even in “mature” legal systems. But public international law is not a fully mature legal system at all—aspects of it remain strikingly primitive, though only in the sense that public international is highly decentralized and institutionally undeveloped, not ineffective or unsophisticated).⁵⁷ Furthermore, customary international law is supposedly a source of signal strength and flexibility for international law.⁵⁸ It allows international legal actors to informally develop rules of behavior, without the necessity of resorting to more formal and difficult means of law-making (like treaties). Custom “tracks” or follows the conduct of States, international institutions, transnational business organizations, religious and civic groups, individuals involved in international matters, and many other actors.⁵⁹ These functional aspects of CIL appear to have been overlooked by Bradley and Gulati.

Indeed, CIL’s ostensible efficiency appears to have been a primary motivation for its incorporation into the ICJ’s Statute Article 38’s formulation of the sources of international law. As Baron Descamps, President of the Advisory Committee of Jurists, noted in 1920: CIL is “a very natural and extremely reliable method of development [of international law] since it results entirely from the constant expression of the legal convictions and of the needs of the nations in their mutual intercourse.”⁶⁰ But efficiency and “reliab[ility]” may have two very different meanings here. The extent to which CIL effectively tracks State

57. DAVID J. BEDERMAN, *THE SPIRIT OF INTERNATIONAL LAW* 94-95 (2002); *see generally* A.I.L. Campbell, *International Law and Primitive Law*, 8 O.J.L.S. 169 (1988) and Yoram Dinstein, *International Law as a Primitive Legal System*, 19 N.Y.U. J. INT’L L. & POL. 1 (1986).

58. *See* R.R. Baxter, *Treaties and Custom*, 129 RCADI 25, 42, 96 (1970) (Neth.); David Fidler, *Challenging the Classical Concept of Custom*, 1996 GER. Y.B. INT’L L. 198, 220-24 (describing CIL as a “dynamo”); LEPARD, *supra* note 14, at 371-79; Julius Stone, *On the Vocation of the International Law Commission*, 57 COLUM. L. REV. 16, 21, 32 (1957) (explaining that CIL is superior to codification).

59. For the development of CIL by individuals, NGOs, and members of international “civil society,” *see* Christiana Ochoa, *The Individual and Customary International Law Formation*, 48 VA. J. INT’L L. 119 (2007).

60. *See* Baron Descamps, *Address Before the Advisory Committee of Jurists* (July 2, 1920), in PERMANENT COURT OF INTERNATIONAL JUSTICE, ADVISORY COMMITTEE OF JURISTS, PROCÈS-VERBAUX OF THE COMMITTEE, June-July 1920, at 322.

behavior (the sense that Descamps employed) is a very different inquiry than whether a particular customary norm is rational or reasonable.⁶¹

Some scholars have inferred that CIL is more forgiving in embracing unreasonable norms than any realm of domestic law, public or private,⁶² where irrational customs are routinely struck by judges. Many of the factors that tend towards the promotion of efficient customs are notably absent in international relations.⁶³ These are, most particularly, the lack of homogeneity among States in the international community and the unlikelihood that States will play reciprocal roles on most contentious issues. Such a reciprocal relation occurs when international actors find themselves routinely on both sides of the problem, such as being *both* buyers and sellers in a commercial transaction.⁶⁴ Nevertheless, CIL norms are most likely to flourish precisely in the interstices of international relations, where States have homogenous objectives and are likely to appreciate both sides of an issue in relatively *non*-contentious circumstances.⁶⁵ While it may well be true that there is no prohibition on CIL's incorporation of irrational norms, such is a highly unlikely occurrence.

The refutation of these critiques of CIL may beg the larger implications of the efficiency paradox for CIL. On this issue, Goldsmith's and Posner's critique hits closer to the mark, and their conclusions are amplified by Professors Bradley and Gulati.⁶⁶ "Multilateral coordination problems," Goldsmith and Posner argue, cannot "easily be solved in the informal, unstructured, and decentralized manner typically associated with customary international law."⁶⁷ This, of course, converts CIL's supposed signal strengths—its informal, unstructured and decentralized character—into fatal flaws. But in an international legal system which already features

61. See Francesco Parisi & Nita Ghei, *The Role of Reciprocity in International Law*, 36 CORNELL INT'L L.J. 93, 122–23 (2003); Norman & Trachtman, *supra* note 51, at 554–55.

62. See Eugene Kontorovich, *Inefficient Customs in International Law*, 48 WM. & MARY L. REV. 859, 877-96 (2006).

63. Some factors are present, such as the (relatively) small number of States (about 190 today), and the likelihood (at least for some issues) of a high number of repeat transactions. See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* 84, 178-81 (1991).

64. See *id.* at 54; Kontorovich, *supra* note 62, at 893–94.

65. See Kontorovich, *supra* note 62, at 916-17 (discussing CIL of diplomatic privileges and immunities as being paradigmatic of this phenomenon), 917-20 (examining laws of war and human rights, and concluding that these realms are unlikely to find equilibrium with efficient customs because of a lack of reciprocity and mutuality); see also Clayton P. Gillette, *The Exercise of Trumps by Decentralized Governments*, 83 VA. L. REV. 1347, 1373-74 (1997) (explaining that homogenous groups use custom as a way to avoid hold-out problems by individuals).

66. See Bradley & Gulati, *supra* note 1, at 239-46.

67. GOLDSMITH & POSNER, *supra* note 39, at 37.

many highly-structured mechanisms for law-creation (such as functional international institutions, the International Law Commission, and treaty-drafting or treaty-review diplomatic conferences), it certainly makes sense that there should also be an alternative set of processes for CIL formation. The dynamic of State practice and CIL offers the best hope for such an alternative to the glacial pace of treaty-making and sclerotic attempts at treaty enforcement,⁶⁸ application, and compliance.

At a time when customary international law is under attack by both extreme positivists (who suggest that its processes are illegitimate and non-transparent⁶⁹) and those of a naturalist bent (who regard CIL as merely pandering to State interests⁷⁰), it might be useful to recall that in some ways custom is the *most* positive and progressive of international law sources. CIL is certainly the most likely to track (although, I concede, a bit inelastically as Bradley and Gulati suggest)⁷¹ the actual behavior of international actors. The market aspect of customary norm-creation largely ensures that. Moreover, as Anthony D'Amato has observed, “[c]ustom is a dynamic process of law-creation, yet it is also a restraint on illegal dynamism.”⁷² So, any view of CIL “must provide for change and adaptation in customary law, yet it must also ensure enough stability. . . .”⁷³

Reports of the imminent demise of customary international law, which have been circulating for decades,⁷⁴ thus seem premature. It is highly unlikely that the treaty-making process in international law will ever

68. See Christopher J. Borgen, *Resolving Treaty Conflicts*, 37 GEO. WASH. INT'L L. REV. 573 (2005); Bethany Lukitsch Hicks, *Treaty Congestion in International Environmental Law: The Need for Greater International Coordination*, 32 U. RICH. L. REV. 1643 (1999); Edith Brown Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, 81 GEO. L.J. 675, 697–702 (1993).

69. See N.C.H. Dunbar, *The Myth of Customary International Law*, 8 AUSTL. Y.B. INT'L L. 1 (1983); Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1120-39 (1999).

70. See Fidler, *supra* note 58, at 234-48; John Tasioulas, *Customary international law and the quest for global justice*, in THE NATURE OF CUSTOMARY LAW 307, 313-20 (Amanda Perreau-Saussine & James Bernard Murphy eds., 2007).

71. For the academic literature on custom's “stickiness” or lack of responsiveness of new norms, see Omri Ben-Shahar & John A.E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651 (2006); Victor Flesicher, *The Missing Preferred Return*, 31 J. CORP. L. 77, 91-92 (2005); see also Bradley & Gulati, *supra* note 1, at 245-49.

72. D'AMATO, *supra* note 7, at 12.

73. *Id.*

74. See ROBERT JENNINGS, INTERNATIONAL COURTS AND INTERNATIONAL POLITICS 65–67 (1986); Kelly, *supra* note 17, at 537 (any “perceived advantages [of retaining CIL] are not only illusory, but are more than offset by significant disadvantages.”); VAN HOOFF, *supra* note 22, at 114-16; CHARLES DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 156 (P.E. Corbett trans., 1957).

completely supplant CIL,⁷⁵ even though (admittedly) more and more areas subject to exclusively customary regulation will be codified over time. Furthermore, codification is not an “end of history” for customary international law. Codification merely shifts CIL to a new ground of treaty construction and application, as well as the potential for new customary norms to emerge.

CONCLUSION

The crucial challenge for customary international law is to, at once, retain its dynamism and its legitimacy.⁷⁶ As I have tried to argue here, the traditional formula for CIL enshrined in ICJ Statute Article 38⁷⁷ is not a musty formalism or some artifact from the deep recesses of international law’s intellectual history. Rather, the combined objective and subjective inquiries for CIL formation (state practice and *opinio juris*) remain the crucial algorithm for establishing whether a norm really rises to the level of international custom, and is thus deserving of recognition and enforcement. To dispense with, or relax, either of these requirements, in a misguided attempt to increase CIL’s dynamism and relevance (especially to pursue favored objectives, such as the promotion of human rights), would fatally undermine its legitimacy. Likewise, to abandon customary international law’s strong positivist intellectual roots in favor of a new naturalism (whether expressed in the idiom of the “rationality” or “humanity” of favored norms), would also be folly.

Within these theoretical limitations, I favor an approach to customary international law that emphasizes its diverse and robust (even combative) character. The processes of customary international law work best when all international actors realize that there is much at stake. That is why I argue here for the continued embrace of the tacit acceptance (through acquiescence) of emerging CIL norms, so long as the privileged place of the persistent objector is recognized. This should apply to manifestations of global custom, as well as special or local custom, but not for regional custom. Just as we should remove structural impediments to the formation of CIL (even while rigorously observing the requirements of State practice and *opinio juris*), symmetry and legitimacy demands that the same process should be able to ratchet in reverse. Those norms that have outlived their usefulness, and are no longer supported by either constituent ingredient for

75. See Kelly, *supra* note 17, at 538-42 (arguing that treaties provide a complete alternative to CIL).

76. See Fidler, *supra* note 58, at 220-24.

77. Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993.

CIL, should be accorded a decent burial. If this approach is followed, there will be no need to have recourse to Professor Bradley's and Gulati's proposed "return" to the Default Rule for withdrawing from international custom.