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## Mandatory Versus Default Rules: How Can Customary International Law Be Improved?

Although customary international law (CIL) has historically been one of the principal forms of international law, it is plagued by debates and uncertainties about its proper sources, its content, its usefulness, and its normative attractiveness.<sup>1</sup> While some of these debates and uncertainties are longstanding, they have intensified in recent years, in part because of the rise of multilateral treaty-making, which allows nations collectively to negotiate and codify broad areas of international law instead of relying on unwritten custom. Moreover, it has become increasingly apparent that CIL is structurally unable to address many of the world's most pressing problems, such as (to name a few) nuclear proliferation, global warming, and international financial stability. Perhaps most fundamentally, there "is no coherent or agreed upon theory to justify [CIL's] role or explain its doctrine."<sup>2</sup> For these and other reasons, CIL is "under attack from all sides."<sup>3</sup>

In light of the current state of CIL, it is worth thinking creatively about how to improve this body of international law. One difference between the way that many treaties are structured and the way that CIL is structured concerns withdrawal rights. The conventional wisdom among international law scholars is that, once a rule of CIL becomes established, no nation has the legal right to withdraw from the rule. Instead, if a nation wants to change a rule of CIL,

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1. See, e.g., Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U CHI. L. REV. 1113, 1117-18 (1999); Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 123-31 (2005); J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449 (2000).
  2. Guzman, *supra* note 1, at 117.
  3. *Id.* at 116.

either it must convince other nations to enter into a treaty overriding the rule, or it must violate the rule and hope that other nations will acquiesce to the violation. This regime applies even to nations that enter the international system after a CIL rule is formed. In a recent article, *Withdrawing from International Custom*, we referred to this conventional wisdom as the “Mandatory View” of CIL.<sup>4</sup>

In contrast to the Mandatory View, many treaties, even those that address fundamental issues of international public policy, expressly allow for unilateral withdrawal, sometimes conditioned on a notice period.<sup>5</sup> In addition, other treaties are thought to allow for withdrawal by implication—as a function, for example, of their subject matter. Furthermore, even when a treaty does not expressly or implicitly allow for withdrawal, a nation may have the legal right to terminate the treaty as a result of developments such as a material breach of the treaty by another party or a fundamental change of circumstances. We suggested in *Withdrawing* that the contrast between the extensive and variable exit rights under treaties and the purported lack of any exit rights under CIL was puzzling and deserved study, especially given the overlap that exists today between the content of treaties and of CIL and the frequent reference to treaties as evidence of CIL.<sup>6</sup>

We then turned in *Withdrawing* to a consideration of history. The Mandatory View, we explained, was not always the canonical understanding of CIL. Some of the classic publicists on international law, such as Emmerich de Vattel, thought that nations had the legal right to withdraw from some rules of international custom, a proposition that we referred to as the “Default View” of CIL.<sup>7</sup> Also, a number of the U.S. Supreme Court’s early international law decisions assumed such a Default View.<sup>8</sup> We attempted to discern when the intellectual shift to the Mandatory View occurred, and we suggested that the shift—at least in the international law treatises—may have taken place most sharply in the late nineteenth and early twentieth centuries.<sup>9</sup> We also found

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

5. See Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579 (2005).

6. See Bradley & Gulati, *supra* note 4, at 204-05.

7. See *id.* at 216-19. International legal historian Antony Anghie describes Vattel’s treatise as “arguably the most influential book ever written on the subject of international law.” Antony Anghie, *Vattel, Imperialism, and the Rights of Indigenous People* (Feb. 2011) (unpublished manuscript) (on file with authors).

8. See Bradley & Gulati, *supra* note 4, at 219-26.

9. See *id.* at 226-29.

indications that the shift may have been related in part to efforts to bind new states to customary rules that had been established by Western powers.<sup>10</sup>

We did not argue that this history dictated any particular conclusions about how CIL should operate today. Instead, we noted that it “shows that the Mandatory View is not the only possible approach to CIL, and that an international legal system could potentially operate despite the allowance of some CIL withdrawal rights.”<sup>11</sup> The remainder of *Withdrawing* was dedicated to an examination of the functional desirability of the Mandatory View. We found little explanation for the Mandatory View in the literature and thus were compelled to speculate about its justifications. Drawing upon scholarship in the areas of contract theory, corporate law, voting rights, and constitutional design, we concluded that reasonable arguments could be made for disallowing exit with respect to those areas of CIL that address significant interstate externalities or agency problems but that it was difficult to justify a disallowance of opt-out rights across the board for all of CIL.<sup>12</sup>

Finally, we suggested that allowing for withdrawal rights under CIL could help revitalize this body of international law.<sup>13</sup> Withdrawal rights would make it easier for states to innovate in addressing modern problems because the additional flexibility provided by such rights would lower the cost of creating new rules of CIL as well as the cost of pushing for alterations to existing rules. In addition, the invocation of withdrawal rights would help provide information to the international system about the position of nations on both the content of particular CIL rules and their level of commitment to them. Furthermore, providing a lawful avenue for exiting from CIL rules in the face of changed circumstances would increase the likelihood of collective enforcement of such rules against states that have not exercised the right of withdrawal since the line between breach and exit would be more sharply delineated.

*Withdrawing* challenges conventional wisdom, so it is not surprising that it has generated strong reactions. The scholars who have written responses in *The Yale Law Journal Online*—Lea Brilmayer, Bill Dodge, David Luban, Isaias Tesfalidet, and Carlos Vázquez—critique our analysis on a number of grounds. In this Essay, we attempt to address these criticisms, while also highlighting areas of research that might help move the debate forward. Throughout the Essay, we emphasize a recurring theme, which is the need to improve and

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10. See *id.* at 230–31.

11. *Id.* at 226.

12. See *id.* at 254–69.

13. See *id.* at 242–52.

revitalize CIL. Before proceeding, we want to express our gratitude to the respondents for engaging with our project and to *The Yale Law Journal* for facilitating this dialogue.<sup>14</sup>

In Part I, we discuss the endorsement of the Default View by some of the classic international law publicists, including Vattel. In Part II, we consider the shift in the international law treatises to a Mandatory View of CIL and the potential connections between that shift and colonialism. In Part III, we revisit the modern disparity in withdrawal rights between treaties and CIL. Finally, in Part IV, we address a number of functional considerations that are relevant in choosing between the Default and Mandatory Views.

## I. VATTEL AND THE SHIFT AWAY FROM THE DEFAULT VIEW

In *Withdrawing*, we explained that a number of the classic international law publicists, such as Vattel, thought that nations could unilaterally withdraw from some rules of CIL. We also explained that this Default View was reflected in some of the U.S. Supreme Court's early and most famous international law decisions, such as *Ware v. Hylton* and *Schooner Exchange v. McFaddon*.<sup>15</sup> Bill Dodge and David Luban acknowledge this history but point out, as we did in *Withdrawing*, that Vattel and other publicists still thought that many rules of CIL, most notably rules based on natural law, were mandatory.<sup>16</sup> Somewhat confusingly, Vattel labeled these rules based on natural law the "voluntary law of nations" to distinguish them from those rules that were subject to unilateral withdrawal, which he named the "customary law of nations."<sup>17</sup>

It is worth pausing to note the significance of this agreement between the respondents and ourselves. In discussing CIL and its history, not one modern

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14. For additional discussion of the project, see Symposium, 21 DUKE J. COMP. & INT'L L. 1 (2010). For our response to the papers in that symposium, see Curtis A. Bradley & Mitu Gulati, *Customary International Law and Withdrawal Rights in an Age of Treaties*, 21 DUKE J. COMP. & INT'L L. 1 (2010).

15. See Bradley & Gulati, *supra* note 4, at 219-23.

16. See William S. Dodge, *Withdrawing from Customary International Law: Some Lessons from History*, 120 YALE L.J. ONLINE 169, 173-74 (2010), <http://yalelawjournal.org/2010/12/17/dodge.html>; David Luban, *Opting Out of the Law of War: Comments on Withdrawing from International Custom*, 120 YALE L.J. ONLINE 151, 158 (2010), <http://yalelawjournal.org/2010/12/8/luban.html>; see also Bradley & Gulati, *supra* note 4, at 217-18 (explaining that Vattel did not think nations could withdraw from the "voluntary" law of nations).

17. See EMMERICH DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND OF SOVEREIGNS*, intro., §§ 21, 25, at 8 (photo. reprint 1993) (James Brown Scott ed., Charles G. Fenwick trans., Carnegie Inst. of Wash. 1916) (1758).

casebook or treatise acknowledges that there was ever a Default View. Moreover, scholars who have otherwise relied on early publicists such as Vattel seem to be unaware of the publicists' endorsements of the Default View. In addition, debates in foreign relations law scholarship often depend on understandings of the early Supreme Court cases, and yet no one in those debates has realized that some of these decisions assumed a Default View.

While agreeing with our basic claim about the history, Dodge contends that the scope of what Vattel thought was encompassed by the Default View was relatively insignificant. For Vattel, says Dodge, the voluntary law of nations (which was mandatory) "completely overshadowed" the customary law of nations, which was "merely interstitial."<sup>18</sup> Dodge's position is not necessarily inconsistent with what we wrote in *Withdrawing*, since we made no claims there about the scope of the Default View, in Vattel's writing or otherwise. In any event, a close reading of Vattel's treatise suggests that his understanding of the role of the Default View was more robust than what Dodge describes.

In categorizing international law, one of Vattel's postulates was that nations generally have freedom of action, so long as they do not interfere with the "perfect rights" of other nations. Thus, said Vattel, "[a] Nation is therefore free to act as it pleases, so far as its acts do not affect the perfect rights of another Nation, and so far as the Nation is under merely *internal* obligations without any *perfect external* obligation."<sup>19</sup> Perfect rights, in Vattel's view, concerned certain fundamental matters, such as territorial sovereignty, freedom of navigation on the high seas, and the ability to conduct diplomatic relations. The breach of these rights provided a just cause for war.<sup>20</sup> Many rights under international law, however, were imperfect, and they were still considered binding.<sup>21</sup> Moreover, Vattel said that "care must be taken not to extend [perfect rights] so as to prejudice the liberty of Nations."<sup>22</sup>

It was against this backdrop that Vattel describes what he means by the customary law of nations. He explains that this body of law consists of "rules

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18. Dodge, *supra* note 16, at 173-74.

19. VATTEL, *supra* note 17, intro., § 20, at 7.

20. See Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 6 (2009). Violations of perfect rights provided a legal justification for war, whereas violations of imperfect rights did not. See VATTEL, *supra* note 17, intro., § 20, at 7; *id.* bk. III, § 26, at 243-44.

21. See, e.g., H.W. HALLECK, INTERNATIONAL LAW 282 (photo. reprint 2000) (1861) ("[A] right is no less a right because it belongs to the class called *imperfect* in international law; so of a duty, it is none the less obligatory because it is *imperfect*, and cannot be enforced under the rules of international jurisprudence.")

22. VATTEL, *supra* note 17, intro., § 23, at 8.

and customs, consecrated by long usage and observed by Nations as a sort of law” and that it “is founded upon a tacit consent, or rather upon a tacit agreement of the Nations which observe it.”<sup>23</sup> Such a customary rule was binding on nations “so long as they have not expressly declared their unwillingness to follow it any longer.”<sup>24</sup> Although Vattel noted that this category of international law encompasses customs that “are indifferent in nature,”<sup>25</sup> by “indifferent” Vattel did not mean that the custom was insignificant. Rather, he meant that the custom was not “unjust or unlawful.”<sup>26</sup>

Importantly, Vattel makes clear that he is not attempting in his treatise to catalogue the various customary rules and instead limits himself to “stating the general theory of it.”<sup>27</sup> As it turns out, in a number of places in his treatise he does refer to particular rules as falling within the customary category. For example, he treats a nation’s obligation to allow enemy citizens to leave its territory upon declaring war as a customary obligation, explaining that this obligation exists because the enemy citizens came into the territory “in reliance upon the public faith; for in permitting them to enter his territory and to reside there the sovereign impliedly promised them full liberty and security for their return home.”<sup>28</sup> Similarly, he treats consular immunity as falling within the customary law of nations.<sup>29</sup> In addition, Vattel often describes particular areas of international law as involving a mixture of the voluntary law of nations and the customary law of nations.<sup>30</sup> Furthermore, even when classifying something

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23. *Id.*, intro., § 25, at 8.

24. *Id.*, intro., § 26, at 9.

25. *Id.*

26. *Id.*, intro., § 25, at 9.

27. *Id.*, intro., § 25, at 8.

28. *See id.*, bk. III, § 63, at 256.

29. *See, e.g., id.*, bk. II, § 34, at 125. In his introduction to this edition of Vattel’s treatise, Albert de Lapradelle explains that, “[h]aving only the imperfect duty of receiving consuls, Nations who receive them have the power of refusing them the necessary immunities.” Albert de Lapradelle, *Introduction* to EMMERICH DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND OF SOVEREIGNS* xix (photo. reprint 1993) (James Brown Scott ed., George B. Gregory trans., Carnegie Inst. of Wash. 1916) (1758).

30. In his discussion of the international law governing the treatment of neutral nations, for example, Vattel refers to both “certain practices [that] have become customary among civilized Nations” as well as “the rules of the natural Law of Nations.” VATTEL, *supra* note 17, bk. III, § 109, at 269. After elaborating upon what he thought natural law required with respect to neutrality, Vattel then returns to ordinary custom when discussing contraband goods on neutral ships, noting that he was describing rules for which “there seems to be fairly general agreement among European Nations.” *Id.*, bk. III, § 111, at 271.

as falling within the voluntary law of nations, Vattel often falls back on reasoning grounded in tacit consent rather than on natural law. He does so, for example, when discussing ambassadorial immunity.<sup>31</sup>

Vattel also returns to his general theory of the customary law of nations in the portion of his treatise that discusses the privileges and immunities of ambassadors and other public ministers. He explains that if a nation:

happens to find at a later time that the custom is disadvantageous, it is free to declare that it is unwilling to abide by such a custom; and once it has clearly made known its intention there is no room for complaint on the part of others if it does not observe the custom.<sup>32</sup>

He makes clear here that this Default View applies “not only in matters relating to ministers, but also *in other matters in general*.”<sup>33</sup>

In sum, while not the principal focus of his treatise, there is no indication that Vattel viewed the customary law of nations as insignificant in the way that Dodge suggests. Nor did other classic publicists who endorsed the Default View, such as Burlamaqui, Bynkershoek, or Martens, view it as insignificant.<sup>34</sup> Moreover, as Dodge acknowledges,<sup>35</sup> Vattel’s endorsement of the Default View

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31. Vattel explains that “it is impossible to believe that it is the intention of the prince who sends an ambassador, or any other minister, to subject him to the authority of a foreign power.” *Id.*, bk. IV, § 92, at 376. As a result, he reasons that:

If it can not be reasonably presumed that the sovereign of the minister would consent to subject him to the authority of the sovereign to whom he is sent, the latter, in receiving the minister, consents to receive him upon that footing of independence; and this constitutes between the two princes a tacit convention which gives a new force to the natural obligation.

*Id.*

32. *Id.*, bk. IV, § 106, at 385-86.

33. *Id.*, bk. IV, § 106, at 385 (emphasis added).

34. See Bradley & Gulati, *supra* note 4, at 217. Luban contends that Burlamaqui thought that customary rules of international law were not binding. See Luban, *supra* note 16, at 158. Luban cites no secondary literature endorsing that contention, and it does not appear to be supported by the text of Burlamaqui’s treatise, which refers to CIL rules as “obligatory” and maintains that nations are “reasonably supposed to submit to those customs, *so long as they have not made any declaration to the contrary*.” J.J. BURLAMAQUI, THE PRINCIPLES OF NATURAL LAW IN WHICH THE TRUE SYSTEMS OF MORALITY AND CIVIL GOVERNMENT ARE ESTABLISHED 199 (Nugent trans., Dublin, John Rice 1791) (1718) (emphasis added).

35. See Dodge, *supra* note 16, at 170, 171.

was influential in both international law commentary in the eighteenth and nineteenth centuries as well as in early decisions of the U.S. Supreme Court.<sup>36</sup>

Dodge also takes issue with our suggestion that the intellectual shift to the Mandatory View may have occurred most sharply in the late nineteenth and early twentieth centuries. He contends, rather, that the Mandatory View developed “not at the turn of the twentieth century, but during the middle of the nineteenth.”<sup>37</sup> The precise timing of the shift, while of obvious historical interest, is not particularly material for our project. Our main point was that, unbeknownst to most modern commentators, there was once a Default View for some rules of CIL. In any event, the evidence that Dodge advances in support of his mid-nineteenth century temporal claim is thin. He notes that some commentators as early as the mid-1800s, most notably the British publicist Richard Wildman, had a more mandatory conception of CIL than did Vattel, but he does not dispute that other important treatises continued to support the Default View throughout the remainder of the nineteenth century.<sup>38</sup> Although Dodge suggests that Henry Halleck’s 1861 treatise adopted the Mandatory View,<sup>39</sup> in fact Halleck relied on Vattel’s framework, including the right to opt out of some rules of CIL, and this reliance continued up

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36. Luban contends that in two of these decisions, *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796), and *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814), the Supreme Court was expressing the view that the customary rules of international law in question were not binding. See Luban, *supra* note 16, at 158-59. This claim is unsupported by anything other than Luban’s own reading of the decisions and appears to be inconsistent with what we know about the Supreme Court’s views of CIL at the relevant times. Cf. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.”).
37. Dodge, *supra* note 16, at 186; see also *id.* at 180 (arguing that the shift to the Mandatory View “developed much earlier” than 1905); cf. William S. Dodge, *Customary International Law, Congress, and the Courts: Origins of the Later-in-Time Rule*, in *MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY: ESSAYS IN HONOUR OF DETLEV VAGTS* 531, 551 (Pieter H.F. Bekker, Rudolf Dolzer & Michael Waibel eds., 2010) (claiming that “[b]y the turn of the twentieth century, the customary law of nations was no longer optional”).
38. See Dodge, *supra* note 16, at 182; see also Bradley & Gulati, *supra* note 4, at 219 & n.66. Dodge also cites *The Scotia*, 81 U.S. (1 Wall.) 170 (1871), as endorsing the Mandatory View, but that case is distinguishable on a number of grounds. Among other things, it involved the obligations of private parties under general maritime standards that had been accepted by the United States, see *id.* at 183, not public international law obligations imposed on the United States, and the Court was using the “common consent” idea simply to make clear that no one nation could dictate the standards on the high seas, not to disallow a nation from opting out of a custom in its own territory, see *id.* at 184.
39. Dodge, *supra* note 16, at 183.

through the 1908 edition of Halleck's treatise.<sup>40</sup> In addition, as we discussed in *Withdrawing*, the "voluntarist" school of international law, which was influential at least up until World War II, was in substantial tension with the Mandatory View. And there were continuing challenges to the Mandatory View even in the post-World War II period (from developing countries and the Soviet bloc, in particular).<sup>41</sup> Dodge does not address, let alone contest, these points.

Dodge does respond to one twentieth century development that we discussed—the shift from an absolute approach to sovereign immunity to a restrictive approach whereby nations have immunity in foreign courts only for their public, sovereign acts and not their private, commercial acts. As noted in *Withdrawing*, nations shifted away from the absolute approach without being viewed as violators of CIL, and without the need for a treaty, suggesting that the Default View may have continued to operate in practice for some areas of CIL even in the twentieth century.<sup>42</sup>

Dodge attempts to explain this development by contending that sovereign immunity is merely a matter of nonbinding comity rather than CIL.<sup>43</sup> In support of that proposition, he cites language from several decisions of the U.S. Supreme Court that link immunity with comity.<sup>44</sup> However, while the Court has sometimes stated that sovereign immunity "is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution,"<sup>45</sup> it has never denied that immunity also implicates principles of international law. For example, it has described as one of the major purposes of the 1976 Foreign Sovereign Immunities Act (FSIA) the codification of international law,<sup>46</sup> and it has looked to international law and practice both in

40. See 1 HALLECK'S INTERNATIONAL LAW 55-56 (G. Sherston Baker ed., 4th ed. 1908); Bradley & Gulati, *supra* note 4, at 219 & n.65. Halleck does appear to have had a narrower conception of the Default View than publicists like Wheaton, but that does not mean that he abandoned the Default View altogether.

41. See Bradley & Gulati, *supra* note 4, at 228-29, 231-32.

42. See *id.* at 232.

43. Dodge, *supra* note 16, at 188-89.

44. See *id.*

45. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983).

46. See, e.g., *Samantar v. Yousuf*, 130 S. Ct. 2278, 2289 (2010) ("[O]ne of the primary purposes of the FSIA was to codify the restrictive theory of sovereign immunity, which Congress recognized as consistent with extant international law."); *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 199 (2007) (referring to "two well-recognized and related purposes of the FSIA: adoption of the restrictive view of sovereign immunity and codification of international law at the time of the FSIA's enactment").

construing the Act and in filling in its gaps.<sup>47</sup> Even long before the Act, U.S. courts understood that sovereign immunity was governed by international law.<sup>48</sup> This has also been the position of the Executive Branch.<sup>49</sup> Other nations, as well as influential commentators, also understand sovereign immunity as governed by international law.<sup>50</sup>

Dodge's dispute with us about the timing of the shift to the Mandatory View is related to his attempt to explain the shift to the Mandatory View as resulting from the rise of positivism in international legal theory.<sup>51</sup> This causal claim, however, is insufficiently supported. At most, Dodge is able to show a temporal correlation between the rise of positivism and the shift to the Mandatory View. Correlation, however, is not causation. In addition to the

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47. See, e.g., *Permanent Mission of India*, 551 U.S. at 200 (looking to “international practice at the time of the FSIA’s enactment”); *First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 623 (1983) (looking to principles “common to both international law and federal common law” to address an issue relating to the application of the FSIA).
  48. See, e.g., *Wulfsohn v. Russian Federated Soviet Republic*, 138 N.E. 2d 24, 26 (N.Y. 1923) (“[Courts] may not bring a foreign sovereign before our bar, not because of comity, but because he has not submitted himself to our laws. Without his consent he is not subject to them.”); *Hassard v. Mexico*, 29 Misc. 511, 512 (N.Y. Sup. Ct.) (“It is an axiom of international law, of long-established and general recognition, that a sovereign State cannot be sued in its own courts, or in any other, without its consent and permission.”), *aff’d*, 46 A.D. 623 (N.Y. App. Div. 1899).
  49. See, e.g., Statement of Interest of the United States of America at 19, *Matar v. Dichter*, 500 F. Supp. 2d 284, (S.D.N.Y. 2007) (No. 05 Civ. 10270 (WHP)) (“The [FSIA] was enacted partly in order to bring U.S. foreign immunity law into line with prevailing international practice . . . and should be construed compatibly with customary international law absent a specific reason to the contrary.”); 2 GREEN HAYWARD HACKWORTH, DIGEST OF INTERNATIONAL LAW § 169, at 393 (1941) (“While it is sometimes stated that [jurisdictional exemptions for sovereigns] are based upon international comity or courtesy, and while they doubtless find their origin therein, they may now be said to be based upon generally accepted custom and usage, i.e. international law.”).
  50. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES ch. 5, intro. note (1987) (“The immunity of a state from the jurisdiction of the courts of another state is an undisputed principle of customary international law.”); ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 159 (2005) (“State immunity is a doctrine of customary international law.”); HAZEL FOX, THE LAW OF STATE IMMUNITY 13 (2d ed. 2008) (“That immunity is a rule of law is generally acknowledged by States.”). Other types of immunity, such as head of state immunity, are also understood by the international community to be governed by CIL. The International Court of Justice has stated, for example, that “in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal.” *Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belg.)*, 2002 I.C.J. 3, 21-22 (Feb. 14).
  51. See Dodge, *supra* note 16, at 182-84.

usual difficulties with making causal historical claims, there are particular reasons to doubt the causal story here. As Dodge himself argues, the early arguments for making some CIL rules mandatory were based on natural law, so it is unclear why a shift *away* from natural law would lead to the Mandatory View for all of CIL. Moreover, even if positivist commentators were attempting to use notions of general communitarian consent to replace what had been addressed by natural law, as Dodge suggests,<sup>52</sup> Dodge does not explain why they would preclude withdrawal rights even for CIL rules that had not previously been considered to fall within natural law. It is also worth noting that the Marshall Court was positivistic in its international law decisions and yet subscribed to the Default View, not the Mandatory View.<sup>53</sup> Finally, it appears that Vattel contributed to the shift towards positivism in international legal theory and yet he provided what was probably the most influential intellectual support for the Default View.<sup>54</sup>

A final historical dispute between us and the respondents concerns our suggestion that the famous *Paquete Habana* decision from 1900 may have been influenced by the Default View.<sup>55</sup> In that case, the Supreme Court, sitting as a prize court, held that the U.S. Navy was required to pay compensation to the owners of fishing vessels seized during the Spanish–American War because the seizure violated CIL. The decision is famous because the Court stated in its opinion that “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”<sup>56</sup> It also stated, however, that courts should apply CIL only “where there is no treaty, and no controlling executive or legislative act or judicial decision,”<sup>57</sup> and this qualification has long puzzled and divided commentators.

52. *See id.*

53. *See* Bradley & Gulati, *supra* note 4, at 229–30.

54. *See, e.g.,* Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT’L L.J. 1, 12 (1999) (“Vattel . . . is a pivotal figure in this shift towards positivism . . .”); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1112–13 (1985) (“[S]ome later eighteenth-century scholars such as Vattel began to elevate positive law as the basis for a nation’s duties under international law.”); *cf.* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 121 (2005) (“Vattel’s programme is to create an objective system of law by excluding natural law from it.”).

55. *See* Bradley & Gulati, *supra* note 4, at 223–25.

56. 175 U.S. 677, 700 (1900).

57. *Id.*

In *Withdrawing*, we suggested that the Court in *The Paquete Habana* may have had in mind the Default View of CIL.<sup>58</sup> In support of this possibility, we noted several elements of the decision that we found suggestive: that the Court emphasized that the United States had continued to accept the CIL rule in question; that the Court relied heavily on a Marshall Court decision (*Brown v. United States*) that had reflected the Default View; that the Court relied on Henry Wheaton's international law treatise, which strongly endorsed the Default View; and that the Court suggested that a unilateral public act by the U.S. government disavowing the CIL rule would be equivalent to a treaty exception to the rule.<sup>59</sup> We also made clear, however, that we were "not arguing that this is the only possible reading of the decision—just that it is an available reading that becomes apparent when one understands the Default View that was common in the nineteenth century."<sup>60</sup>

Nothing set forth in the responses rebuts this possibility. Dodge points out that the Court in *The Paquete Habana* refers to the "general consent of civilized nations,"<sup>61</sup> but that language alone seems hardly dispositive, since it does not preclude the possibility of a withdrawal of consent. Luban makes a better argument, noting that the Court referred to a controlling "judicial decision" and that it would be strange from the perspective of separation of powers to think that "the judiciary has unilateral authority to opt the United States out of a rule of international law."<sup>62</sup> This proposition becomes less strange, however, when one considers the context of the case: it was a prize decision, a context in which the courts traditionally had an especially broad and independent role in developing the rules of international law.<sup>63</sup> More importantly, although Luban does not explain how he would interpret the Court's reference to a controlling "judicial decision," it appears that he would read it as an endorsement of a judicial ability to place the United States in breach of international law. It is unclear, however, why that interpretation would be any less strange from the perspective of separation of powers. Indeed, the Court has long presumed that even Congress does not intend to place the United States in breach of

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58. See Bradley & Gulati, *supra* note 4, at 224.

59. See *id.* at 223-25.

60. *Id.* at 225.

61. See Dodge, *supra* note 16, at 185 (quoting *The Paquete Habana*, 175 U.S. at 701, 711).

62. Luban, *supra* note 16, at 160.

63. See, e.g., Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1334-38 (1996); Jack M. Goldklang, *Back on Board The Paquete Habana: Resolving the Conflict Between Statutes and Customary International Law*, 25 VA. J. INT'L L. 143, 144 n.10 (1984).

international law,<sup>64</sup> so there are reasons to doubt that the Court in *The Paquete Habana* was asserting a judicial ability to do so.

It bears repeating that the principal goal of our historical analysis in *Withdrawing* was to establish that the Mandatory View was not always the exclusive understanding of how CIL operates. It is heartening to see that the debate is already moving beyond that issue to address questions relating to the nature and extent of the Default View and the timing and circumstances of the shift to the Mandatory View—all questions that could undoubtedly benefit from additional research. In addition to its intrinsic interest, knowing more about this history could be useful when considering how best to improve CIL going forward.

## II. THE MANDATORY VIEW, COLONIALISM, AND NEW STATES

In *Withdrawing*, we attempted to trace the intellectual origins of the shift from the Default View of CIL to the Mandatory View. The Mandatory View is obviously canonical in modern writings about international law, but these writings do not explain its current justifications, let alone the reasons for its original adoption. We considered an explanation based on the rise of legal positivism, but found that explanation to be problematic, for the reasons discussed above in Part I. An alternative explanation, which we found more plausible, is that the Mandatory View developed in part to ensure that non-Western countries, which were increasingly coming into the “family of nations” in the late nineteenth and early twentieth centuries, would be bound by the CIL rules that had already been worked out by the Western powers.<sup>65</sup> We found support for this explanation in, among other things, some of the key early treatises that endorsed a Mandatory View (such as in Oppenheim’s influential 1905 treatise) and in the secondary literature that has explored the relevant periods.<sup>66</sup>

The historical record is complicated and difficult to assess, so we were tentative in our conclusions on this point. We did note, however, that this explanation seemed generally consistent with other practices by Western powers during this time period, including coercive and unequal treaty regimes with non-Western states.<sup>67</sup> It also seemed consistent, we explained, with the post-World War II rise of the persistent objector exception to the Mandatory

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64. See, e.g., *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

65. See Bradley & Gulati, *supra* note 4, at 230–31.

66. See *id.* at 230.

67. See *id.* at 231.

View, pursuant to which nations can potentially opt out of CIL rules before the rules develop. Under that exception, new states (such as former colonies) are not allowed to opt out of preexisting CIL rules, whereas Western powers can potentially avoid being bound by CIL developed by what was after World War II a rapidly growing number of non-Western regimes.<sup>68</sup>

Dodge accuses us of tarring the Mandatory View “with the brush of imperialism,”<sup>69</sup> a connection that he contends is “simply false.”<sup>70</sup> The Mandatory View, Dodge states conclusively, “did not develop as a tool of imperialism.”<sup>71</sup> Dodge’s principal argument is that CIL, as understood in the nineteenth century, applied only to nations regarded as “civilized” (meaning generally Western, Christian nations) and that, therefore, a Mandatory View of CIL would not have involved the application of CIL to “uncivilized” nations. “Writers from Hall to Westlake to Oppenheim expressly stated,” he observes, “that Western rules did *not* bind non-Western nations without their consent.”<sup>72</sup> This proposition, however, is not inconsistent with our analysis, and it does little to reduce the normative concerns associated with the rise of the Mandatory View that we articulated in *Withdrawing*.

As an initial matter, Dodge’s argument here is in tension with his claim that the mandatory elements of CIL predominated in the first half of the nineteenth century, and also with his claim that a more general mandatory conception of CIL was taking hold by the middle of that century. If much of the world was not viewed during the nineteenth century as being bound by rules of CIL, then there was no Mandatory View in the universalistic sense that it is understood today. In any event, Dodge seems to suggest that Western powers were excluding non-Western powers from CIL out of respect for their sovereignty. In fact, it is more likely that the exclusion of the non-Western powers was connected to the colonial and empire-building interests of the time. As Kal Raustiala has explained, the exclusionary perspective “made it easy for empire to coexist with Westphalian territoriality and to become a viable and even valorized form of rule.”<sup>73</sup> In particular, this perspective allowed

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68. See *id.* at 233-41.

69. Dodge, *supra* note 16, at 170.

70. *Id.* at 186.

71. *Id.* at 171.

72. *Id.* at 186.

73. KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 16 (2009); see also Arnulf Becker Lorca, *Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation*, 51 HARV. INT’L L.J. 475, 479 (2010) (“Western international lawyers and diplomats, representing their merchants’ interests or their states’ expansionist policies, deployed the idea of an exclusively

the Western powers to act in a relatively unconstrained fashion in taking over the lands of the uncivilized peoples.<sup>74</sup>

The writings of the international law commentators that Dodge relies on tend to support this less attractive narrative. John Westlake explained, for example, that “the occupation by uncivilised tribes of a tract, of which according to our habits a small part ought to have sufficed for them, was not felt to interpose a serious obstacle to the right of the first civilised occupant.”<sup>75</sup> Westlake went on to connect this idea of land rights with ideas about racial superiority:

The inflow of the white race cannot be stopped where there is land to cultivate, ore to be mined, commerce to be developed, sport to enjoy, curiosity to be satisfied. If any fanatical admirer of savage life argued that the whites ought to be kept out, he would only be driven to the same conclusion by another route, for a government on the spot would be necessary to keep them out. Accordingly international law has to treat such natives as uncivilised.<sup>76</sup>

Hall and Oppenheim expressed similar positions about the taking of the land of indigenous peoples.<sup>77</sup>

There is no conflict between this nineteenth-century distinction between civilized and uncivilized states and what we suggested in *Withdrawing*. Our suggestion was based in part on the work of Antony Anghie, who has pointed out that, by the end of the nineteenth century, two developments were occurring that would have contributed to more of a universalization of

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European international law in order to justify the exclusion of non-European entities from the privileges of an international legal order based on sovereign equality.”).

74. See S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 29-30 (2d ed. 2004); Ruth Gordon, *Saving Failed States: Sometimes a Neo-Colonialist Notion*, 12 AM. U. J. INT'L L. & POL'Y 903, 937-40 (1997). Along these lines, Martti Koskenniemi explains that the international lawyers for the Western empires saw the pursuit of the colonial empire as “a perfectly natural drive; just as ownership was a projection of the owner’s person in the material world, colonial possession was an aspect of the healthy State’s identity and self-respect.” MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960*, at 109 (2001).
75. JOHN WESTLAKE, *CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW* 137 (1894).
76. *Id.* at 142-43.
77. See WILLIAM EDWARD HALL, *INTERNATIONAL LAW* 87 (1880) (explaining that if a territory was “unappropriated by a civilised or semi-civilised state” it could be acquired through “occupation”); L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 276 (1905) (explaining that occupation applied to land that was uninhabited and defining “uninhabited land” to include land “inhabited by natives whose community is not to be considered as a State”).

international law.<sup>78</sup> First, the Western powers, as a result of their many conquests in the uncivilized lands, had acquired a great deal of territory. Squabbles among these Western nations over these territories were in danger of escalating. Second, one of the methods of conquest had been to enter into treaties with many of the uncivilized nations. Recognizing those treaties was somewhat inconsistent with the view that the nations making the treaties were not covered by international law. To the extent that part of the story of the development of international law in the early twentieth century was about ensuring that these often unequal and exploitative treaties would be respected, one can see why it would be important to shift toward greater inclusion of the previously uncivilized nations (that had, as a result of the years of conquest, supposedly become more civilized) while also preventing them from trying to exit previously developed international law.<sup>79</sup>

We do not mean to suggest that there was a clean shift towards a more inclusionary view of the previously uncivilized nations in the late nineteenth and early twentieth centuries, or that the desire of the Western nations to further their imperial agendas provides the only explanation for greater universalism in international law. There is evidence, for example, that jurists from a number of then-peripheral nations such as China and Japan were taking active steps to obtain greater inclusion within the system. Given the threats of Western imperial agendas and the unequal treaties that were being imposed, there were benefits to learning to work within the system.<sup>80</sup> Overall, though, there are strong reasons to believe that, whereas in the mid- to late nineteenth century it suited the colonial purposes to have the uncivilized nations excluded from the reach of international law, in the late nineteenth and early twentieth centuries it was beginning to suit those same interests to have the uncivilized world included. Nothing in Dodge's analysis shows otherwise.

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78. See ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 69-82 (2004).

79. See Tayyab Mahmud, *Colonial Cartographies, Postcolonial Borders, and Enduring Failures of International Law: The Unending Wars Along the Afghanistan-Pakistan Frontier*, 20 *BROOK. J. INT'L L.* 10, 10 (2010) ("Recognition of some measure of sovereignty of the dominated polities was warranted by the need to ensure that the terms of colonial treaties would be honored, even though the terms of these treaties betrayed a lack of sovereignty and equality.").

80. See Lorca, *supra* note 73, at 475 ("Faced with pressures to sign unequal treaties, elites in the semi-periphery realized the stakes of learning the international legal discourse."). Another complicating factor that deserves further study is that, before the nineteenth century and the rise of imperialism, international law may have been more inclusionary with respect to nations like China. See Anghie, *supra* note 7 (contrasting Vattel's inclusionary perspective regarding China with Westlake's exclusionary perspective).

Luban similarly challenges the Western powers explanation that we suggested in *Withdrawing*. He argues that, even assuming that we are correct in locating the timing of the shift from the Default View to the Mandatory View in the late nineteenth or early twentieth centuries, it could not have developed as part of an effort to bind new states because there were not many new states coming into the international system at that time.<sup>81</sup>

This argument misses the thrust of our analysis. Our position is that the period of the late nineteenth to early twentieth centuries was one of transition, during which some nations previously excluded from the ambit of international law were being allowed in.<sup>82</sup> As an illustration of this transition, consider the difference in identities of the nations participating in the Berlin Conference of 1885 and the 1899 and 1907 Hague Peace Conferences. At the Berlin Conference of 1885, fifteen “civilized” powers gathered to divide Africa amongst themselves.<sup>83</sup> In 1899, at the First Hague Peace Conference, where issues pertaining to arms control and peace were being discussed, there were twenty-six participants. While they were predominantly European nations, they also included four Asian nations—China, Japan, Siam, and Persia.<sup>84</sup> At the second Hague Peace Conference in 1907, held to continue the discussions from the first conference, there were forty-four participants, including the bulk of the Latin American republics.<sup>85</sup> A transition away from the empire model was occurring, and it is not unreasonable to think that the powers of the time were seeking to retain control over the system.<sup>86</sup>

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81. See Luban, *supra* note 16, at 161-62.

82. See, e.g., Anghie, *supra* note 54, at 36-37.

83. See William J. Aceves, *Critical Jurisprudence and International Legal Scholarship: A Study of Equitable Distribution*, 39 COLUM. J. TRANSNAT'L L. 299, 325 (2001) (“The Berlin conference of 1884, where several European powers . . . sought the orderly partition of Africa, represents one of the final efforts to maintain the global status quo.”).

84. See WILLIAM I. HULL, *THE TWO HAGUE CONFERENCES AND THEIR CONTRIBUTIONS TO INTERNATIONAL LAW* 10-11 (1908).

85. See INIS L. CLAUDE, JR., *SWORDS INTO PLOUGHSHARES: THE PROBLEMS AND PROCESS OF INTERNATIONAL ORGANIZATIONS* 29 (4th ed. 1971) (citing the transition between the two Hague conferences as part of the move toward universality in international law).

86. See Kelly, *supra* note 1, at 510-11 (noting that Vattel’s authority was diminished at the end of the nineteenth century because of the “emerging social reality of new, non-Western nations”); see also Aceves, *supra* note 83, at 325 (“As colonial empires began to recede, new states entered the international system. International organizations also began to appear. Despite these developments, the European powers sought to maintain their exclusive grasp over the international system.”).

Luban notes that Oppenheim endorsed the Mandatory View as early as 1905.<sup>87</sup> Importantly, however, Oppenheim's 1905 treatise specifically emphasized that non-Western nations were increasingly coming into the family of nations. After observing that the Turkish Empire and Japan had already done so, Oppenheim explained that the status of a variety of other nations (including a number of Asian states) was currently "doubtful" but that "[m]any treaties had been concluded with them" and that "[t]hey will certainly succeed [in coming into the family of nations] in the near future."<sup>88</sup> Oppenheim also made clear that nations admitted into the family of nations had to accept all of the CIL rules that had already been developed.<sup>89</sup>

We should reiterate the tentative nature of our historical analysis. The intellectual and political history of the legal developments of the period that we are discussing is vast and complex, and we have considered only a small portion of the secondary literature. What we hope that this debate shows is the potential value of a more sustained historical examination of the intellectual origins of the Mandatory View.<sup>90</sup> In addition to being of inherent interest, such an examination would help us better understand the normative underpinnings of the Mandatory View and thus the extent to which that View is consistent with contemporary normative commitments.

### III. WITHDRAWAL FROM TREATIES

In *Withdrawing*, we drew upon Larry Helfer's work, which shows that withdrawal rights are commonly included in treaties in numerous subject areas of international law, even treaties reflecting important principles of international public policy.<sup>91</sup> We suggested that the contrast between frequent and variable exit rights under treaties and a purported lack of any exit rights under CIL deserved further study. The contrast was particularly intriguing, we argued, in light of the substantial overlap that exists today between the

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87. See Luban, *supra* note 16, at 161.

88. OPPENHEIM, *supra* note 77, at 33-34.

89. *Id.* at 18.

90. For a suggestion along these lines, see Bradley & Gulati, *supra* note 14, at 28.

91. See Helfer, *supra* note 5; see also ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 279 (2d ed. 2007) ("Most multilateral treaties of unlimited duration will allow a party an unconditional right to withdraw.") (emphasis omitted); Barbara Koremenos & Allison Nau, *Exit, No Exit*, 21 DUKE J. COMP. & INT'L L. 81 (2010) (explaining how the inclusion of withdrawal clauses in treaties can enhance cooperation and describing some of the diversity in such clauses).

substantive content of treaties and CIL and the frequent use of treaties as evidence of CIL.

Lea Brilmayer and Isaias Tesfalidet take issue with our analysis, contending that analogizing to treaties “involves a serious distortion of the existing law of international agreements, which does not in fact grant a right of unilateral withdrawal.”<sup>92</sup> They go on to explain that, although withdrawal rights under treaties are common, the right “almost always arises because of what both of the parties agreed to observe,” which means that in this context “[t]he right to opt out is mutual, not unilateral.”<sup>93</sup> In support of this proposition, they cite and quote from various provisions in the Vienna Convention on the Law of Treaties limiting the circumstances under which a party may unilaterally withdraw from a treaty when the treaty does not itself provide for a right of withdrawal.<sup>94</sup>

This analysis is interesting, but it does not respond to our analysis in *Withdrawing*. Our focus there was on whether a complete ban on unilateral exit from all rules of CIL made good sense from the perspective of institutional design. State preferences are relevant to that question, but it is difficult to obtain direct evidence of state preferences regarding withdrawal rights under CIL because neither the content of CIL nor its secondary rules of operation are typically the product of express negotiation. In the treaty context, by contrast, we have concrete evidence of state preferences, as reflected in the agreements that are made. In that context, we see that nations commonly express a preference for exit rights, often subject to notice periods and sometimes other limitations. Moreover, we see that states express this preference in the same subject areas that are regulated by CIL. This provides some reason to think that, if states were self-consciously designing a system of CIL, they would not disallow exit across the board.<sup>95</sup>

Pointing out that withdrawal rights in treaties are often the product of agreement is not responsive to this analysis because there is no such process for expression of preferences built into the structure of CIL. Moreover, while it is true that the inclusion of withdrawal clauses in treaties is (like the inclusion of other treaty clauses) a mutual decision, the actual exercise of withdrawal rights

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92. Lea Brilmayer & Isaias Yemane Tesfalidet, *Treaty Denunciation and “Withdrawal” from Customary International Law: An Erroneous Analogy with Dangerous Consequences*, 120 *YALE L.J.* ONLINE 217, 217 (2011), <http://yalelawjournal.org/2011/1/5/brilmayer-tesfalidet.html>.

93. *Id.* at 218.

94. *See id.* at 218-21.

95. *Cf.* Koremenos & Nau, *supra* note 91, at 83 (“The process of negotiating treaty provisions is costly. If we assume that the signatory parties are rational actors, it follows that withdrawal clauses must be beneficial, or they would not appear in agreements.”).

under such clauses is not mutual. Instead, these clauses typically allow states to act unilaterally in deciding whether to exit from a treaty. Nothing in the Vienna Convention is to the contrary: it merely provides various default rules concerning the circumstances under which withdrawal is allowed,<sup>96</sup> and these default rules recognize that nations may choose to allow for withdrawal and that a right of withdrawal can even be implicit in an agreement.<sup>97</sup>

The existence of widespread, agreed-upon withdrawal rights under treaties also illustrates other propositions relevant to our discussion in *Withdrawing*. It suggests that there is no inherent conflict between allowing for exit and maintaining an international rule of law, given that exit rights under treaties are not viewed as presenting such a conflict.<sup>98</sup> In addition, it shows that allowing for a legal right of exit does not necessarily lead to widespread abuse or an unraveling of international commitments, since, as far as we can tell, this has not happened in the treaty context.<sup>99</sup> Furthermore, the fact that states commonly agree to provide for a right of unilateral exit illustrates the potential connection between exit rights and the ex ante decision to create international obligations in the first place.<sup>100</sup> As other commentators have noted, allowing for exit rights or other escape clauses in treaties arguably facilitates treaty-making by lowering the cost of commitment and providing a form of insurance that allows states to engage in greater experimentation.<sup>101</sup> This invites the question, which we explored in *Withdrawing*, of whether exit rights under CIL might have a similar positive effect.

None of this is to say, however, that the treaty regime and the CIL regime are perfectly analogous, or that there is a one-to-one relationship between the choices that states make with respect to treaties and the choices that they would want to make, if given the opportunity, with respect to CIL.<sup>102</sup> Our more

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96. Some nations such as the United States are not parties to the Vienna Convention. We will assume for the sake of argument that all the Convention's default rules reflect CIL and thus are binding even outside of the Convention. Cf. IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 5-24 (2d ed. 1984) (explaining that many provisions in the Vienna Convention did not reflect CIL at the time they were drafted).

97. See, e.g., Convention on the Law of Treaties arts. 54, 56, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

98. See Bradley & Gulati, *supra* note 4, at 258.

99. See *id.* at 259.

100. See *id.* at 250-51.

101. See, e.g., Helfer, *supra* note 5, at 1591; Koremenos & Nau, *supra* note 91, at 91.

102. For a consideration of potential differences between the two contexts, see Bradley & Gulati, *supra* note 4, at 270-73. See also Laurence R. Helfer, *Exiting Custom: Analogies to Treaty*

modest points are simply that the choices made in the treaty context are relevant when thinking about the proper design of the CIL system and that these choices provide some reason to question the across-the-board disallowance of any withdrawal rights under the Mandatory View. As a result, a consideration of the treaty context can be instructive when thinking about how best to reform and improve CIL.

#### IV. FUNCTIONAL CONSIDERATIONS

Much of *Withdrawing* was dedicated to considering the functional advantages and disadvantages of the Mandatory View. We concluded that, although there were arguments for restricting exit from certain types of CIL, it was difficult to justify a complete ban on withdrawal from all rules of CIL.<sup>103</sup> We also suggested that allowing for some withdrawal rights had the potential to improve CIL in a variety of ways. Among other things, such rights would help states better tailor CIL to their specific needs and thus would likely increase both the production and use of CIL.<sup>104</sup> Such tailoring would also have the potential to increase the overall quality of CIL rules, as well as CIL's ability to innovate to address modern problems.<sup>105</sup>

Each of the respondents engages with our functional analysis. Their arguments can be grouped into two sets of considerations: first, whether the Mandatory View already provides nations with sufficient flexibility, and, second, whether a shift to the Default View would cause states to act in ways that are harmful to the international system.

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*Withdrawals*, 21 DUKE J. COMP. & INT'L L. 65 (2010) (considering how limitations on exit in the treaty area could be applied to CIL).

103. See Bradley & Gulati, *supra* note 4, at 240-41, 263.

104. See *id.* at 250-51.

105. See Bradley & Gulati, *supra* note 14, at 26-28. Carlos Vázquez suggests yet another potential advantage of the Default View: whereas under the current understanding of CIL a relatively small number of deviations could cause a CIL rule to collapse, it would be easier to maintain a CIL rule in the face of such dissent under the Default View. See Carlos M. Vázquez, *Withdrawing from International Custom: Terrible Food, Small Portions*, 120 YALE L.J. ONLINE 269, 283-90 (2011), <http://yalelawjournal.org/2011/3/1/vazquez.html>. As we explained in *Withdrawing*, the ability to have a CIL rule operate in the face of dissent was one of the principal justifications advanced for the adoption of the persistent objector doctrine. See Bradley & Gulati, *supra* note 4, at 238.

### A. Flexibility Under the Mandatory View

Both the Vázquez and Brilmayer & Tesfalidet responses recognize the importance of allowing nations some flexibility in making international commitments, but they contend that the current system of CIL already offers sufficient flexibility.

Vázquez asserts that our proposal of allowing increased withdrawal rights “differs only modestly” from the Mandatory View as it currently operates.<sup>106</sup> To the extent that Vázquez is suggesting that the Mandatory View is not a fully accurate description of the current system of CIL, we agree, and we suggested this in *Withdrawing*.<sup>107</sup> At the same time, some of Vázquez’s assertions about how the status quo currently operates are questionable and require more verification than what he has provided.

Vázquez contends that, once the limitations we suggested in *Withdrawing* are factored in, withdrawal rights under the Default View would apply to “only a small subset of customary international law.”<sup>108</sup> It is unclear how Vázquez arrived at this quantitative assessment, especially since we know that the list of treaty rules for which withdrawal is allowed is not a small subset.<sup>109</sup> Ultimately, assessing the amount of CIL that would allow for withdrawal would require the application of a typology to specific areas of CIL, an

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106. Vázquez, *supra* note 105, at 369. Consistent with the *Annie Hall* line in its title, Vázquez’s paper appears to contradict itself, contending, on the one hand, that our proposal would not differ appreciably from the status quo and, on the other, that it would “significantly diminish the value of customary international law as a mechanism for regulating state behavior” and would make CIL “far less useful to states as a mechanism for addressing common problems.” *Id.* at 270, 285.

107. See Bradley & Gulati, *supra* note 4, at 231-33; see also C.L. Lim & Olufemi Elias, *Withdrawing from Custom and the Paradox of Consensualism in International Law*, 21 DUKE J. COMP. & INT’L L. 143, 153-55 (2010) (explaining that “the Mandatory View’s explanations cloud our understanding of the true facts of how states actually go about recognizing customary rules”); Paul B. Stephan, *Disaggregating Customary International Law*, 21 DUKE J. COMP. & INT’L L. 191, 191 (2010) (“[A]s a matter of current practice, CIL does not adhere to a single rule regarding exit. As a result, possibilities of exit are more abundant than many pundits claim.”).

108. Vázquez, *supra* note 105, at 271; see also *id.* at 276 (asserting that the list of norms that would allow for withdrawal would be “quite short”). In addition to noting the limitations that we discussed in *Withdrawing*, Vázquez speculates about limitations that he thinks follows from our analysis, but the contours of some of these suggested limitations are unclear (such as the idea that withdrawal should never be allowed from rules that “have value to states only if all or most other states adhere to them”), or rest on assumptions that we had tried to avoid in *Withdrawing* (such as the assumption that a right of withdrawal from CIL should “depend on the consent-based character of its rules”). See *id.* at 273-74.

109. See *supra* note 91 and accompanying text.

assessment that has not yet been conducted. Our main point in *Withdrawing* was simply that the number should not be zero, as maintained by the Mandatory View.

It is not obvious that the limitations we suggested in *Withdrawing* would disallow withdrawal rights for most of CIL. The two most significant limitations that we suggested were for situations in which the CIL rule addressed either agency issues or externalities. The first category would most obviously encompass *jus cogens* norms, which are viewed as superseding national decisionmaking, but this is a limited subset of CIL.<sup>110</sup> As for CIL rules implicating externalities, collective action problems have meant that the major international externality issues have had to be resolved through treaties or written soft law instruments rather than the evolution of CIL.<sup>111</sup> For these reasons, even if one were to categorize all the laws involving significant agency and externality issues under the Mandatory View, it seems likely that there would remain a large body of what one might call traditional CIL.

Vázquez also suggests that the ability of nations to violate CIL rules under the Mandatory View is similar to the ability of nations to withdraw from CIL rules under the Default View. He explains that if other nations acquiesce to a CIL violation under the Mandatory View, the violation will be “retroactively validated” and will not be considered as a signal of bad behavior.<sup>112</sup> As a result, he argues that CIL is not much stickier under the Mandatory View than it is under the Default View, except that under the Default View states would “be able to continue to deviate even if most other states would prefer to retain the rule.”<sup>113</sup>

Vázquez’s argument here appears to be premised on the claim that, when states violate CIL under the Mandatory View, they will acknowledge their violation and “frame[ it] as a proposal for a change in the law.”<sup>114</sup> We find this prospect unrealistic, and Vázquez provides no examples of it occurring. Because there is no guarantee that other states will acquiesce to a violation, states have little incentive under the Mandatory View to be this open about their position, since they run the risk of being considered a lawbreaker. Under

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110. These norms may also reflect a natural law approach to international law, in which case disallowing withdrawal rights for these norms would be consistent with Vattel’s view that CIL based on natural law should be mandatory. See *supra* note 17 and accompanying text.

111. See Bradley & Gulati, *supra* note 4, at 264-66.

112. Vázquez, *supra* note 105, at 277.

113. *Id.* at 278. Here Vázquez appears to be implicitly disagreeing with Luban, who argues that one of the virtues of the Mandatory View over the Default View is its stickiness. See *infra* note 144 and accompanying text.

114. See Vázquez, *supra* note 105, at 277.

the Default View, by contrast, such openness would not create legal liability. As for the concern that, if withdrawal is allowed, it will mean that states would “be able to continue to deviate even if most other states would prefer to retain the rule,”<sup>115</sup> something like this is already allowed under the current persistent objector doctrine, a doctrine that Vázquez purports to accept.

More generally, we question Vázquez’s apparent assumption that the reputational consequences of a breach of international law are identical to those associated with a lawful withdrawal. Certainly there does not appear to be such an equivalence between breach and withdrawal in the treaty context.<sup>116</sup> Taken to an extreme, this equivalence argument would suggest that CIL is not operating as law, a proposition that we do not believe Vázquez intended to endorse.<sup>117</sup>

Unlike Vázquez, Brilmayer and Tesfalidet assume that the Mandatory View as it is described in the literature is an accurate description of the status quo, but they contend that this View offers sufficient flexibility. They emphasize in particular the existence of the persistent objector doctrine, pursuant to which nations are allowed to opt out of CIL rules before they become established.<sup>118</sup>

As we have explained elsewhere, a number of limitations on the persistent objector doctrine substantially reduce its usefulness.<sup>119</sup> To invoke the persistent objector doctrine, a nation must object to an international norm before it “crystallizes,” yet it is often unclear when such crystallization is occurring. Moreover, the nation must vocally and repeatedly object to the emerging norm, which makes the doctrine costly in terms of inter-state friction. Such vocal protests also carry a risk that the objecting state will inadvertently help crystallize the norm, since the objections may be seen as an acknowledgment that the rule is forming. In addition, the persistent objector doctrine is of no use to a state that develops an interest in the issue only after the CIL rule develops (or that has its interests or circumstances change such that the rule becomes more problematic).<sup>120</sup> For these and other reasons, the doctrine has almost never been invoked.

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115. *Id.* at 278.

116. See Helfer, *supra* note 5, at 1621-29.

117. Cf. JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 43 (2005) (arguing that CIL “is not an exogenous influence on state behavior”).

118. See Brilmayer & Tesfalidet, *supra* note 92, at 224-25.

119. See Bradley & Gulati, *supra* note 14, at 24-25; see also Lim & Elias, *supra* note 107, at 148 (noting a number of considerations that “deprive the so-called persistent objector rule of its intended utility”).

120. For this reason, Andrew Guzman has argued for the allowance of subsequent objector rights that can be invoked when a state first develops an interest in the issue. See Guzman, *supra*

The structural limitations of the persistent objector doctrine would be remedied under the Default View. Since nations would have the ability to be subsequent objectors, they would not need to police the formation of potential CIL rules around the globe. Nor would there be a requirement of vocal and repeated objections. A single clear objection would suffice, diminishing the amount of friction that has to be created. And a nation desiring exit would not need to be concerned that, by announcing its desire to exit, it was inadvertently helping to create a rule that it opposed.<sup>121</sup>

Brilmayer and Tesfalidet acknowledge that the persistent objector doctrine will not apply once a CIL rule has formed, but they contend that any argument for subsequent withdrawal rights must be grounded in value judgments about fairness or sovereignty rather than functional considerations.<sup>122</sup> Their argument is that the addition of subsequent withdrawal rights cannot affect a state's ex ante behavior, because the decision whether to withdraw will come up only after a state decides not to opt out under the persistent objector doctrine. Even putting aside the various limitations on the persistent objector doctrine that make it unlikely to be used, their argument assumes that states believe that their interests will remain static, which seems unlikely. If a state in fact understands that its interests may change over time, the state is likely to factor in that need for flexibility when making decisions ex ante, such as whether to support a CIL rule or join a treaty that might help create CIL.<sup>123</sup>

### *B. Effect on International Cooperation*

Each of the responses contends that a shift to the Default View would undermine international cooperation. The purported harms associated with such a shift involve an increase in complexity and uncertainty in the

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note 1, at 169-71; see also Bradley & Gulati, *supra* note 4, at 253-54 (discussing Guzman's argument).

121. See Bradley & Gulati, *supra* note 14, at 24.

122. Brilmayer & Tesfalidet, *supra* note 92, at 226. Brilmayer and Tesfalidet state that we "attach great importance to 'sovereignty costs.'" *Id.* at 229. In fact, we referred to such costs only in the context of arguing that the Default View might facilitate more multilateral treaty-making by reducing the potential costs of such treaties in terms of state flexibility. See Bradley & Gulati, *supra* note 4, at 262-63. We do not disagree with Brilmayer and Tesfalidet that states are sometimes willing to incur sovereignty costs in order to obtain commitments from other nations; we simply question their apparent assumption that states always favor commitment over flexibility.

123. Cf. Koremenos & Nau, *supra* note 91, at 89 ("States may not even commit themselves to an agreement if they anticipate circumstances will alter their expected benefits. Certain flexibility provisions, like duration clauses, can insure states in this context.").

international system, increased manipulation of the rules, the creation of gaps in the law, and excessive withdrawals.

### 1. *Complexity and Uncertainty*

After arguing that a shift to the Default View would not differ significantly from the status quo, Vázquez changes course and contends that such a shift would “significantly diminish the value of customary international law as a mechanism for regulating state behavior.”<sup>124</sup> He first argues that allowing for withdrawal from some CIL rules would increase the complexity of CIL. While he acknowledges that withdrawal rights are common in treaties,<sup>125</sup> he contends that treaty law is better situated to absorb the increased complexity that comes with allowing for such rights because, unlike CIL, treaty provisions are typically set forth in an agreed-upon written document.<sup>126</sup> By contrast, he says, the Default View for CIL would “introduc[e] significant indeterminacies and complexities that would adversely affect the efficacy of its norms.”<sup>127</sup>

As an initial matter, it is not clear to us how much complexity in a body of law is too much, and Vázquez does not suggest any metric for making such an assessment. CIL as currently understood has a variety of secondary rules about its formation, and none of them is written down. Moreover, a number of these rules, such as the rules concerning the amount, type, and duration of state practice that is needed in order to generate a CIL rule, are highly uncertain. In addition, the secondary rules of CIL have not remained constant. The development of the persistent objector doctrine, for example, appears to be a relatively recent phenomenon.<sup>128</sup> Moreover, CIL does not currently have just one exit rule, as Vázquez appears to assume. For example, although states can use treaties to exit (as between themselves) from most rules of CIL, this is not true for *jus cogens* norms. Going in the opposite direction, the development of regional CIL (also sometimes referred to as “special” CIL) is understood as

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124. Vázquez, *supra* note 105, at 270.

125. *See id.* at 285-86.

126. *See id.* at 286-87.

127. *Id.* at 288. Vázquez relies in this part of his analysis on Tom Franck’s theory that international law’s efficacy stems from its “compliance pull.” *See id.* at 286. Although not material to our analysis, it is worth noting that this theory has been criticized from a variety of perspectives. *See, e.g.*, Rachel Brewster, *Unpacking the State’s Reputation*, 50 HARV. INT’L L.J. 231 (2009); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823, 1834-35 (2002); Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT’L L.J. 487, 493 (1997).

128. *See* Bradley & Gulati, *supra* note 4, at 238-39.

requiring the unanimous consent of the states to which it applies.<sup>129</sup> Furthermore, as discussed above, Dodge potentially introduces yet another category of rules that fall within the “comity” label, in which there may be no limits on withdrawal. Vázquez does not raise any complaints about the additional complexity created by having those additional categories.

It is also worth noting that there is nothing preventing the codification of the secondary rules of CIL, including withdrawal rights, which would presumably reduce their uncertainty. This is eventually what happened with the secondary rules of treaty law, which until the modern era were all addressed through unwritten CIL. In another article, we have described the kind of research and activities that might produce such a codification, and we would welcome Vázquez and the other respondents to join us in that project.<sup>130</sup>

Vázquez is also worried that if withdrawal rights were allowed, CIL “would degenerate into an unfathomably complex patchwork of essentially bilateral legal relationships.”<sup>131</sup> Such degeneration, however, would depend in part on the extent of withdrawals. As explained in *Withdrawing*, there are reasons to predict that withdrawals would not be extensive under the Default View.<sup>132</sup> In any event, as Vázquez acknowledges, this sort of complexity is common in the treaty area and is not thought to seriously undermine the value of that body of international law. While it is true that treaty withdrawals are by definition public events—a fact that helps clarify the particular interstate relationships—that would also be true of withdrawals from CIL under the Default View. Nations would need to announce publicly their prospective withdrawal in order to avoid a default rule of CIL, so other nations would have full notice, just as they do for treaty withdrawals.

In fact, the public notice aspect of the Default View would likely *increase* the clarity of CIL, and that potential effect would need to be weighed against a potential increase in complexity. Under the current Mandatory View, nations typically do not publicly acknowledge that they are deviating from a rule of CIL. Instead, they argue about the content of CIL or act surreptitiously. To invoke withdrawal rights under the Default View, by contrast, nations would need to announce publicly their deviation and describe the CIL rule from

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129. See, e.g., MALCOLM N. SHAW, *INTERNATIONAL LAW* 93 (6th ed. 2008) (“While in the case of a general customary rule the process of consensus is at work so that a majority or a substantial minority of interested states can be sufficient to create a new custom, a local custom needs the positive acceptance of both (or all) parties to the rule.”).

130. See Bradley & Gulati, *supra* note 14, at 15 (discussing the process used to produce the Vienna Convention on the Law of Treaties).

131. Vázquez, *supra* note 105, at 285.

132. See Bradley & Gulati, *supra* note 4, at 258–60.

which they were exiting. In light of that informational value of the Default View, it is not clear that the regime that we are suggesting would be substantially more uncertain or complex than what already exists under treaties, which not only typically allow for withdrawals but also often permit reservations that further complicate the web of relationships.

## 2. Manipulation

Dodge contends that the Mandatory View is justified on the ground that having an additional category of CIL that allows for withdrawal would add uncertainty to the system and lead to manipulation.<sup>133</sup> He further contends that although flexibility is desirable in international relations, sufficient flexibility already exists by virtue of having some international norms fall within a nonbinding “comity” category rather than within the category of CIL.<sup>134</sup>

There is tension between Dodge’s defense of the category of comity and his argument that having additional categories beyond the mandatory category of CIL poses a risk of manipulation. As our debate with him over the status of sovereign immunity shows,<sup>135</sup> his concern about the uncertainty that can be generated by multiple categories applies to the current system he is defending. Perhaps more importantly, his defense of comity reveals that, like us, he believes that nations should have some ability to exit from at least some international norms (something that is allowed within the comity category). The comity category that he defends, however, offers none of the limitations and protections that could be applied under the Default View of CIL, such as requirements of prospectivity and advance notice.<sup>136</sup>

In any event, while it is almost tautologically true that having an additional category can increase uncertainty and thus the possibility of manipulation, that argument could be made about any system of law that has some mandatory rules. Nevertheless, we find that this argument is not considered a persuasive reason against having nonmandatory rules in other contexts. In corporate and contract law, for example, where there are both default and mandatory rules, there are frequent debates about how to categorize particular rules. Despite decades of robust discussion in the literature over default versus mandatory rules, however, we are unaware of any serious argument in favor of having the

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133. Dodge, *supra* note 16, at 190-91.

134. *See id.* at 187-88.

135. *See supra* text accompanying notes 43-50.

136. For other potential limitations that could be encompassed within the Default View of CIL, see Bradley & Gulati, *supra* note 4, at 254-75.

entire system covered by a set of mandatory rules, just so that there can be no uncertainty about categorization.

Dodge says that “history suggests some reasons to worry” about manipulation of CIL categories,<sup>137</sup> but he does not point to any serious problems of manipulation arising from the Default View in the nineteenth century. He refers to *Ware v. Hylton*, but then acknowledges that the Supreme Court correctly categorized the CIL rule in that case.<sup>138</sup> He contends that the Court in *Schooner Exchange* “engaged in its own manipulation” because it assumed a right of withdrawal for the CIL rule there—immunity for a foreign state’s warships—whereas under Vattel’s scheme there would not have been a right of withdrawal.<sup>139</sup> In fact, Vattel never addressed the issue of immunity for warships, and Chief Justice Marshall correctly noted that the Court was “exploring an unbeaten path, with few, if any, aids from precedents or written law.”<sup>140</sup> That is all the history that Dodge musters on this point.

Another problem with the manipulation argument is that the Mandatory View is itself structured in a way that encourages manipulation. Under that view, instead of invoking a right of formal exit (as nations do under treaty regimes), nations dissemble, argue about the content of CIL, and engage in surreptitious violations.<sup>141</sup> It is unclear why that sort of behavior is preferable to allowing formal exit, which at least provides the system with clear notice of a nation’s position. As discussed in *Withdrawing*, in a legal system that is heavily dependent on reputation and retaliation for its enforcement, as is true for international law, the availability of such information about the expectations and behavior of the actors is particularly beneficial.<sup>142</sup> A system of formal exit as opposed to manipulation of extant CIL rules is also more consonant with rule of law values.<sup>143</sup>

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137. Dodge, *supra* note 16, at 190.

138. *Id.*

139. *Id.*

140. *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812). The Court also correctly observed that, even for ambassadorial immunity, Vattel himself relied in part on reasoning grounded in tacit consent. *See id.* at 143; *see also supra* note 31 and accompanying text.

141. *See Bradley & Gulati, supra* note 4, at 261-62; *see also* Samuel Estreicher, *A Post-Formation Right of Withdrawal from Customary International Law?: Some Cautionary Notes*, 21 DUKE J. COMP. & INT’L L. 57, 59 (2010) (discussing the “law-speak afforded by CIL”).

142. *See Bradley & Gulati, supra* note 4, at 259-60.

143. *See id.* at 262; *see also Bradley & Gulati, supra* note 14, at 17 (“[A] system of de jure exit is more consonant with rule of law values than a system of de facto exit and thereby has the potential to enhance CIL’s legitimacy.”).

### 3. Possibility of No Law

Luban contends that if nations are allowed to withdraw from rules of CIL, the result will be no law at all on particular subjects, and he is particularly concerned that this legal lacuna will emerge with respect to the CIL governing the laws of war. As a result, he contends that the “stickiness” of CIL—something that we discussed in *Withdrawing*—is a virtue. “[T]here are a few reactionaries among us,” he says, “who think that this particular inefficiency is a good thing.”<sup>144</sup>

Although we briefly addressed the issue of gaps in the law in *Withdrawing*,<sup>145</sup> we were not particularly focused on the laws of war. We did note, however, that CIL in this area might need updating in light of changes in the nature of armed conflict.<sup>146</sup> This observation has been made by others and we did not view it as particularly controversial.<sup>147</sup> Luban, however, suggests that, even if CIL governing the laws of war is outdated, allowing for withdrawal from this CIL will lead to “detainee mistreatment and civilian casualties.”<sup>148</sup>

We understand Luban’s concerns, but we think that they are overstated. To the extent that there are CIL rules governing the treatment of individuals during armed conflict, these rules presumably developed because they were in the mutual interest of nations likely to engage in conflict, and this would be true whether there was a right of withdrawal or not. Relatedly, almost all nations have ratified the Geneva Conventions, and, even though those Conventions allow for withdrawal, nations have chosen to stay within the treaties.<sup>149</sup> Luban does not explain why the calculus would be different for CIL.

Luban may have in mind that there are certain norms—for example, the norm against torture—that should operate without regard to national consent. For such norms, moral and other considerations might suggest that nations cannot even enter into treaties altering the norms. There is in fact a category of

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144. Luban, *supra* note 16, at 164.

145. See Bradley & Gulati, *supra* note 4, at 272-73.

146. See *id.* at 247-48.

147. Luban acknowledges that “a number of commentators have suggested that these rules are outdated because they are not adapted to asymmetrical conflicts.” Luban, *supra* note 16, at 163.

148. *Id.* at 164.

149. See, e.g., *International Humanitarian Law—State Parties/Signatories*, INT’L COMM. OF THE RED CROSS, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&tps=P> (last visited Mar. 7, 2011) (listing the 194 states that are parties to the Geneva Convention Relative to the Treatment of Prisoners of War).

international norms that is said to operate this way—the small category of *jus cogens* norms—and this category is generally thought to include a prohibition on torture. As explained in *Withdrawing*, there are strong arguments for treating *jus cogens* norms as mandatory,<sup>150</sup> so in this respect there may be little disagreement between us and Luban.

As for stickiness, we did not argue in *Withdrawing* that stickiness is always a drawback. Instead, we argued that CIL was likely to be sticky even under the Default View.<sup>151</sup> There are a variety of reasons for this, such as network effects, learning externalities, first-mover problems, and the phenomenon of bureaucratic entrenchment that Luban himself discusses.<sup>152</sup> As a result, concerns about excessive withdrawals from CIL rules under the Default View are probably unrealistic.<sup>153</sup> If so, then creating additional stickiness through a complete disallowance of exit is less necessary for deterring harmful behavior than Luban assumes. Again, however, *jus cogens* norms may be a sensible exception.

Luban was a vociferous critic of the Bush Administration's approach to the war on terror,<sup>154</sup> and it may be that he is worried that CIL withdrawal rights would legitimize such an approach. Importantly, however, the Bush Administration's approach had nothing to do with the Default View of CIL. Instead, it was based on the claim that much of the laws of war simply did not apply to a conflict with a worldwide terrorist organization.<sup>155</sup> As discussed above, this sort of argumentation is unfortunately encouraged by the *Mandatory View* of CIL. By contrast, to invoke withdrawal rights under the Default View, a nation would be required to publicly announce that it no longer accepted the international legal principle in question, something that the Bush Administration showed no inclination to do with respect to the laws of war. Indeed, the Administration repeatedly reaffirmed its commitment to

150. See Bradley & Gulati, *supra* note 4, at 267-68, 273.

151. See *id.* at 246-47.

152. See Luban, *supra* note 16, at 165.

153. See Bradley & Gulati, *supra* note 4, at 246, 258-59.

154. See, e.g., David Luban, *The War on Terrorism and the End of Human Rights*, in *THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY* 219 (Mark Tushnet ed., 2005); David Luban, *Forget Nuremberg: How Bush's Torture Bill Eviscerates the Promise of Nuremberg*, SLATE (Sept. 26, 2006, 5:15 PM), <http://www.slate.com/id/2150396>.

155. See, e.g., Memorandum from President George W. Bush for Vice President et al., *Humane Treatment of Taliban and al Qaeda Detainees* (Feb. 7, 2002), available at [http://www.pegc.us/archive/White\\_House/bush\\_memo\\_20020207\\_ed.pdf](http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf). With respect to the military detention of terrorist suspects, the Obama administration's position is similar to that of the Bush administration. See, e.g., *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010).

both the international law prohibition on torture and the Geneva Conventions, while at the same time engaging in the conduct that Luban has criticized.<sup>156</sup> In light of the structural inability of the Mandatory View to address this sort of problem, it is not clear why Luban is defending the status quo approach to CIL.

#### 4. *Excessive Withdrawals*

Under the Mandatory View, violations of CIL are understood to be a method of altering and improving the existing rules. As a result, violations are not inherently a sign of bad behavior. Under the Default View, by contrast, violations are more likely to indicate bad behavior because a violation means that the nation was unwilling to acknowledge its true position with respect to the CIL rule in question.<sup>157</sup>

Brilmayer and Tesfalidet do not disagree with this analysis but are concerned that we may end up with the reverse problem: if withdrawal is not an inherent sign of being a bad state, bad states might engage in withdrawals.<sup>158</sup> As we suggested in *Withdrawing*, however, there are reasons to believe that bad states will be less willing to invoke withdrawal rights than good states.<sup>159</sup> Among other things, it is likely that good states will be able to articulate better and more credible explanations for withdrawals and thus avoid negative reputational effects that might otherwise be associated with withdrawal. In any event, even if bad states make the effort to mimic good states in this regard, the result will be that more information gets revealed, which would have positive effects over the status quo.<sup>160</sup>

Brilmayer and Tesfalidet also suggest that we are being inconsistent in claiming that, even under the Default View, there will be reputational incentives not to withdraw from rules of CIL.<sup>161</sup> We do not see the inconsistency. Brilmayer and Tesfalidet appear to assume that only behavior that violates a legal norm can generate negative reputational consequences, but

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156. See Curtis A. Bradley, *The Bush Administration and International Law: Too Much Lawyering and Too Little Diplomacy*, 4 DUKE J. CONST. L. & PUB. POL'Y 57, 59 (2009) (“[M]ost of [the Bush Administration’s] positions did not involve repudiations of international law.”).

157. See Bradley & Gulati, *supra* note 4, at 261.

158. See Brilmayer & Tesfalidet, *supra* note 92, at 228.

159. See Bradley & Gulati, *supra* note 4, at 261.

160. See *id.* at 262, 271-72.

161. See Brilmayer & Tesfalidet, *supra* note 92, at 228-29.

this is incorrect.<sup>162</sup> Most social norms, for example, are not embodied in law, but their violation can nevertheless have reputational consequences. That reputation and legality are not perfectly coordinated in international relations is illustrated by two examples: NATO's bombing campaign against Serbia in the late 1990s was probably illegal, but it did not undermine NATO's reputation in most circles (and may have enhanced it).<sup>163</sup> By contrast, North Korea's purported withdrawal from the Nuclear Non-Proliferation Treaty in 2003 may have been legal, since the treaty expressly allows for withdrawal, but it likely had a negative effect on North Korea's (already low) reputation.<sup>164</sup>

Vázquez makes a related argument, contending that an allowance of withdrawal rights would reduce the value of CIL to each state because it would lower the likelihood that other states would remain bound to the rule and that such rights would therefore reduce state investment in creating CIL.<sup>165</sup> As explained in *Withdrawing*, there are a number of reasons to believe that allowing withdrawal rights would not lead to a large number of exits.<sup>166</sup> In any event, while it is essentially a truism that withdrawal rights would make CIL less prospectively binding, Vázquez does not take account of the additional flexibility that each state also receives, which in turn makes the CIL rule less costly and thus potentially more attractive to each state *ex ante*. Importantly, we know that when states consider the balance between flexibility and commitment in the treaty context, they often choose the flexibility of withdrawal rights, and the ability to make that choice likely facilitates investments in treaty-making.<sup>167</sup> Vázquez does not explain why, for CIL, the balance always favors commitment over flexibility.

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162. See, e.g., Helfer, *supra* note 5, at 1623-24 (explaining how lawful decisions not to ratify treaties or to withdraw from treaties can have negative reputational effects).

163. We raised this example in *Withdrawing*. See Bradley & Gulati, *supra* note 4, at 260. Brilmayer and Tesfalidet take issue with the example on the ground that the NATO countries were not invoking a right of withdrawal. See Brilmayer & Tesfalidet, *supra* note 92, at 227 n.37. We were not claiming, however, that this was an example of withdrawal; our claim was that, under the current Mandatory View, violations of CIL do not inherently send a negative signal.

164. See Helfer, *supra* note 5, at 1619. For additional discussion of the complicated relationship between international law and reputation, see Brewster, *supra* note 127.

165. See Vázquez, *supra* note 105, at 288-89.

166. See Bradley & Gulati, *supra* note 4, at 245-46.

167. See Helfer, *supra* note 5, at 1599.

## CONCLUSION

If CIL is to continue operating as a significant body of international law, its problems must be addressed. While we do not claim that the Default View is a panacea, allowing for broader withdrawal rights under CIL has the potential to facilitate innovation in CIL, while also increasing the flow of information and enhancing CIL's legitimacy. There may of course be other ways to improve CIL that we have not considered, and we would be happy to see this debate prompt additional proposals for reform. We share the instinct of some of our respondents that a shift to the Default View, to be done effectively, would likely require a concerted effort from the major players in the international system along with contributions from academics. Experience with prior efforts to codify the secondary rules of international law, such as with the Vienna Convention on the Law of Treaties, suggests that a project of this nature is feasible over the long term. In the meantime, this debate has revealed fruitful areas of research that will help deepen our understanding of both the history and operation of CIL.

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